Pro Se

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FOIL BARS SHIFTING COST OF VIDEOTAPE REVIEW TO INMATES

In response to Jessie Barnes' Freedom of Information Law (FOIL) request for copies of ten videotapes, DOCCS advised him that pursuant to Directive 2010, the cost of reproducing eight of the tapes was $.60 each. The cost of reproducing two of the tapes – one that was 2 hours long and the other one hour – was $124.42 and $62.51, respectively. Mr. Barnes appealed this determination and it was affirmed: "with regard to pricing . . . a DVD under one hour is 60 cents and a DVD one hour or more is charged the hourly rate as it takes the time of both Loronox [the videotape system used by DOCCS] to produce and the lieutenant to review the video." Mr. Barnes then filed an Article 78 challenge to the Department's charges.

The issue before the court in Barnes v. Heywood was whether the Public Officers Law authorizes agencies to charge people who request copies of videotapes for the time that it takes for agency personnel 1) to move the data from the Loronox system to a DVD and 2) to determine whether any of the images on the tape fall within one or more of the exemptions to records that an agency must produce. According to the affidavit of the Department's then Acting Records Access Officer which was submitted in support of its practice in Matter of Barnes v. Heywood, Index No. 2386-17 (Sup.Ct. Albany Co. Aug. 28, 2017), it was proper for DOCCS to charge for all time required to prepare a copy, including the recording of the video onto a DVD and the review required by security personnel because the reproduction of video pursuant to a FOIL request necessarily includes review by a security supervisor of the rank of lieutenant or above and redaction of any exempt material.

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EDUCATION IN PRISON: Right, Fiscally Sound and Smart!

A Message from the Executive Director – Karen L. Murtagh

"We must accept the reality that to confine offenders behind walls without trying to change them is an expensive folly with short-term benefits -- winning battles while losing the war. It is wrong. It is expensive. It is stupid." - **Former U.S. Supreme Court Chief Justice Warren Burger.**

On August 7, 2017, Governor Cuomo and Manhattan District Attorney Cyrus R. Vance, Jr. took an important step in putting Chief Justice Warren Burger's words into action when they announced an award of $7.3 million to fund educational programming and reentry services at 17 New York State prisons over the next five years. The 'College-in-Prison Reentry Program' will create more than 2,500 seats for college-level education and training for incarcerated New Yorkers across the state. While this funding will provide education and training opportunities to only 5% of New York's current prison population, it is a huge step in the right direction.

According to the Federal Bureau of Prisons, there is an inverse relationship between recidivism rates and education. As such, this program will significantly increase the likelihood of successful reentry into the community, thereby reducing recidivism rates.

Of course, we have known this for decades. Over 50 years ago, in 1965, Congress passed Title IV of the Higher Education Act. This Act permitted incarcerated individuals to apply for financial aid through Pell Grants. In the 70's, studies were conducted to determine the success rate of the higher education programs by measuring the re-arrest rate and the ex-offender's ability to obtain and maintain employment. The studies found that incarcerated individuals with at least two years of college education had a 10% re-arrest rate compared to a national re-arrest rate of approximately 60%.

In 1993, the Texas Department of Criminal Justice undertook a study of recidivism rates (noting that the average recidivism rate in Texas was also 60%) and found that individuals with associates' degrees had recidivism rates of 13.7%, those with bachelor's degrees a rate of 5.6% and those with masters' degrees a recidivism rate of zero. In New York State, it was found that incarcerated individuals who had begun the college program, but had not finished the program by the time of their release, had a recidivism rate of 44%, while those who had completed their college education had a recidivism rate of 26%.

One would think that such results would have warranted a huge governmental investment in education programs in prison; unfortunately, federal and state governments did just the opposite. In 1994, the U.S. Congress included a provision in the Violent Crime Control and Law Enforcement Act which denied prisoners' access to federal Pell Grants. New York soon followed suit in 1995 by taking away access to Tuition Assistant Program (TAP) grants from prisoners.

