Pro Se

Vol. 26 No. 4 August 2016 **Published by Prisoners' Legal Services of New York**

Supreme Court Rejects "Special Circumstances" Exception to the Requirement that Prisoners Exhaust Their Administrative Remedies Before Suing in Federal Court

The Prison Litigation Reform Act (PLRA), 42 U.S.C. §1997e(a), requires that prisoners exhaust "such administrative remedies as are available" before filing a lawsuit that challenges prison conditions. In New York, generally speaking, a prisoner has exhausted his administrative remedies when he has fully and properly filed a grievance, has followed the steps for appealing the responses to his grievance up to and including the appeal to the Central Office Review Committee (CORC) and has received a response from CORC.

Following the adoption of the PLRA, the Second Circuit Court of Appeals carved out several exceptions to the exhaustion requirement. First, the Court held that where the remedies are not actually available, a prisoner will not be required to exhaust his administrative remedies. See, Abney v. McGinnis, 380 F.3d 663 (2d Cir. 2004) (Where grievances pertaining to a particular condition are repeatedly decided in the prisoner's favor but DOCCS fails to implement the decisions, administrative remedies are not available to the prisoner). Second, the Court held that defendants can waive the defense of failure to exhaust administrative remedies by failing to raise the defense in their answers to a prisoner's complaint. See, Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004). Third, the Court held that the defendants' own actions inhibiting a prisoner's exhaustion of remedies may estop (prevent) one or more of the defendants from raising the plaintiff's failure to exhaust as a defense. Ziemba v. Wezner, 366 F.3d 161 (2d Cir. 2004). Fourth, the Court held

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This project was supported by a grant administered by the New York State Division of Criminal Justice Services. Points of view in this document are those of the author and do not necessarily represent the official position or policies of the Division of Criminal Justice Services.

A LOOK BACK

A Message from the Executive Director – Karen L. Murtagh

In 2015, PLS received over 10,000 requests for assistance and, while we couldn't accept every case, there were hundreds of cases that PLS did accept and, in turn, hundreds of incarcerated individuals received critical legal representation on issues associated with their conditions of confinement. In light of this, I thought it would be worthwhile to share with you some of the major successes that PLS achieved for our clients in 2015.

As most of you know, the majority of PLS' work involves administrative advocacy on behalf of incarcerated individuals to ensure that their legal rights are protected and enforced. PLS advocates on a myriad of issues including: disciplinary hearings; medical and mental health care; disability accommodations; housing; programming; and visitation. In 2015, PLS accepted a total of 782 cases for full investigation and possible representation. A full investigation typically involves prison visits, requests for and review of documents, (including medical, mental health, use of force and disciplinary documents, photographs and video), and consultation with experts. Of the 782 cases accepted in 2015, PLS has completed work on 285 cases. Of those, PLS was successful in advocating on 184 cases or 64.5%.

Such a success rate demonstrates that PLS operates a highly professional law office that engages in in-depth investigation, identifies legal issues, and effectively and efficiently advocates on behalf of our clients. In over 90% of the successful cases, the result was achieved through successful administrative advocacy. Successful administrative advocacy benefits everyone; clients' issues are resolved more quickly, the State saves millions of dollars annually by the diversion of cases from the courts and, most importantly, those involved in the system have a sense that justice has been done.

A significant part of the advocacy work PLS does is to ensure that sentences are calculated accurately and that our clients receive all of the good time, sentencing credit and jail time to which they are entitled. PLS staff also regularly challenge the wrongful imposition of solitary confinement time. The chart below shows the amount of time PLS saved for prisoners in 2015:

SHU Time Cut	82 yrs. 8 mos. 5 days
Good Time Restored	37 yrs. 12 days
Jail Time Credit	15 yrs. 9 mos. 22
Parole Release	2 yr. 4 mos. 26 days
Sentence Computation	7 yrs. 9 mos. 24 days

PLS also eliminated solitary confinement for juveniles; continued the Albion Telephone Project benefiting over 100 women; assisted 18 clients seeking modification of child support orders; published bi-monthly issues of *Pro Se* and *Essentials of Life* for over 8,500 incarcerated individuals; and established PLS' Immigration Initiative which accepted 45 new immigration cases. PLS staff also presented testimony before the Assembly Corrections Committee on the need for additional prison oversight and presented on prison law related issues on various panels across the state.

