Pro Se

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State Found Liable For Confining Claimant Beyond SHU Expiration Date

In Hernandez v. State of New York, 4 N.Y.S.3d 854 (Ct. Clms. 2015), the claimant sought an award of damages for the period of time that he spent in disciplinary special housing after the defendants received notice that the hearing had been administratively reversed. In addressing the parties' arguments in support of and against the claimant's motion for summary judgment, the court noted that while writing misbehavior reports and making determinations at Tier III hearings were quasi-judicial and "cloaked with absolute immunity," the release of a prisoner from SHU (or keeplock) upon the expiration of a disciplinary penalty is "a purely ministerial act" invoking no discretionary authority. Thus, the court wrote, citing Gittens v. State, 504 N.Y.S.2d 969 (Ct. Cl. 1986) and Minieri v. State, 613 N.Y.S.2d 510 (4th Dep't 1994), when a prisoner is subject to continued disciplinary confinement that lacks a statutory or regulatory basis, the defendant may be liable for failing to timely release him from disciplinary confinement.

Noting that the claim, in addition to being based on the failure to perform a **ministerial act** (an act that does not involve discretion), could be based on wrongful confinement, the court stated that the elements of the latter theory include:

- The defendant intended to confine the claimant;
- The claimant was conscious of the confinement;
- The claimant did not consent to the confinement; and
- The confinement was not otherwise privileged.

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DOLLARS AND (SENSE) – MEDICAL PAROLE REVISTED

A Message from the Executive Director, Karen Murtagh

In May 2015, the United States Department of Justice, Office of the Inspector General (OIG) issued a report entitled: "The Impact of an Aging Inmate Population on the Federal Bureau of Prisons." The report notes that, "according to Bureau of Prisons (BOP) data, inmates age 50 and older were the fastest growing segment of its inmate population, increasing 25 percent from 24,857 in fiscal year (FY) 2009 to 30,962 in FY 2013." New York is witnessing a similar trend. Between 2009 and 2014, the number of inmates who are age 50 and over increased by 18%, from 7,755 to 9,535.

The interest in this **demographic** [the portion of the prison population which is 50 years and older] is growing primarily because of fiscal reasons. The OIG reported that due to medical expenses associated with the treatment of older individuals, incarcerating them is more costly than the incarceration of younger individuals. In recognition of this issue, during this past budget session, New York passed an amendment to New York's medical parole bill that provides the Commissioner of the Department of Corrections and Community Supervision (DOCCS) authority to grant medical parole to nonviolent offenders, rather than leaving this solely in the hands of the Board of Parole. In an analysis of this proposed bill, the Senate Finance Committee, together with Senate Counsel Staff, issued a statement supporting the bill, noting that a significant saving "in inmate health care costs [would result] from the timely release of nonviolent inmates who would qualify for medical parole" and predicting that "20 inmates could be eligible under this proposal," resulting in an estimated savings of $1 million.

There are many other factors that should cause us all to revisit the issue of medical parole. The OIG found a lack of adequate staff training in dealing with the aging population as well as institutional infrastructure issues that impede the BOP from providing proper housing for this population. The report also pointed out that not only do aging individuals have fewer disciplinary problems in prison, they also have extremely low re-arrest rates once released; "fifteen per cent of aging inmates were re-arrested for committing new crimes within 3 years of release" whereas the recidivism rate for all federal inmates is 41%.

New York has reported similar statistics. The most recent recidivism report available on DOCCS' website (2010) notes that "[g]enerally, return rates declined as age at release increased." The DOCCS report shows that over 53% of individuals under 21 returned to prison within three years of being released; 30% of those returns were for violent felony offenses. For individuals over 50, only 30% returned to prison within 3 years of being released and only 14% of those returns were for violent felony offenses.

The OIG report issued eight recommendations, the first seven of which focused on improving the way in which prisons identify, manage and treat the aging prison population. The eighth recommendation suggests that the BOP "consider revising its compassionate release policy to facilitate the release of appropriate aging inmates, including by lowering the age requirement and eliminating the minimum 10 years served requirement."

For New York, focusing on this last recommendation would not only be fiscally responsible, it would also fall in line with New York's four-prong criminal justice policy. This policy requires New York to focus not only on punishment, but on deterrence, rehabilitation and reintegration. While the newly amended medical parole statute does give the DOCCS' Commissioner some discretion in granting medical parole, that discretion is limited to nonviolent felony offenders and the parole board still has the authority to override the Commissioner's decision to release an elderly and infirm prisoner. Amending our current medical parole statute to expand eligibility for medical parole and creating a separate parole board to review medical parole recommendations, comprised of individuals with expertise in areas relevant to the aging population, would be a good place to start. Requiring that the board include doctors with geriatric specialties and criminal justice experts in recidivism would allow New York to move forward in a fiscally responsible way, protect public safety and, at the same time, give real meaning to the term 'medical parole.'

2015 PRO SE APPEAL

Dear *Pro Se* Subscriber:

First, I would like to thank those subscribers who donated to our annual *Pro Se* appeal last year. Your donations, **totaling $1,639.00,** helped offset the increased costs of publishing and mailing *Pro Se.* As you know, *Pro Se* provides invaluable information, free of charge, to prisoners in New York State. *Pro Se* covers issues involving changes in the law, statutory and regulatory requirements and legal practice issues that relate directly to prisoners. In addition, we are now publishing another newsletter, *Essentials of Life*, specifically tailored to the needs of incarcerated women.