But in February 2014, Governor Cuomo announced his intention to give incarcerated individuals an opportunity to earn a college degree. Stated the Governor, "New York State currently spends $60,000 per year on every prisoner in our system, and those who leave have a 40 percent chance of ending up back behind bars." Under this program, it will cost the State less than $3000 to provide one year of college education per person. "Existing programs show that providing a college education in our prisons is much cheaper for the state and delivers far better results. Someone who leaves prison with a college degree has a real shot at a second lease on life because their education gives them the opportunity to get a job and avoid falling back into a cycle of crime," said the Governor.

It has taken us quite a while to get here, but the fact that this decision is morally right, fiscally sound and politically smart should ensure that college education in New York's correctional facilities is here to stay.

. . .Continued from Page 1

Article 6, §§84-90 of The Public Officers Law is known as the Freedom of Information Law. The section of the law that was at issue in Barnes v. Heywood provides:

> (c) In determining the actual cost of reproducing a record, an agency may include only:
>
> i. an amount equal to the hourly salary attributed to the lowest paid agency employee who has the necessary skill required to prepare a copy of the requested record;
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> ii. the actual cost of the storage devices or media provided to the person making the request in complying with such request;
>
> iii. the actual cost to the agency of engaging an outside professional service to prepare a copy of a record, but only when an agency's information technology equipment is inadequate to prepare a copy, if such service is used to prepare the copy; and
>
> iv. preparing a copy shall not include search time or administrative costs, and no fee shall be charged unless at least two hours of agency employee time is needed to prepare a copy of the record requested. A person requesting a record shall be informed of the estimated cost of preparing a copy of the record if more than two hours of an agency employee's time is needed, or if an outside professional service would be retained to prepare a copy of the record.

Pub. Officers Law §87(1)(c)(iv).

In this case, DOCCS took the position that the law permits the Department to charge for all of the time required to "prepare a copy" including the recording of the video onto a DVD and the review required by security personnel. This review, the Acting Records Access Officer stated, is necessary to determine "whether the video depicts anything that could be used to disrupt the safety and security of the facility or violate the personal privacy of other inmates (such as the depiction of other inmates in stages of undress.") In his view of the law, the time required to prepare a copy within the meaning of Section 87(1)(c)(iv) includes a review of the video by a lieutenant to determine whether there exists any exempt materials which must be redacted.

The court rejected the Department's position, finding that FOIL specifically states that administrative costs shall not be considered in determining the actual cost of reproducing a record. The "plain language" of the statute, the court wrote, leaves no doubt that the imposition of a fee for reviewing a requested record in order to determine the extent to which it must be disclosed is improper.

The court noted that at least one other court, Matter of Time Warner Cable News NY1 v. NYC Police Dept., 53 Misc.3d 657 (Sup. Ct. N.Y. Co. 2016), has held that the cost to review and redact video footage – in that case, recorded on body cameras worn by police – may not be passed on to the requestor. In addition, the Barnes v. Heywood court pointed to several advisory opinions from the Committee on Open Government (COOG) that support this view, one noting that FOIL has never authorized a fee for time taken by an attorney or staff to determine which records or portions thereof must be disclosed and which portions may be exempt from disclosure and another stating that an agency may not charge for an employee's time redacting the already prepared records. The COOG has also written that the cost of

transferring the prepared record to the requested medium may not be charged to the requestor. While noting that COOG's opinions are not binding on the courts, the court in Barnes v. Heywood stated that an agency's interpretation of the statutes it administers should be upheld if the interpretation is not unreasonable or irrational.

The court also considered that while review and redaction is undoubtedly necessary and not without cost, the Court of Appeals, in Matter of Doolan v. Board of Coop. Educ. Servs., 422 N.Y.S.2d 927 (1979), made clear that meeting the public's legitimate right of access to information concerning the government is fulfillment of a governmental obligation, not a gift or waste of public funds.

Based on this analysis, the court found that the decision to impose fees for reviewing the requested tapes and transferring them to the requested medium (DVDs) was affected by error of law and was arbitrary and capricious.

Jessie Barnes represented himself in this Article 78 proceeding.