Like many non-profits and most civil legal services providers, because of limited resources we could not accept every request for assistance that we received. As such, over this past year some of the individuals who wrote to us for help received letters from PLS providing them with counsel and advice as to how to advocate on their own and, unfortunately, in some cases, some people received letters rejecting their cases. For our lack of resources and our inability to provide representation to all those in need, I apologize and I promise to continue working to increase PLS' ability to provide the critical legal services incarcerated individuals need.

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that where administrative remedies were available to the plaintiff, and that the defendants are not estopped and have not forfeited their non-exhaustion defense, but that the plaintiff nevertheless did not exhaust available remedies, the court should consider whether the prisoner-plaintiff has plausibly alleged that "special circumstances" justify "the prisoner's failure to comply with administrative procedural requirements." Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004) (holding that special circumstances justifying a prisoner's failure to follow the procedural rules of the Inmate Grievance Program process include reliance on a reasonable interpretation of prison grievance regulations).

Recently, the United States Supreme Court, in Ross v. Blake, 136 S.Ct. 1850 (June 6, 2016), examined the Second Circuit's fourth exception to the exhaustion requirement: whether special circumstances − in this case what the plaintiff argued was a reasonable interpretation of prison grievance regulations − can justify a prisoner's failure to follow the procedural rules set forth in a department of corrections' administrative remedies process.

In Ross, Plaintiff Blake filed a complaint about excessive force with the equivalent of the NYS DOCCS Office of Special Investigation (formerly the Inspector General). He did not follow the procedures set forth in the Administrative Remedy Procedure (the equivalent of the NYS DOCCS Inmate Grievance Program). After a year, the OSI equivalent issued a decision finding that one of the officers involved had used excessive force. Following this finding, Blake filed a §1983 suit against the two officers involved. One of the defendants raised Plaintiff Blake's failure to exhaust his administrative remedies as a defense to the suit. The Fourth Circuit Court of Appeals, with one judge dissenting, adopted the approach taken by the Second Circuit Court of Appeals, holding that where a prisoner-plaintiff reasonably, although mistakenly, believes that he had exhausted his administrative remedies, his failure to exhaust may be justified. The dissenting judge wrote that the PLRA's mandatory exhaustion requirement is not **amenable** (receptive) to "judge-made exceptions." The defendant appealed to the U.S. Supreme Court.

The Supreme Court rejected the argument that special circumstances, such as the plaintiff's reasonable though mistaken belief that he had exhausted his administrative remedies, might justify a plaintiff's failure to exhaust. It found that language in the PLRA and the statutory history of the exhaustion requirement **foreclose** (exclude) a "special circumstances" exception to the exhaustion requirement. The Court did, however, conclude that Plaintiff Blake may be able to show that the prison's grievance process was not available to him and therefore he was not required to exhaust. That issue, the Court wrote, can be considered by the lower court on remand.

In rejecting the argument that special circumstances may justify a prisoner-plaintiff's failure to exhaust, the Court first examined the text of §1997e(a) of the PLRA:

> No action shall be brought with respect to prison conditions under §1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

This language, the Court noted is mandatory. The only qualifier in the text is that the remedies must be available. Thus, the text of the law, the court found, does not lend itself to a "special circumstances" exception. This holding, it noted, is consistent with prior holdings involving the interpretation of the requirement. For example, in Booth v. Churner, 532 U.S. 731 (2001), the Court held that a prisoner must exhaust his administrative remedies even where he wanted a type of relief that the administrative process did not provide.