Second, **I write to ask you to donate to *Pro Se*.** Although we post each issue of *Pro Se* and *Essentials of Life* on our website at www.plsny.org, the majority of our 7,568 readers do not have Internet access and cannot take advantage of the web posting, thus a personal mailing of each issue is necessary. It costs approximately $8,400 to publish and mail one issue of *Pro Se* and *Essentials of Life* to our readers; our annual cost of providing six issues of *Pro Se* and *Essentials of Life* is approximately $50,400.00.

PLS pays for the majority of these costs from its operational funds; funds which also must cover the costs of providing legal assistance to the over 10,000 prisoners who write to us annually. **This year, even though costs have risen, we did not receive any increase in our state funding.** As a result, we need your help more than ever! **It is only with your help that we can continue providing *Pro Se* to incarcerated individuals free of charge.**

I am urging those who are able to make a donation to *Pro Se*. **It doesn't take much! If each of our readers sent us just $7.00, *Pro Se* and *Essentials of Life* would be fully funded for the entire year! Of course, not every reader can contribute, so I implore you, if you are able, to contribute what you can. Your contribution will help preserve *Pro Se* and *Essentials of Life* for all of our readers. Please be generous!**

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Sincerely yours,

Karen L. Murtagh, Esq.

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Here, the court found, the only element in dispute is whether the confinement to disciplinary SHU was "otherwise privileged."

With respect to whether the confinement was otherwise privileged, the court noted that the claimant's release from SHU date was March 28. However, on February 25, the hearing which was the basis for the confinement was administratively reversed with a notice to commence a re-hearing within 7 days and to complete the hearing "within 14 days of receipt of this notice." The record attached to the claimant's motion papers showed that while the hearing was commenced on time, it was never finished. Claimant remained in SHU until he was transferred to general population on May 8. Claimant's proof, the court wrote, showed that defendant intended to confine claimant in SHU beyond February 25 and that the claimant was conscious of, and did not consent to, the confinement.

The defendant claimed that following the granting of timely requested extensions, the hearing was commenced on May 23 and completed on June 4 and therefore the confinement was privileged. The defendant attached the administrative record of the hearing to show that the re-hearing had been properly conducted and in support of its argument, cited 7 N.Y.C.R.R. §251-1.6(a) which authorizes disciplinary confinement while a hearing is pending. Thus, the defendant argued, the confinement was privileged.

In assessing the claim of privilege, the court found that where a prisoner is confined prior to a hearing, as was the situation in claimant's case, 7 N.Y.C.R.R. §251-1.5(a) requires that a re-hearing be commenced within 7 days of the notice of administrative reversal. Here, claimant conceded the hearing was timely commenced. Claimant argued that the re-hearing was not completed within 14 days. The defendant argued that the extensions were lawful and therefore the additional confinement beyond 14 days was privileged.

With respect to the claim of unlawful confinement, the court found that because there were factual differences between the administrative records of the re-hearing which the parties had attached to their papers, a genuine issue of material fact existed with respect to whether the confinement was privileged. As this issue could not be resolved on the papers, summary judgment on that claim was not proper.

The court then turned to the issue of whether the defendant had the authority to confine the claimant while the re-hearing was pending. Citing Minieri v. State of New York, 613 N.Y.S.2d 510 (4th Dep't 1994), the court noted that when a hearing is reversed administratively, a prisoner is to be released from SHU after the reversal. Here the defendant relied on 7 N.Y.C.R.R. §251-1.6(a) to support its argument that the continued confinement was privileged. Section 251-1.6(a) provides that confinement is authorized where an officer has reasonable grounds to believe that a prisoner represents an immediate threat to the safety, security or order of the facility. In Matter of Pettus v. West, 813 N.Y.S.2d 563 (3d Dep't 2006), the court held that the regulation can be interpreted as authorizing keeplock whenever an officer reasonably believes that a facility rule has been violated. Here, the court held that this interpretation of the regulation does not defeat claimant's motion for summary judgment for three reasons.

First, §251-1.6(a) authorizes confinement to keeplock, not to SHU. Confinement to SHU can only be authorized by the Superintendent or his designee after reasons for the confinement have been reported by an officer or his superior. See 7 N.Y.C.R.R. §251-1.6(d). The defendant did not submit any evidence showing that claimant's confinement to SHU following the administrative reversal was pursuant to any order of the superintendent or his designee.

Second, the defendant did not produce proof that the rules authorizing ***pre-hearing*** confinement are applicable where the inmate has been confined in SHU while his Tier III appeal was pending and is now subject to continued confinement prior to a re-hearing on the same misbehavior report. Seven N.Y.C.R.R. §301.3(a) authorizes detention admission while a prisoner is awaiting an initial appearance at a Tier III hearing or the determination of the hearing.