News and Notes

DOCCS Adopts New Policy on Controlled Substances

In June 2017, DOCCS adopted health care policy No. 1.24, entitled "Medications with Abuse Potential." This policy is published in the DOCCS Health Services Policy Manual (HSPM). The policy provides for a centralized review and approval process for all prescription medications that have a recognized potential for abuse (i.e., medications that are likely to cause dependence or addiction or which have the potential for misuse). The policy sets forth a list of medications with abuse potential (MWAP). Among the medications covered by the policy are all medications on the DEA (Drug Enforcement Administration) Controlled Substances list, muscle relaxants (including Flexeril, Norflex and Robaxin), Gabapentin (Neurontin), Sudafed, Robitussin SM, and Claritin-D.

In brief, the policy requires the facility health staff to review all MWAP prescriptions currently issued to DOCCS inmates. It also creates a procedure whereby facility heath care providers submit all proposed MWAP prescriptions to the Regional Medical Director (RMD) who is responsible for deciding whether to approve the request.

The policy contemplates that facility medical providers will use alternative pain management methods to treat both acute and chronic pain. Section IV(J) of the policy states:

> "As an alternative to the use of medications with abuse potential, safer treatment modalities to treat acute and chronic pain and chronic medical/psychiatric and or neurological issues will be strongly encouraged by facility medical providers and specialty care consultants like pain specialists, neurologists, and psychologists."

Thus, pursuant to the policy any denial of an MWAP might include not only a prescription for other medications that do not have a recognized potential for abuse, but also alternative means of treating and managing pain. For instance, where the RMD rejects a prescription for an MWAP, physical therapy and/or other medical interventions could be recommended. In the event that you are denied a MWAP, consider seeking an alternative form of pain management such as physical therapy.

If you are interested in obtaining a copy of the MWAP policy and/or the MWAP List, you can obtain them by making a FOIL request. Familiarizing yourself with the policy is an important first step in your pain management discussions with your medical providers.

Reflections on National Pro Bono Week

Letters from Home: Incarcerated New Yorkers Reflect on the Love of Their Families

Each year in October, Prisoners' Legal Services of New York (PLS) hosts an event in conjunction with National Pro Bono Week. Started by the American Bar Association, National Pro Bono Week is a time to recognize and honor our volunteers, raise awareness of access to justice issues and, in PLS' case, share the voices of incarcerated individuals with the community. To do so, we pick a topic and ask for incarcerated New Yorkers to write to us about that topic. This year, we asked individuals to share stories, letters, poems, songs, photos, drawings, cards or any other form of art that would help others understand the significance of preserving family connections during incarceration.

On October 4th, members of the Soul Rebel Performance Troupe, a Capital Region theater group that focuses on social justice issues in their featured plays, performed the pieces for a diverse audience, including PLS staff, *pro bono* volunteers, students, and other invited guests. We also honored our volunteers, recognizing the incredible efforts of our more than 100 *pro bono* partners.

While we received more than a hundred submissions this year, we were only able to include a small number of pieces in the performance. We greatly appreciate the contributors' willingness to share their stories and to invite us into their lives and the lives of their families. We want to particularly recognize the following individuals, whose stories we integrated into our celebration: Marquis Adams; Anonymous; Sabir Archer; Hector Arroyo; Sebastin Barba; Anthony Breedlove; Nyanda Charley; Michael Crawford; James Francischelli; Rubin Fuentes; Joseph Fortier; Alexis Irizzary; Gardy Jean-Baptiste; Frank Johnston; Nelson Long, Jr.; Kirtland McCloud; Marc Paul; Tyler Neal; Felicito Rodriguez; and Michael Taffinder.

We are indebted to each person who shared his or her story this year and are eager to receive new submissions as we prepare for National Pro Bono Week 2018. Please watch for an announcement of the topic in an upcoming *Pro Se*.

PLS Announces the New Bedford Hills Phone Program

PLS is excited to announce the new Bedford Hills Phone Program. Starting October 12, 2017, once a week women at Bedford Hills will have an opportunity to speak with a PLS lawyer on the phone about a variety of legal issues. Notices explaining the phone program will be posted in the facility. Offender Rehabilitation Counselor Figueroa will help you arrange a call.

Correction

In the last issue of *Pro Se*, we announced that *Pro Se* would soon be available electronically in the facility law libraries. When *Pro Se* is available in the DOCCS Law Libraries, it will be on the Law Library Resource Panel, a different application than we had indicated in the original article.