Likewise, the Court found, the statutory history of the exhaustion requirement evinces an intent to make exhaustion mandatory. The statute which PLRA §1997e(a) replaced had a weaker exhaustion requirement and was discretionary. In replacing it with §1997e(a), Congress substituted an "invigorated"

exhaustion requirement and eliminated the language that had made the predecessor statute discretionary.

Having rejected the "special circumstances" exception, the Court went on to note that §1997e(a)'s exhaustion requirement hinges on the availability of the administrative remedies. The Court listed three circumstances in which an administrative remedy is officially available but is not actually capable of use to obtain relief. First, the Court wrote, the remedies are not available where, for example, the procedures require grievances to be filed with a particular office, but the office claims it does not have the authority to decide grievances. The procedure, the Court wrote, "is not then capable of use for the intended purpose." This would also be true if the prison officials have authority, but decline ever to exercise it.

Second, administrative remedies would not be available where the process is so **"opaque"** (unclear) that it cannot be used. In this situation, the procedures exist, but no ordinary prisoner can figure out how to use them. The procedures, the Court cautioned, need not be sufficiently plain as to preclude any reasonable mistake or debate with respect to their meaning.

And third, exhaustion is not required where prison administrators prevent inmates from taking advantage of a grievance process through manipulation, misrepresentation or intimidation. Interference with an inmate's pursuit of relief renders the administrative process unavailable.

NEWS & NOTES

PLS Files Lawsuit Challenging DOCCS' Use of Alleged Residential Treatment Facilities (RTFs)

On May 24, 2016, Prisoners' Legal Services of New York, The Legal Aid Society, and Willkie Farr & Gallagher LLP, filed a petition in Supreme Court, Albany County, on behalf of persons who have passed the maximum expiration date of their sentences, or the expiration date of their parole violation time assessments, but are being held in Fishkill or Woodbourne "residential treatment facilities" (RTFs) because they cannot find an address that meets the requirement of being more than 1,000 feet away from school grounds. We also filed a motion seeking permission to certify a class, which means that those in similar situations will be represented, even if not personally named in the action. If we are granted permission to proceed as a class, the litigation will cover any person convicted of a sex offense, who is being held in an alleged RTF beyond a maximum expiration date or the end of a parole violation time assessment.

The Petition seeks a declaration that Fishkill and Woodbourne are not "residential treatment facilities" that comply with legal requirements for such a facility under the Correction Law, and a declaration that persons being held beyond their maximum expiration or time assessment are being illegally incarcerated. The Petition argues that, even if these prisons did legally qualify as "RTFs," persons may not be held there for more than six (6) months beyond their maximum expiration dates.

As relief, the Petition demands that: (1) DOCCS release the petitioners/class members from prison; (2) DOCCS provide educational, employment and housing assistance to all residents of "RTFs"; and (3) the City of New York provide a SARA-compliant shelter bed to all persons subject to the SARA law and who are being held by DOCCS solely on account of inability to gain a SARA-compliant

residence. **Please note that we *are not* seeking monetary damages in this action.**

A hearing on the petition and the motion for class certification should be held in the next couple of months, and we will provide an update to known class members as soon as we can as to whether the class certification motion was granted and what the next steps will be in the lawsuit.

We do not know how long it will take to resolve this lawsuit. If we need to rely on a favorable decision from the courts, it could be a long, drawn-out process. Meanwhile, we are engaged in discussions with State and City attorneys to see whether we can make progress toward a settlement of the case that meets our demands.

We are also aware that some individuals are being held beyond their conditional release or open parole dates, though they may not be in "RTFs." These individuals, however, are not part of the current class, because they have not reached their maximum expiration date. As the statues and case law are different for those past their maximum expiration or time assessment versus those past their conditional release or open parole dates, we must investigate a different approach for the latter class of individuals.

See *Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor, Petitioners, v. Anthony J. Annucci, Acting Commissioner, NYS DOCCS, Tina M. Stanford, Commissioner, NYS Board of Parole, and Steven R. Banks, Commissioner, NYC Department of Social Services and NYC Human Resources Administration*, Index No. 02534-16 (Albany County Supreme Court).