Third, to the extent that §251-1.6(a) is applicable here, it authorizes confinement when a prisoner poses an "immediate threat to the order of the facility." Although the claimant's misconduct may have warranted pre-hearing confinement when the incident took place, four months later, when the hearing was reversed, the same conclusion could not be drawn on the basis of the misbehavior report; any inference that could have been drawn from the misbehavior report that claimant posed a threat to the order of the facility in October was not apparent four months later. Accordingly, the misbehavior report included in the proof does not raise an issue of fact regarding an immediate threat authorizing confinement beginning when the hearing was administratively reversed. In the absence of any other proof that the claimant's presence in general population continued to be a danger to the security of the prison, the court found no basis for concluding that his SHU confinement while the rehearing was pending was authorized by the regulation.

Based on this analysis, the court found that the claimant's proof established that 1) the hearing was administratively reversed on February 25 − thereby giving rise to the inference that he was entitled to release from SHU; 2) the defendant confined him to SHU for an additional 72 days; 3) he was conscious of and did not consent to the confinement; and 4) that the confinement was not privileged. Accordingly the court granted claimant's motion for summary judgement and set the case down for trial on the issue of damages.

Abel Hernandez represented himself in this Court of Claims action.

News and Notes

The Sexual Assault Reform Act Leads to the Creation of Non-Conforming RTFs

Beginning in the spring of 2014, a number of sex offenders have been held in DOCCS' custody beyond their legally mandated release dates, primarily at Fishkill C.F. and Woodbourne C.F. Some of these individuals have reported that DOCCS employees told them that they have been "released" from prison and are currently being housed in a residential treatment facility (RTF); the RTF being Fishkill C.F., Woodbourne C.F. or some other prison that has been designated an RTF. They also report that their conditions of confinement are no different than they were when the individuals were prisoners; they do not have the privileges, programs or opportunities which the law requires be provided in an RTF.

There are two statutes governing which agency has the authority to place individuals in RTFs. Under Penal Law §70.45(3), the Parole Board can impose, as a condition of release, that an individual spend up to the first six months of post-release supervision (PRS) in an RTF. Under Correction Law §73(10), the Commissioner of DOCCS has authority to place anyone who is on community supervision into an RTF.

Correction Law §2(6) defines an RTF as "a correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released." Correction Law §73 provides that a person in an RTF "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation …"

The increased reliance on what prisoners' rights advocates argue are "non-conforming RTFs," i.e., the designation of correctional facilities which do not provide the privileges, programs and opportunities included in the definition of a RTF, came about as the result of one of the provisions of the Sexual Assault Reform Act (SARA). This provision prohibits sex offenders whose victims were under 18 years old, or who are level 3 sex offenders, from being on the grounds of a school. Executive Law §259-c(14). In 2005, the Penal Law definition of school grounds, upon which the SARA prohibition relies, was amended to expand the definition of "school property" from the grounds and structures within the property line of a school to include **the area within 1,000 feet of the property line of a school.** Penal Law §220.00(14)(a-b). Between 2005 and 2014, the "1,000 feet prohibition" was not strictly enforced. However, in 2014, when a report was released showing that most New York City homeless shelters were within 1,000 feet of a school, shelters within 1,000 feet of the property line of a school were deemed unsuitable for sex offenders.

Following publication of this report, the release of sex offenders almost completely stopped because sex offenders could not locate residences which met with Parole approval. Subsequently, DOCCS began releasing sex offenders to a small number of shelters in New York City that are more than 1,000 feet from a school. While the 1,000 foot prohibition may be less of an obstacle outside of New York City, these areas lack the extensive shelter networks found in New York City and thus have limited housing options for released sex offenders. Because of the shortage of SARA-compliant housing, many sex offenders are being held beyond their lawful release dates in prisons or in non-conforming RTFs while they wait for a space in a shelter approved for sex offenders to become available.

The people most significantly affected by the creation of non-conforming RTFs are sex offenders who have passed the maximum expiration dates of their determinate terms and those who have finished serving time assessments after being returned to prison as post-release supervision violators. These individuals are clearly entitled to be released. By creating non-conforming RTFs and "releasing" these individuals to them, DOCCS argues, such individuals are under parole supervision and no longer in prison.

There are also sex offenders who have been held past their CR dates − or their parole open dates − who are not released due to the unavailability of approved, SARA-compliant housing. It is DOCCS' position that these individuals may be held in prisons until they have fully served their determinate terms because they are not legally entitled to release. That is, because they have not yet completely served their determinate terms, their entitlement to release and the unlawfulness of their confinement is not as clear as it is for people who are being held beyond the maximum expiration of a sentence or the end of a time assessment.

Represented by PLS and other organizations including the Legal Aid Society and the Center for Appellate Litigation, a number of individuals who have completely served their determinate terms or time assessments and who are confined in non-conforming RTFs, have filed habeas corpus proceedings challenging their confinement in prisons under the same conditions as prisoners. In their habeas petitions, the petitioners argued that when people are confined in a non-conforming RTF after their maximum expiration dates have passed, or their time assessments are over, they are confined illegally. They also argued that while the Corrections Law and the Penal Law give DOCCS and the Parole Board the authority to place people in RTFs as a condition of community supervision, they do not give DOCCS and the Parole Board the authority to confine prisoners whose determinate terms have expired, or who have completed their time assessments, in correctional facilities which do not provide them with the privileges, programs and opportunities which, by definition, are required to be provided in RTFs. Finally, the petitioners argued that the statute authorizing DOCCS to place people in RTFs is superseded by the statute which gives the Board of Parole the authority to do so.