Letters to the Editor

Dear Editors,

I would like to thank you for giving me useful things to read and giving me hope. I hope that more people can become better educated about the law by reading *Pro Se*. Keep up the good work. By the time the next issue of Pro Se is published, I will have gone home. I hope that all my brothers on the inside will continue to hold their heads up and keep moving forward.

Respectfully,

Robert Stevens
Released 9/13/17

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

PRO SE VICTORIES!

Matter of Christopher Hynes v. Anthony Annucci, Index No. 209-17 (Sup. Ct. Albany Co. June 14, 2017). Christopher Hynes successfully challenged the finding of guilt with respect to charges arising from documents enclosed with his correspondence by arguing that the Department did not have a valid mail watch authorization. According to the misbehavior report, a mail room staff person, reviewing Mr. Hynes' outgoing mail pursuant to an Authorized Facility Mail Watch, discovered notarized documents relating to two other inmates in an envelope with Mr. Hynes' contact information in the return address. The court agreed with Mr. Hynes that at the time of the discovery, a valid mail watch authorization was not in effect because the mail watch authorization did not set forth specific facts forming the basis for reviewing Mr. Hynes' correspondence. The court ordered the hearing reversed and expunged.

Matter of Anthony Arriaga v. C. Marchese, Index No. 1770-17 (Sup. Ct. Albany Co. Aug. 14, 2017). Anthony Arriaga successfully challenged the Department's refusal to electronically document certificates and degrees that Mr. Arriaga had earned from an accredited institution while he was in prison. In this case, Mr. Arriaga earned two degrees from the New York State accredited Blackstone Career Institute: a Diploma of Legal Assistant/Paralegal and a Certificate of Real Estate Law. DOCCS refused to electronically document his achievements, because the Department has its own paralegal certificate program. Noting that the Directive makes it clear that the Department is responsible for ensuring that inmate participation in education programs is recorded on the "KIPY System," the court held that the Department's refusal to input the information regarding Mr. Arriaga's degrees was arbitrary and capricious and without a reasonable basis.

William M. Nichols v. The State of New York, Motion No. M-89903 (Ct. Clms. May 23, 2017). William Nichols successfully argued that the court should grant him permission to file a late claim with respect to the roughly 30 days that he spent in keeplock

as a result of a determination at a Tier III hearing that he had an unauthorized program on his computer and that he had altered certain forms on that computer. In this case, the court concluded that the defendant was not prejudiced by the late filing and that assuming the truth of the movant's allegation, the claim that the misbehavior report had not provided the movant with adequate notice of the charges was not patently without merit. Based on these findings, the court concluded that there was cause to believe that a cause of action for wrongful confinement may exist and granted the motion.

DOCCS Reverses 51 Determinations Challenged in Pro Se Article 78 Proceedings

Between October 1, 2016 and September 21, 2017, the administrative determinations of guilt in the cases listed below were administratively reversed and expunged at the request of the Assistant Attorneys General assigned to represent the respondents. Congratulations to all of you who persevered in your efforts to obtain justice from the courts!