This article was written by Samantha Howell, Director of Pro Bono and Outreach at Prisoners' Legal Services.

Important Message from the Legal Aid Society

If you receive a letter from the Garcia & Perez law firm in Miami, Florida about a lawsuit and asking you to fill out a claim form, you should <u>not</u> send them your Social Security Number and Date of Birth. This appears to be a scam designed to get your Social Security Number and Date of Birth. If this letter appears to be on Legal Aid Society letterhead, please be advised that it is not from the Legal Aid Society.

LETTERS TO THE EDITOR

Dear Ms. Murtagh,

I have been receiving Pro Se for over a decade now. Sometimes I love the articles, sometimes I don't and I write you about it. But I always read it, no matter what, from cover to cover. It could be an article that is completely unrelated to my situation and I will still read it. Sometimes Pro Se is the only mail that I get and in many respects, it gives me a feeling that someone out there was thinking about me.

So this time, instead of sending my comments, constructive or laudatory, I am sending a contribution. I know it is not much, but I know it will be well received and appreciated. I also know that it is going to a good place. I know this because not only has Pro Se been a surrogate family to me,

but also because Pro Se has taught me a very valuable lesson about the law and about jurisprudence. Over the years, Pro Se has taught me that JUSTICE IS A PROCESS – not an event. The legal world is for the patient and the humble; the key is to never give up!

Sincerely,

Conrad "Focus" Marhone

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.

STATE COURT DECISIONS

Disciplinary and Administrative Segregation

Court Rejects HO's Finding that Testimony Would be Redundant

In connection with charges of assault on staff, organizing a demonstration and unauthorized assembly, the petitioner in Matter of Payton v. Annucci, 139 A.D.3d 1223 (3d Dep't 2016), gave his assistant a list of 13 potential inmate witnesses. The hearing officer, without knowing the subject matter of each witness's testimony, told the petitioner that he could only call 3 of the witnesses because the testimony of the other 10 would be redundant. The court found that where the hearing officer did not explain the reason that the testimony was redundant and where redundancy was not apparent from the record, the denial of the 10 witnesses was a violation of the petitioner's regulatory right to call witnesses. The court ordered the hearing reversed and remitted the matter for a new hearing.

Calvin Payton represented himself in this Article 78 proceeding.

Charge of Creating a Disturbance Not Supported by Substantial Evidence

After arguing with another inmate who had unplugged the television in the day room, the petitioner in Matter of Petty v. Prack, 2016 WL 3434539 (3d Dep't June 23, 2016), was charged with and found guilty of engaging in violent conduct and creating a disturbance. In his Article 78 proceeding, the petitioner argued that neither determination of guilt was supported by substantial evidence. The respondent agreed that the finding that petitioner had engaged in violent conduct was not supported by the record but argued that there was a sufficient evidentiary basis for the charge of creating a disturbance. The court disagreed. First, the court noted, "[T]he description within the misbehavior report and the testimony of the report's author that 'petitioner disrupted the order of the facility' is conclusory and does not permit intelligible review of whether petitioner violated [the rule prohibiting] conduct which disturbs the order of any part of the facility[.]" That rule defines the activities that would constitute such conduct as "includ[ing], but not limited to, loud talking in a mess hall, program area or corridor, talking after the designated facility quiet time, playing a radio, television or tape player without a headphone or through a headphone in a loud or improper manner, or playing a musical instrument in a loud and improper manner."

Here, the court found, the record showed "at most" that the petitioner argued with the other inmate. While the record shows that the other inmate violated several rules, the other inmate's conduct, the court wrote, cannot be ascribed to the petitioner. In the absence of any evidence describing how the petitioner disrupted the order of the facility, the determination was not supported by

substantial evidence. For this reason, the court ordered the determination annulled and all references to the matter expunged from petitioner's institutional record.

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Reginald Petty represented himself in this Article 78 proceeding.