DOCCS takes the position that the petitioners have been released and have been placed in a statutorily compliant RTF as a condition of release.

While some of the habeas petitions were successful, more were not. Some courts have found that because of the apparent conflict between these

two statutes, the broader authority of Correction Law §73(10) is not valid, but other courts have found that both provisions are lawful. Some judges held that if DOCCS designates a correctional facility as an RTF, then it is an RTF, and DOCCS and the Parole Board can use their statutory authority to place people who have been "released to community supervision" in non-conforming RTFs. Other courts have accepted the petitioners' arguments that the use of Fishkill C.F., Woodbourne C.F., and other state prisons as RTFs is illegal because none of those prisons, nor any units within them or on their grounds, fall within the definition of an RTF.

Thus far, challenges to DOCCS' use of non-conforming RTFs through individual habeas corpus proceedings have not fared well for two reasons. One reason is that, as noted above, judges in a number of cases have accepted DOCCS' argument that its reliance on non-conforming RTFs is lawful. The second reason is that, even when a habeas petition is successful and results in the petitioner's release from DOCCS' custody, the decision does not affect DOCCS' policy regarding its authority to confine in non-conforming RTFs individuals whose determinate terms or time assessments have expired. This situation is likely to change when the losing side of a habeas challenge to placement in a non-conforming RTF takes an appeal to the appellate division.

If you have further questions about this topic you can contact:

Samantha Howell, Director of Pro Bono & Outreach
Prisoners' Legal Services of New York
41 State Street, Suite M112
Albany, NY 12207

Rumors About Determinate Sentencing and Post-Release Supervision

Prisoners' Legal Services has received requests from prisoners for information regarding a rumor that determinate ("flat") sentencing and/or post-release supervision will be repealed effective September 1, 2015. According to some versions of the rumor, any person serving a determinate sentence as of that date will have their sentence converted into an indeterminate sentence.

The rumor is false, but it is understandable how it arose. When former Governor George Pataki first proposed determinate sentences, in 1995, he met with resistance from the Democratically controlled State Assembly. The proposal was eventually passed as a two year "pilot project" scheduled to expire in 1997. It has been renewed in two year increments every other year since then. Thus, all statutes that reference determinate sentences state that they will expire on September 1st of the next odd-numbered year, to be replaced by an identically worded statute without the reference to determinate sentences. However, there is no reason to believe that determinate sentencing (and post-release supervision) will not be renewed again in 2015. (Indeed, far from retreating from determinate sentencing, the Legislature has made more and more offenses subject to it since 1995, including all drug offenses and sex offenses.) Moreover, even were determinate sentencing to expire, its expiration would not affect determinate sentences imposed prior to the expiration date.

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LETTERS TO THE EDITOR

Dear ***Pro Se*** Editors,

I just wanted to express my sincere thanks for your hard and great work. I was charged with having a weapon in my cube. I was given 5 months SHU and 5 months loss of good time on top of certainly not making my parole board. The cases you publish gave me the belief and knowledge that I should fight. I read many issues of ***Pro Se*** and figured out how to fight back. I wrote an administrative appeal with the help of your Administrative Appeal brochure and the Central Office reversed the sanction. Now I can concentrate on going home.

Please keep up the good work and thank you for your help.

Sincerely,

Arthur Bogarez

Dear Editors:

I am writing to thank you for the inspiration that you have given me in my legal issues and to continue to push forward no matter how long it takes to get a victory. I recently got a Tier III overturned that stemmed from a dirty urine charge made in August 2013. I filed an Article 78. The Attorney General tried to get it dismissed because it lacked a cause of action. I had to amend my petition. Then the court transferred it to the Appellate Division because it raised a claim that the decision was not supported by substantial evidence. After filing my brief, the Director of Special Housing overturned the hearing. This was 20 months later!

Respectfully submitted,

Jason Smith (12 A 4902)

LETTERS TO THE EDITOR

Letters to the editor should be addressed to: ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

Letters/documents sent for consideration for placement in **Letters to the Editor** will not be returned.

PRO SE VICTORIES!

Matter of DeShawn Owens v. Anthony Annucci, Index No. 3698-14 (Sup. Ct. Albany Co. April 1, 2015). DeShawn Owens successfully challenged the Department's requirement that he participate in the Sex Offender Counseling and Treatment Program (SOCTP).

DeShawn Owens was convicted of participating in a crime in which others were found guilty of committing sexual offenses; he, however, was acquitted of all sex offense charges. Among the charges that he was convicted of was first degree unlawful imprisonment. The Sexual Offense Registration Act requires that certain perpetrators of this crime, of which Mr. Owens was one, register. As a result of this conviction, DOCCS required or recommended that Mr. Owens enroll in SOCTP. Mr. Owens objected, and after submitting a grievance and exhausting his administrative remedies, filed an Article 78 petition.

A requirement that an offender take SOCTP can only be overturned if the determination was arbitrary and capricious or without a rational basis. The Department has broad authority to assign prisoners to

work and treatment programs, and is required to study the background of each prisoner and assign him to programs that would be useful to assisting him in refraining from future criminal acts. Correction Law §137(1). Correction Law §622 states that the Department shall provide SOCTP to prisoners who are serving sentences for felony sex offenses . . . and who are identified as having a need for such programs, and that OMH staff will assess such offenders to identify their need for treatment.