Matter of Anthony Arriaga v. Michael Capra

Matter of Aikio Garnes v. Anthony J. Annucci

Matter of Jeffrey Joseph v. Anthony Annucci

Matter of Kwok Sze v. Linda Goppert

Matter of Jerome Anderson v. Donald Venettozzi

Matter of Lester Rufus v. Anthony Annucci

Matter of Carl Macedonio v. Anthony J. Annucci

Matter of Lusher Wallace v. Anthony J. Annucci

Matter of Vernon A. Jones v. Anthony J. Annucci

Matter of Byron K. Brown v. Anthony J. Annucci

Matter of Latasio Cendales v. Michael Sheahan

Matter of Joseph A. Gelling v. Anthony J. Annucci

Matter of Mike White v. Anthony J. Annucci

Matter of Ralik Bailey v. Anthony J. Annucci

Matter of Reginald McFadden v. Donald Venettozzi

Matter of Eric DeBerry v. Donald Venettozzi

Matter of Marcus A. Micolo V. Michael Kirkpatrick

Matter of Abdul Ali Karim-Rashid v. Anthony Annucci

Matter of Samuel Abrams v. Anthony J. Annucci

Matter of Oneil Brown v. Brian Fischer

Matter of Carl Young v. NYS DOCCS

Matter of James C. Hines II v. Donald Venettozzi

Matter of Johnny B. Brown v. Donald Venettozzi

Matter of Bernard Moore v. Anthony J. Annucci

Matter of Stanley L. Howard v. Anthony Annucci

Matter of Injah Unique Tafari v. Anthony J. Annucci

Matter of Walter Ellison v. Anthony J. Annucci

Matter of Corey Elder v. NYS DOCCS

Matter of Keith Waters v. Lt. W. Purdy

Matter of Terence Daum v. Anthony J. Annucci

Matter of Shannon V. Campbell v. Anthony J. Annucci

Matter of Corey D. Whitlock, v. Michael Kirkpatrick

Matter of Edmir Gega v. Anthony J. Annucci

Matter of Barry Palczewski v. Anthony J. Annucci

Matter of Terraine Slide v. Anthony Russo

Matter of Shawn Williams v. Harold D. Graham

Matter of Juan Serrano v. Joseph T. Smith

Matter of Roy Worth v. Donald Venettozzi

Matter of Corey Harris v. Albert Prack

Matter of Gerard Jenkins v. Anthony J. Annucci

Matter of Michael Sheard v. Anthony J. Annucci

Matter of Lamont Nanton v. Anthony J. Annucci

Matter of Kenneth McMaster v. C.S. Rowe

Matter of William M. Nichols v. Michael Kirkpatrick

Matter of Elias Cruz v. Anthony J. Annucci

Matter of Arthur Harrison v. Anthony J. Annucci

Matter of Jermaine Habeeb v. Anthony J. Annucci

Matter of Trazz Sawyer v. Anthony J. Annucci

Matter of Ricky Owens v. Anthony Annucci

Matter of Robert Thousand v. Michael Kirkpatrick

Matter of Darnell Ballard v. Bruce Yelich

Pro Se Victories! *features summaries of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this column 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

Second Department Writes About Substantial Evidence Standard

According to Jermaine Archer, he was found guilty of possession of a tool without authorization, possession of an article in a prohibited area, possession of an item that the superintendent had not authorized the inmate to possess and smuggling. He filed an Article 78 challenge to the determination of guilt and in Matter of Archer v. Annucci, 2017 WL 3723142 (2d Dep't Aug. 30, 2017), the Second Department found that the determination of guilt was not supported by substantial evidence. The court then offered the following guidance to hearing officers with respect to weighing the evidence before them:

"More than seeming or imaginary, [substantial evidence] is less than a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable doubt. Essential attributes are relevance and a probative character. Marked by its substance – its solid nature and ability to inspire confidence – substantial evidence does not rise from bare surmise, conjecture, speculation or rumor. A court reviewing the substantiality of the evidence upon which an administrative agency has acted exercises a genuine judicial function and does not confirm a determination simply because it was made by such an agency." [citations and quotation marks omitted].

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Jermaine Archer represented himself in this Article 78 proceeding.

Insufficient Evidence Supported Determination That Inmate's Wife Gave Him a Cell Phone

Following a family reunion program visit, petitioner Frans Sital was charged with smuggling and possessing and using a cell phone during the visit. The factual basis for the charges was that a correction officer overheard the petitioner making what sounded like a phone call. When the visit ended, two cell phones were found in a bag which the wife had left in a locker outside the visiting area.

In Matter of Sital v. Capra, 2017 WL 3044692 (2d Dep't July 19, 2017), the court ruled that the officer's testimony supported the charges that the petitioner possessed and used the cell phone. However, the court rejected the argument that the presence of two cell phones in the petitioner's wife's bag was sufficient to support the conclusion that petitioner's wife had brought into the facility the phone that petitioner had used. As to that charge, the court wrote, the evidence showed that the items that petitioner's wife brought into the visit were

searched, that she went through a metal detector before entering the visiting area and that no phones were found at that time. Thus, the court concluded, in the absence of evidence connecting the phones recovered from his wife to the petitioner, and in the absence of proof that the wife was in possession of the phones prior to their recovery from the bag that had been left in the locker, the charge of smuggling was not supported by substantial evidence and had to be dismissed.

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Frans Sital represented himself in this Article 78 proceeding.