HO's Wrongful Failure to Call Witnesses Leads to Reversal

Charged with fighting, violent conduct, refusing a direct order and creating a disturbance, the petitioner in Matter of Allaway v. Prack, 139 A.D.3d 1203 (3d Dep't 2016), requested two inmates as witnesses whom he was able to identify only by their nicknames and cell blocks. The hearing officer made a phone call to try to locate one of the witnesses, but made no effort to identify the second, saying that the petitioner had not given him enough information. After he was found guilty, the petitioner filed an Article 78 challenge to the hearing, alleging that the hearing officer had violated his right to call witnesses. The court agreed, holding that "although petitioner's description of the witnesses was limited," in the court's view "it was sufficiently detailed [such that making] an attempt to locate them would not have been overly burdensome." Thus, the court found, the hearing officer had violated the petitioner's right to call witnesses.

In reaching this result, the court rejected the respondent's argument that the violation was harmless error because the testimony of the witness whom the hearing officer did not attempt to locate would have been redundant to the testimony of the witness who did testify. The court disagreed that the testimony would have been redundant. The testifying witness, the court noted, had not seen the entire incident and therefore was unable to answer the question of whether the petitioner had refused a direct order. Thus, the court reasoned, it could not conclude that the testimony of the witness who did not testify would be redundant; the uncalled witness might have witnessed the incident in its entirety. However, because the hearing officer "**articulated** [voiced] a good faith reason for denying the witnesses and for his lack of effort in locating them," the court held that the violation was only regulatory, as opposed to constitutional, and therefore the appropriate remedy was remittal for a re-hearing.

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Waberly Allaway represented himself in this Article 78 proceeding.

Absence of Evidence of Gang Activity Leads to the Reversal of Two Determinations of Guilt

In Matter of Clarke v. Venettozzi, 139 A.D.3d 1221 (3d Dep't 2016), the court considered whether the determinations of guilt made at two Tier III hearings were supported by substantial evidence. The first hearing occurred when, after mail sent by petitioner was returned as undeliverable, prison authorities charged him with gang activity based on the contents of the returned letter. The second hearing related to a charge of drug use that was revealed by a drug test which, an officer testified, was mandated whenever an inmate receives a ticket for gang activity.

The court first reviewed the hearing relating to the charge of gang activity. The determination of guilt with respect to that charge, the court found, could not be reviewed because neither of the letters was included in the record. Accordingly, because the court was unable to meaningfully review the petitioner's challenge to the sufficiency of the record establishing his guilt of gang activity, the determination of guilt had to be reversed.

Turning next to the hearing on the charge of drug use, the court first noted that there is a regulation requiring that before urinalysis testing can be done, there must be a valid reason for seeking a drug test. 7 NYCRR §1020.4(a)(1). Here, the officer testified that the reasonable basis for the test was that petitioner had received a ticket for gang activity. With respect to this basis, the court wrote, "Even assuming, without deciding, that evidence of gang activity could have provided correctional staff with a reason to believe that

petitioner had used drugs, inasmuch as we are unable to review the letters that were the basis for the charge that led to the test being conducted, we are precluded from a meaningful review of this issue." Accordingly, the court ordered the determination finding petitioner guilty of using drugs must be annulled and reference to the charge expunged from the petitioner's records.

Michael Clarke represented himself in this Article 78 proceeding.

Parole

Third Department Reverses Finding of Civil Contempt

In June 2015, the Supreme Court, Orange County, granted Michael Cassidy's Article 78 petition challenging the Parole Board's denial of his application for parole release. In addition, the same court granted petitioner's motion to hold the NYS Board of Parole in contempt for failure to comply with a judgment of the same court dated July 18, 2014. The respondent then appealed from both orders. (Had the respondent Board of Parole not appealed the June 2015 order, Mr. Cassidy would have been entitled to a new parole hearing; he would not have been entitled to release to parole supervision).