Mr. Owens was required to take SOCTP because he was convicted of unlawful imprisonment, an offense requiring sex offender registration whether it has a sexual component or not. Mr. Owens argued that Department's decision was arbitrary and capricious and was not made in accordance with the law because 1) his crime did not involve any sexual misconduct and 2) the only factor considered was the fact that his non-sexual crime was an offense requiring registration.

The court agreed that the only information that the Department relied on in finding that Mr. Owens should take SOCTP was the fact that he was convicted of a crime requiring registration. The court found that the record was "completely lacking" any indication that the Department performed or based its decision on any assessment by OMH staff that petitioner needed sex offender treatment, as is required by Correction Law §622. In the absence of such an assessment and consideration of whether Mr. Owens has a need for SOCTP, the court found, the Department's determination to require Mr. Owens to participate in SOCTP was arbitrary and capricious.

As part of its order reversing the grievance determinations at issue, the court stated that the Department could reconsider petitioner's need for SOCTP in a manner not inconsistent with its decision.

Matter of Trevor Porter v. David Stallone, Index No. 2014-0893 (Sup. Ct. Cayuga Co. April 20, 2015). Court annuls hearing after respondent declares issues moot.

Following the filing of an Article 78 petition, the respondent restored petitioner to the job that he had been removed from as a result of the hearing and gave idle pay for the time that he was not in the position. Based on this conduct, the respondent proclaimed the action moot but did not otherwise defend the Commissioner's actions. The court disagreed, finding that the issue of setting aside the determination of guilt and expunging references to the charges from the petitioner's records were not resolved by the petitioner's restoration to his job. The court held that in view of the lack of a defense, the matter should be annulled and that the equities (prior to this incident the petitioner had a clean disciplinary history, that he was found guilty of only 1 of 2 charges, and that the only penalty imposed was removal from his prison job) dictated that the matter should be expunged from petitioner's records.

Rather than Defend its Determinations of Guilt, DOCCS Reverses 22 Tier III Hearings Challenged in Pro Se Article 78 Proceedings

Between October 1, 2014 and March 31, 2015, the Tier III hearings challenged in the below listed Article 78 actions were administratively reversed and expunged at the request of the Assistant Attorney Generals assigned to represent the respondents. While we normally do not mention published decisions in this column, we thought the success of such a large group of litigants should be recognized. Congratulations to all of you who persevered in your efforts to obtain justice from the courts!

Matter of Nicole Raduns v. Albert Prack
Matter of Herman Bank v. Steven Racette
Matter of Semrau Harris, v. Albert Prack
Matter of Keith Folk v. Anthony Annucci
Matter of Sidney Hayes v. Anthony J. Annucci
Matter of Alexander Pasley v. Anthony Annucci
Matter of Wonder Williams v. Harold Graham
Matter of Elijah Bell v. Social Worker Johnson
Matter of Roy Tarbell v. B. McAuliffe
Matter of Adam Bennefield v. Anthony Annucci
Matter of Eon Shepherd v. Brian Fischer
(4 hearings)
Matter of Antonio Oppenheimer v. T. Griffin
Matter of David Ramos v. DOCCS
Matter of Nathaniel Jay v. Graham
Matter of Juan Rivas v. NYS DOCCS

Matter of Bruce Albaladejo v. NYS DOCCS
Matter of Rashid Laliveres v. Albert Prack
Matter of Ian Dawes v. Anthony J. Annucci
Matter of Maurice Haddock v. Albert Prack

Pro Se Victories! *features descriptions of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Possessing Article on the Young Lords Is Not Sufficient Evidence of Rule Violation

After officers found an article on the Young Lords in Lawrence Perez's cell, he was charged and found guilty of possessing materials relating to an unauthorized organization. The rule that Mr. Perez was found guilty of violating prohibits the possession of written material relating to an unauthorized organization where such material advocates violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the organization. (According to the New York Times, in 1969, the Young Lords adopted a human rights mission for which it is known in New York). http://cityroom.blogs.nytimes.com/2009/08/24/the-young-lords-legacy-of-puerto-rican-activism/?_r=0).

In Matter of Perez v. Annucci, 4 N.Y.S.3d 457 (4th Dep't 2015), the court found that although Mr. Perez possessed printed material about an unauthorized organization, there was no evidence that the material advocated violence based upon race, religion, sex, sexual orientation, creed, law enforcement status or violence or acts of disobedience against department employees or that could facilitate organizational activity within the organization. Based on this finding, the court held that the determination of guilt was not supported by substantial evidence and ordered the hearing annulled and all references to the charges expunged from Mr. Perez's records.

The Buffalo Office of Prisoners' Legal Services represented Lawrence Perez in this Article 78 proceeding.

Prisoner Proceeding Pro Se Establishes Hearing Officer Bias

After being found guilty of assaulting staff, engaging in violent conduct and refusing a pat frisk, the petitioner in Matter of Rambert v. Fischer, 2015 WL 2097721 (3d Dep't May 7, 2015), filed an Article 78 challenge alleging that he had been denied a fair hearing due to the hearing officer's bias. The court agreed, finding that the hearing officer "clearly shifted the burden of proof when he improperly stated that it was the petitioner's burden to prove that his version of the incident . . . was the truth." In addition, the court found, the hearing officer questioned **the petitioner's veracity** (whether he was telling the truth) multiple times and openly called the petitioner a liar. The court ordered the determination annulled and remitted the matter for a new hearing.

Shadron Rambert represented himself in this Article 78 proceeding.

Hearing Officer's Interference Violates Prisoner's Right to Assistance

Charged with refusing a direct order and participating in a demonstration, petitioner advised the hearing officer that he had not gotten assistance

and wanted an employee assistant (EA) to interview 19 inmate witnesses. When the hearing reconvened, the petitioner complained that the EA had interviewed only 4 of his witnesses. The hearing officer stated that he had instructed the EA not to speak to the 15 witnesses because the information that the petitioner was looking for was not relevant to the charges. In response to the petitioner's Article 78 alleging that his right to employee assistance had been violated, the court in Matter of Williams v. Fischer, 2015 WL 2095838 (3d Dep't May 7, 2015), agreed, finding that the EA should have interviewed the prisoners involved in the incident and reported back to the petitioner with the results. In addition, the court found that the hearing officer improperly interfered with and deprived the petitioner of his right to employee assistance by directing the EA not to contact 15 of the witnesses on the ground that he considered the information requested to be irrelevant. The court annulled the hearing and ordered the respondent to expunge all references to the charges from petitioner's records.

Charles Williams represented himself in this Article 78 proceeding.

HO Failed to Investigate Witness's Specious Reason for Refusing to Testify

In Matter of Jackson v. Prack, 3 N.Y.S.3d 650 (3d Dep't 2015), the petitioner argued that his right to call witnesses was violated by the hearing officer's failure to investigate a witness's specious reason for refusing to testify. A specious reason is a reason which is clearly not true. An example of a specious reason for refusing to testify would be when the victim of an assault refuses to testify because he does not know anything about the incident.

In this case, petitioner was charged with conspiring with other inmates to assault an officer. He asserted the misbehavior report was made in retaliation for a grievance that he had filed against the officer. He called as a witness another inmate who was implicated in the conspiracy to attack the officer and who had telephoned petitioner's wife to report that the officer posed a threat to petitioner. The witness refused, writing on the refusal form that he did not know what was going on.

In analyzing the claim that the hearing officer had violated the petitioner's right to call witnesses when he failed to make further inquiry about the refusal, the court first noted that "as a general rule, 'no violation of the right to call witnesses will be found when there was no prior assent to testify, but the reason for the refusal appears in the record.' " However, the court went on, further inquiry is required where the reason given by the witness for refusing is "clearly specious." Here, the witness's claim that he had no relevant knowledge is belied by the record evidence which demonstrated that the witness was aware of the interactions between petitioner and the officer and suggested that he was involved in the conspiracy against the officer. Because the evidence cast doubt on the authenticity of the reason given for the refusal, the hearing officer erred in accepting the witness's alleged lack of knowledge at face value and failing to conduct further inquiry. Nonetheless, the court found that the hearing officer gave a good faith reason for the denial and therefore ordered that the hearing be reversed and remitted the matter for a new hearing.

Determination of Guilt Reversed Due to Insufficient Evidence

Following an investigation resulting in confidential information that the petitioner in Matter of McCarthy v. Prack, 4 N.Y.S.3d 399 (3d Dep't 2015), had stood watch while another inmate urinated in an officer's water bottle, the petitioner was charged and found guilty of unhygienic act and assaulting an officer. In his Article 78 challenge, Petitioner Derick McCarthy argued that the determination of guilt was not supported by substantial evidence. The court concluded that while there was sufficient evidence of the guilt of the inmate who was accused of urinating in the officer's water bottle, the evidence of petitioner's guilt was "not compelling." None of the witnesses had personally observed the petitioner standing watch as the inmate urinated in the bottle and, the court found, the reliability of confidential information from the inmate who said that petitioner was the look-out was not sufficiently corroborated. For this reason, the court

annulled the determination and ordered all references to the charges expunged from the petitioner's records.

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Derick McCarthy represented himself in this Article 78 proceeding.

IPC Recommendation: Neither Supported By Substantial Evidence Nor Moot

Based on confidential information that his life was in danger if he remained in general population, the petitioner in Matter of Melendez v. Commissioner, 6 N.Y.S.3d 323 (3d Dep't 2015), received a recommendation that he be placed in involuntary protective custody. The petitioner challenged the determination that substantial evidence showed that IPC was necessary to protect him. The respondent asserted that because petitioner, who had been transferred and released from IPC, was no longer subject to the determination, the petition was moot and should be dismissed.

The court found that because the petitioner sought to have all references to the recommendation removed from his prison records, the Article 78 proceeding was not moot. The court then addressed the merits of the petition and found that because the hearing officer had failed to make an independent assessment of the reliability and credibility of the confidential information, the acceptance of the recommendation was not supported by substantial evidence.

Here, while the hearing officer interviewed the captain who had obtained the confidential information and made the IPC recommendation, the hearing officer failed to find out the details of the investigation and did not review any notes or letters that the captain may have received that threatened the petitioner's life. Further, the captain acknowledged that the confidential source who initially disclosed the threat had no first-hand knowledge of the threat. The captain testified that he believed the informant to be reliable based on past dealings with him. The court found that this was not a sufficient basis upon which 1) to conclude that the information was reliable and credible; and 2) to put someone in IPC. The court annulled the determination and directed the expungement of all references to it from petitioner's institutional records.