This case actually began in 2013, when the Parole Board denied Mr. Cassidy's application for release to parole supervision. After Mr. Cassidy filed an Article 78 challenge to the decision, the Supreme Court, Orange County, in July 2014, found that because the Board had relied almost exclusively on the nature of Mr. Cassidy's crime without taking into account other relevant factors which the statute requires the Board to consider – see Executive Law §259-i(2)(c)(A) – the court ordered a re-hearing before a different panel of parole board members. In April 2015, the Board conducted a re-hearing and again denied Mr. Cassidy's application. In that decision, the Board noted Mr. Cassidy's achievements, but concluded that none of them lessened the serious and senseless loss of life caused by his actions.

Mr. Cassidy, without exhausting his administrative remedies (by filing an administrative appeal) filed both an Article 78 and a contempt motion, asserting that the Board had failed to comply with the 2014 order, and arguing that once again, the Board's decision was based solely on the nature of the offense and did not provide the detailed, rational and non-conclusory explanation required by law. The Board agreed that it had denied release solely on the basis of the seriousness of the crime but argued it had considered all of the required factors and legitimately had placed more weight on the nature of Mr. Cassidy's offense. The respondent also argued that the Article 78 should be dismissed for failure to exhaust administrative remedies.

The court ruled against the respondent on the issue of exhaustion, holding that Mr. Cassidy was not seeking to overturn the latest denial, but was seeking a finding that the respondent was in contempt. The court found that the Board had failed to remedy the errors that had caused the court to reverse the 2013 decision. In fact, the court found, the 2015 decision was even more flawed than the earlier decision. The court found the Board to be in contempt and ordered the respondent to conduct a new hearing and to pay $3,000.00 in legal fees and costs.

On June 15, 2016, the Second Department of the Appellate Division, reversed the June 2015 order and denied the petitioner's motion to hold the Board of Parole in contempt.

In reaching this result, the Second Department disagreed with the lower court's determination that the Parole Board appeared to have accorded no weight to any factor apart from the seriousness of petitioner's offense.

Rather, the court found, the 2015 parole board hearing revealed that the petitioner had acknowledged that the crime he committed in 1984 was related to a serious drinking problem that had continued in prison until he stopped using drugs and alcohol in 1997. His COMPAS (Correctional

Offender Management Profiling for Alternative Sanction) assessment, which is scored on the basis of 1 through 10, showed that his score for prison misconduct had fallen from 10 to 5, but he was assessed with a high probability of a return to substance abuse upon re-entry into society. Further, the court noted, in denying petitioner's application, the Board noted its consideration of, among other factors, petitioner's institutional adjustment – which included discipline and program participation – his Risk and Needs Assessment and his need for successful reentry into the community, as well as the senseless murder of his former girlfriend.

Turning to whether the petitioner had shown by clear and convincing evidence that the Board had violated a clear and unequivocal court order, the appellate court found that the petitioner had not. The appellate court found that petitioner had been afforded a new hearing before a different panel of the Parole Board and that the conclusion that panel had drawn took into account the petitioner's COMPAS assessment and other statutory factors. Thus, the court held, the written decision and the hearing transcript demonstrated that the Parole Board had fully complied with its responsibilities.

Dutchess County Court Holds Board of Parole in Contempt

In Matter of John MacKenzie v. Tina Stanford, Index No. 2789/15 (Sup. Ct. Dutchess County May 14, 2016), the court considered a **de novo** (new) parole release hearing conducted in 2015 which the court, having reversed a prior 2014 hearing, had ordered the Board to conduct. The 2014 hearing had been reversed when the court found that it was issued in the form of a conclusory statement that petitioner's release would not be compatible with the welfare of society and would so **deprecate** (detract from) the seriousness of his crimes as to undermine respect for the law. The court found that the conclusion was entirely unsupported by the factual record and that the board had failed to provide a rational basis for the determination.