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George Melendez represented himself in this Article 78 proceeding.

Sentencing

Unenforceable Promise of Eligibility for Programs Leads to Vacation of Plea

In People v. Ballato, 2015 WL 2214719 (2d Dep't May 13, 2015), the defendant pled guilty in exchange for a promise that the court would sign a violent felony override (VFO) which, the court promised, would make the defendant eligible for several prison programs. However, when the defendant went into DOCCS' custody, he learned that the VFO only made him eligible to apply for the programs; it did not guarantee that he would be found eligible to participate in the program. In his appeal of his criminal conviction, the defendant argued that his plea was involuntary because contrary to the court's promise, the VFO did not actually make him eligible for any programs in prison.

In analyzing the appeal, the court first noted that the sentencing court's promise of a VFO was not of any value. The defendant was entitled to the VFO based on the particular subsection of the law he was convicted of violating. And second, the Appellate Division wrote, the sentencing court overstated the significance of the VFO; it would not guarantee the defendant's admission into any of the programs. It only made him eligible to apply for the program. Under these circumstances, the court found, the plea was not voluntary, knowing and intelligent. The court vacated the plea and remitted the matter to the County Court for further proceedings.

Miscellaneous

Prison's Denial of Notary Was Not Arbitrary and Capricious

In Matter of Nunez v. Central Office Review Committee, 126 A.D.3d 1248 (3d Dep't 2015), the petitioner challenged, among other matters, the respondent's denial of a grievance complaining that Clinton C.F. staff had wrongfully refused to notarize his grievances. The superintendent denied the grievance and the Central Office Review Committee (CORC) agreed with the superintendent. The Supreme Court held that the facility notary had improperly denied petitioner's request to have his grievance documents notarized. On appeal, the Third Department reversed.

First, the Third Department found that the regulation upon which the lower court had based its decision – 9 N.Y.C.R.R. part 7031 – and which requires the provision of notary services within 24 hours of a request for the same, applies only to prisoners in the county jails. Directive 4483 provides that prisoners are entitled to reasonable access to a notary within 72 hours of a request. Here, the court found, neither the petitioner's grievance nor the "affidavit of service" of the grievance for which he sought the notary require notarization. That, in combination with the fact that the grievance process is non-adversarial and is designed to be simple and expeditious, led the court to conclude that the prison has the discretion to assign its notary staff to matters that require notarization. For this reason, the court found that the respondent's denial of notary services where the documents did not have to be notarized was not an abuse of discretion.

Manual Nunez represented himself in this Article 78 proceeding.

PRO SE PRACTICE

This issue's Pro Se Practice piece discusses the rights that prisoners have to visit with their children. The information in this article, along with instructions for drafting and filing a petition for visitation, are available in PLS's newly revised memo, "Visitation with Children."

A Prisoner's Right to Visit with His or Her Children

A prisoner's right to communicate and visit with his or her child is one of the most fundamental rights he or she may possess. Despite its great importance to the prisoner, the child, and society, this right was only formally recognized by the New York State legislature in the early 1980s.

While the law recognizes an incarcerated parent's right to visit with his or her child, it also requires that the parent pursue visitation or risk losing that right permanently. New York does not exempt incarcerated parents from the duty to regularly visit with their children.

IF YOUR CHILD IS IN FOSTER CARE . . .

Your Responsibility Under the Law

In 2010, the Adoption and Safe Families Act (ASFA) Expanded Discretion Bill was signed into law. As the name suggests, the purpose of the law is to give social services agencies more discretion. Before the change, social services agencies were **required** to terminate parental rights where a child was in foster care for 15 out of the most recent 22 months. In certain limited circumstances, the agency could delay terminating these rights, but incarceration was not one of the permitted considerations.

ASFA was enacted because the legislature found that the 15 month timeline was unrealistic. In making this finding, the legislature cited the fact that the average prison sentence for women in New York is 36 months, the fact that prisoners face difficulty ensuring they are produced for court appearances or consulting with their attorneys, and the fact that prisoners have limited access to

phones. NYS Assembly Memo in Support of Legislation, Bill Jacket, L 2010 ch. 113 at 8.

With the new change, agencies are no longer required to observe a strict 15 month rule. Instead, agencies can now consider a parent's incarceration and the truly unique circumstances that incarcerated individuals face when making decisions about terminating parental rights. Social Services Law §384-b(3)(l)(i).

Example 1: Joey's dad was sentenced to 3 years (36 months) in prison. Joey was placed in foster care as a result. Prior to the change in law, after the child had been in foster care for 15 months, the social services agency would have been required to file for a termination of rights. The length of time that Joey's dad is going to be incarcerated guarantees that the child will be in foster care for 15 months. As a result of the change in the law, before moving to terminate Joey's dad's parental rights, the social services agency must consider the fact that his 36 month sentence impacts on his ability to remove his child from foster care.