After reviewing the 2015 hearing, the court concluded that the board had again failed to provide a rational basis for denying parole to Mr. MacKenzie. Specifically, the court noted that the board members questioned Mr. MacKenzie extensively about his crime and his lifestyle at the time of the crime, in response to which petitioner acknowledged having shot a police officer and having been on drugs for 24 hours at the time that he did so. Petitioner took complete responsibility for the offense, expressed remorse and noted that everything that he had done since the crime he had done in memory of the victim. Near the end of the hearing, the Board discussed Mr. MacKenzie's prison record and only briefly mentioned what he would do and where he would go if he were released. The board denied parole and reinstated the 24 month hold.

In response to this decision, the petitioner filed a contempt motion. At the hearing on the motion, only the 70 year old petitioner testified. He emphasized his clean disciplinary record, his positive and productive use of the time that he spent in prison – he had earned two Associate's Degrees and a Bachelor's Degree, was an inmate grievance representative, worked as a special events clerk and a pre-release peer counselor – and acknowledged great remorse for the pain that he had caused his victim and his victim's family.

The court granted the motion, finding that there was a clear mandate of the court of which the respondent was aware, that the petitioner was prejudiced by the respondent's failure to comply with the mandate and that there were no other remedies. The court found that the respondent had once again denied parole to the petitioner solely on the basis of his crime. Based on these findings, the court held the respondent in contempt and ordered her to pay $500.00 a day until she conducts an actual de novo parole hearing and issues a decision in accordance with Executive Law §259-1(2).

Miscellaneous

Court Holds Denial of Family Reunion Program Application to be Rational

In Matter of Campbell v. Morris, 139 A.D.3d 1278 (3d Dep't 2016), the petitioner sought judicial review of the respondent's denial of his application to participate in the Family Reunion Program (FRP). The petitioner is serving a 25 year to life sentence as a result of a murder conviction. When he went into DOCCS custody, he was married to his first wife. While in prison, the petitioner divorced his first wife and a year later, married his second wife whom he also divorced. The petitioner then married his third and current wife. A year later, in 2013, he applied for the FRP. This application was denied because there was no disruption of family ties and because the petitioner's multiple marriages did not show a commitment to preserving family ties. When his appeal from the denial was rejected, the petitioner filed an Article 78 proceeding.

In deciding the case, the court first noted that participation in FRP is a privilege and not a right, and that a decision as to whether an inmate may participate is "heavily discretionary" and will not be disturbed if it has a rational basis. Further, the court noted, the purpose of the FRP is "to preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration."

Here, the court found, petitioner's third marriage occurred after he had been given a sentence of 25 years to life and had been incarcerated. Thus, the marriage did not predate his incarceration and participating in the FRP would not further the goal of sustaining family times that were disrupted due to incarceration. In addition, the court noted, petitioner was married to 3 different women between 2009 and 2012, two of whom he met in prison. This does not show a commitment to preserving family relations. Based on this analysis, the court concluded that the denial of the petitioner's application had a rational basis.

Shawn M. Campbell represented himself in this Article 78 proceeding.

Approval of Prior FRP Application Does Not Render Later Denial Irrational

In Matter of Garcia v. Morris, 140 A.D.3d 1441 (3d Dep't 2016), the Third Department reviewed the denial of a Family Reunion Program (FRP) application and found that the denial was not irrational. In this case, the petitioner, after being released on parole, shot and killed his wife, her son and her nephew in the presence of the petitioner's 4 year old daughter. Sentenced to 45 years to life, the petitioner returned to prison, re-married and participated in the FRP. In 2013, he requested that his wife's adult grandson be added to the list of visitors approved for FRP visits.

Because of his history, petitioner's request was subject to special review and his application was denied. After exhausting his administrative remedies, petitioner filed an Article 78 challenge to the denial. When the Supreme Court dismissed his petition, he appealed to the Appellate Division.

Like the court in Matter of Campbell v. Morris, the Garcia court stated that participation in the FRP is a privilege not a right, that the decision as to whether an inmate may participate is "heavily discretionary," and that a denial will be upheld if it has a rational basis. The court added to this basic statement of review that prior participation in the program does not guarantee a future application will be approved, and that contrary to petitioner's claim, his application requesting the addition of a new family member over the age of 12 required that his application receive a full review with the final determination made by the Deputy Commissioner of Program Services after reviewing recommendations from facility staff.