This change in law does not change a parent's responsibility to maintain a **meaningful role** in the child's life; the new law specifically requires that a parent maintain a meaningful role in his or her child's life. Id. To assess whether an incarcerated parent is maintaining a **meaningful** role in his or her child's life, an agency must consider the evidence. Evidence often comes in the form of parental behavior that shows concern for the child. Social Services Law §384-b(3)(l)(v). Evidence of concern includes "letters, telephone calls, visits, and other forms of communications." Id. Because incarcerated parents cannot always participate in these expressions of concern, the law specifically considers a parent's communication with the agency, the courts, foster parents, the parent's attorney, and correctional personnel as it relates either to complying with a service plan or maintaining a relationship with the child. Id.

Example 2: The social services agency from the above example must now determine whether Joey's dad has been meaningfully involved with Joey while the father was incarcerated. The social services agency conducts an investigation and finds that Joey's dad has sent birthday cards and letters to Joey. The social services agency also finds that Joey's dad has made a diligent effort to call Joey and arrange to see Joey. In this example, there is evidence that Joey's dad was meaningfully involved with Joey, pursuant to Social Services Law §384-b(3)(l)(v).

Example 3: The same facts as are set forth in Example 2, except that Joey's dad was not able to call or visit with Joey because of a Tier III disciplinary hearing that resulted in SHU time and a loss of visits. Joey's dad filed an appeal objecting to the disposition because it interfered with his ability to visit or contact his child. Joey's dad also wrote letters to the social services agency asking for updates on Joey's status and wrote his attorney to inquire about having his visits reinstated. In this example, there is evidence that Joey's dad was meaningfully involved with his son, pursuant to Social Services Law §384-b(3)(l)(v).

Example 4: The same facts as are set forth in Example 2, except that Joey's dad has not tried to call or correspond with Joey. Joey's dad has not tried to arrange visits with Joey, has not contacted the agency about forming a long-term plan for Joey, and has not contacted family members or other individuals to ask about Joey's well-being. In this example, there is no evidence that Joey's dad was meaningfully involved with Joey, pursuant to Social Services Law §384-b(3)(l)(v).

The Agency's Responsibility Under the Law

ASFA imposes a duty on social services agencies to make "diligent efforts" to reunite children in foster care with their families. This includes a duty to transport the child to the prison as well as to provide or suggest rehabilitative services to resolve or correct problems which impair the prisoner's ability to maintain contact with the child. Social Services Law §384-b (7)(f)(5). This duty is subject to the agency's determination that contact with his or her incarcerated parent is in the best interest of the child. Social Services Law §384-b (7)(f)(5). If an agency has found that visitation with his or her incarcerated parent is not within the best interest of the child, the absence of visitation cannot be used as grounds to terminate parental rights. Id. Furthermore, an agency is relieved from the "diligent efforts" requirement where the parent a) has failed for a period of six months to keep the social services agency apprised of his or her

location; or b) has failed on more than one occasion, while incarcerated, to cooperate with the social services agency in its efforts to assist the parent to plan for the future of the child. Social Services Law §384-b (7)(e)(i),(ii). The court **may** consider the "delays or barriers" faced by incarcerated parents. Id. For this reason, if an incarcerated parent wants to maintain his or her legal relationship with his/her child, it is extremely important that the parent do everything he or she can to try to maintain contact with children in foster care. Refer to the above discussion under "Your Responsibility Under the Law."

There are other circumstances that will suspend the agency's "diligent efforts" requirement. These circumstances include if your parental rights were terminated with respect to a sibling of the child, the child was subject to "aggravating circumstances" (child abuse or abandonment), or you were convicted of killing or attempting to kill a child 11 years old or younger. Social Services Law §§358-a(3)(b), (12); Family Court Act §1039-b, §1052(b)(i)(a), §754(2)(b), and §352.2(2)(c). To be clear, under any of these circumstances, the agency does not have to attempt to reunite the family and can file a permanent neglect petition **even when** the agency has made no efforts to provide visitation and/or other services.

If there is a finding that the agency is not required to make reasonable efforts to make it possible for the child to return home, but you can show that you have 1) done things to attempt to maintain contact with your child, 2) you may be released soon, and 3) what efforts you have made to address the reasons your child went into foster care, you may be able to convince a judge that your parental rights should not be terminated and that it would be in your child's best interests to be in your care as soon as you are able to resume full time parenting.

AFSA increases the chances that an incarcerated parent will be able to maintain custody of his or her children. The bottom line remains that incarcerated parents need to make all possible efforts to maintain contact with their children while they are incarcerated and their children are in foster care. Be sure to check with your Offender Rehabilitation Coordinator (ORC) or the Deputy Superintendent of Programs at your facility to find out if there are any parenting programs or classes available for you to enroll in.

IF YOUR CHILD LIVES WITH HIS/HER CUSTODIAL PARENT OR ANOTHER PERSON

If an incarcerated parent's child lives with his or her other parent or another person and is not in the custody of an agency, the incarcerated parent has a duty to visit. For this reason, you should make regular efforts to write, call and arrange visits in order to show that you are maintaining family ties. These efforts will also help you protect your rights should there be a future attempt to terminate your parental rights for lack of interest on your part. This is especially true for fathers who are not now or have never been married the mother of their child.

Voluntary efforts to arrange visitation are usually preferable to court actions. If voluntary actions fail, you should consider petitioning the Family Court in the county where your child resides to enforce your rights.

Maria Pagano, Managing Attorney of the Buffalo Office of PLS, with the assistance of volunteer attorney Vanessa Glushefski, wrote this Pro Se Practice article.

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Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

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