It was against this backdrop that the court considered the Article 78 challenge. The court held that in denying the application, the Department had appropriately considered 1) the petitioner's history of domestic violence, 2) the violent nature of petitioner's crimes which reflected a lack of regard for human life, 3) the petitioner's prior conviction of armed robbery and kidnapping, and 4) the petitioner's placement of blame on the victim of his crime. It disagreed with the petitioner's argument that the review of his application should have been limited to evaluation of the new family member, as, the court found, this interpretation is not supported by the regulations or any other authority.

Finally, the court held that the Department had correctly concluded that since the goal of the program was to preserve, enhance and strengthen family ties that have been disrupted as a result of incarceration, see Directive 4500 §I, FRP visits with petitioner's wife, whom he married while he was incarcerated, and her children and grandchildren would not be relevant to the core purpose of the program.

Based on this analysis, the court found that the denial was rational and it affirmed the lower court decision.

Peter Garcia represented himself in this Article 78 proceeding.

Claim of Innocence Does Not Excuse Failure to Participate in SOCTP

Due to petitioner's conviction of committing a sex offense, DOCCS required that the petitioner in Matter of Johnson v. Annucci, 139 A.D.3d 1271 (3d Dep't 2016), enroll in the Department's sex offender counseling and treatment program (SOCTP). The petitioner, who asserted that he had not committed the sex crime that he had been convicted of committing, refused to enroll in the program and signed a statement advising him that refusing to participate in a mandatory program may result in, among other things, an ineligibility for an area of preference transfer and a reduction in pay grade and job assignment. In accordance with this notice, petitioner's work assignment was changed to a lower pay grade job and his request for an area of preference transfer was denied.

Petitioner challenged the change in job and pay grade and the denial of his request for an area of preference transfer, arguing in his grievance that the requirement that he take SOCTP should be waived because he denied having committed the sex offense that he had been convicted of committing. When the grievance was denied, and after exhausting his administrative remedies, petitioner filed an Article 78 action challenging the denial of his grievance.

The Supreme Court, Franklin County dismissed the petition. On appeal, the Third Department first stated that, "Judicial review of an inmate grievance is limited to whether such determination was arbitrary and capricious, irrational or affected by error of law." The court then held that in light of the petitioner's refusal to enroll in the SOCTP, the change in his pay grade and job assignment and the denial of his request for an area of preference transfer were not arbitrary and capricious, irrational or affected by error of law. The court also rejected petitioner's argument that the requirement that he take the SOCTP should be waived because he maintained that he was innocent of the sex offense. It found a sufficient factual basis for requiring the SOCTP in petitioner's conviction and the appellate court's affirmation of the conviction. Finally, the court found that the petitioner had not shown that the respondent had violated any of his constitutional rights or that he had suffered any prejudice that would result from participation in the program.

Douglas E. Johnson represented himself in this Article 78 proceeding.

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PLS Offices and the Facilities Served

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:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

BUFFALO, 14 Lafayette Square, Suite 510, Buffalo, NY 14203

Prisons served: Albion, Attica, Collins, Gowanda, Groveland, Lakeview, Livingston, Orleans, Rochester, Wende, Wyoming.

ITHACA, 114 Prospect Street, Ithaca, NY 14850

Prisons served: Auburn, Cape Vincent, Cayuga, Elmira, Five Points, Southport, Watertown, Willard.

PLATTSBURGH, 24 Margaret Street, Suite 9, Plattsburgh, NY 12901

Prisons served: Adirondack, Altona, Bare Hill, Clinton, Franklin, Gouverneur, Moriah Shock, Ogdensburg, Riverview, Upstate.

Pro Se Staff

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COPY EDITING AND PRODUCTION: ALETA ALBERT
CONTRIBUTING WRITER: SAMANTHA HOWELL, ESQ.