Observations Supported Determination That Petitioner Had Used Intoxicants

In Matter of Simmons v. Venettozzi, 56 N.Y.S.3d 908 (3d Dep't 2017), the petitioner argued that the determination that he had used intoxicants was not supported by substantial evidence. The misbehavior report alleged that an officer had observed the petitioner act in an unusual manner, become unresponsive and then begin vomiting. A urinalysis test was negative. The court held that the detailed misbehavior report and the testimony of the sergeant who had observed the petitioner and of the nurse who had reviewed his medical records – both of whom offered opinions that he was under the influence of some kind of intoxicant – provided substantial evidence supporting the determination of guilt.

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Leon Simmons represented himself in this Article 78 proceeding.

Where HO's Error is of Constitutional Magnitude, DOCCS Can Reverse and Conduct New Hearing

In Matter of Bonnemere v. Annucci, 56 N.Y.S.3d 909 (3d Dep't 2017), the Third Department once again held that where DOCCS has not already issued a final determination of an appeal from a Tier III hearing, the Department has the authority to reverse the hearing and conduct a re-hearing, even where the basis for the reversal is an error of constitutional magnitude. In Matter of Bonnemere, based solely on the hearsay misbehavior report of an investigating officer, the petitioner was found guilty of assault on an inmate, extortion, violent conduct and possessing stolen property. On appeal, the Office of Special Housing reversed the determination of guilt because there was no testimony from the author of the misbehavior report; such testimony was required because the report was based on an investigation (as opposed to first-hand knowledge of the events at issue). After the petitioner was found guilty at the re-hearing, he filed an Article 78 challenge to the proceeding.

The court first addressed the petitioner's claim that the Department erred when, after determining that the determination of guilt was not supported by sufficient evidence, it held a re-hearing. With respect to this claim, the court found that where the Department has not issued a final determination, it is entirely proper for the Department to order a rehearing upon its administrative review of an inmate disciplinary hearing, even where the error sought to be corrected was of constitutional magnitude.

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Damon Bonnemere represented himself in this Article 78 proceeding.

Even Where No Drugs Were Introduced Into Prison, Inmate Can Be Found Guilty of Smuggling

As a result of what the court concluded was a properly authorized mail watch, the petitioner in Matter of Douglas v. Annucci, 56 N.Y.S.3d 907 (3d Dep't 2017), was charged with smuggling marijuana. The charges were based on letters that petitioner had placed into outgoing facility mail. One letter requested that a recipient smuggle marijuana into the facility during a visit. After he was found guilty of smuggling at a Tier III hearing, the petitioner filed an Article 78 challenge, asserting that no marijuana had been introduced into the facility. The court rejected this challenge, holding that while his efforts may have been unsuccessful, "inmates involved in attempts or conspiracies to violate institutional rules, will be punished to the same degrees as violators of such rules.

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Amir Douglas represented himself in this Article 78 proceeding.

HO Can Rely on Misbehavior Report to Find That Inmate's Version of Events is Not Credible

In his misbehavior report charging the petitioner with disobeying a direct order, harassment and creating a disturbance, a cook alleged that after hearing the petitioner making inappropriate comments as he served food, he instructed a prisoner on how to properly serve food. However, the report continued, the petitioner continued to make inappropriate comments and the cook ordered him off the serving line. As the cook was escorting the petitioner to the office, the report states, the petitioner became loud and argumentative.

At the hearing, the petitioner did not request that the cook be called as a witness, nor did the hearing officer call the cook as a witness. Petitioner denied that he became argumentative and loud. This created a credibility issue – to decide who was more believable, the cook or the accused. The hearing officer found that the cook's report was more believable than the accused inmate's testimony and found the accused guilty of the conduct charged.

In Matter of Williams v. Kirkpatrick, 56 N.Y.S.3d 916 (3d Dep't 2017), the court found that the hearing officer could properly decide who was more credible without calling the cook as a witness. Here, the court ruled, the misbehavior report was substantial evidence of guilt.

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Thomas Williams represented himself in this Article 78 proceeding.

Raised Fist in the Mess Hall Created a Disturbance

In Matter of Taylor v. Lee, 2017 WL 3176013 (3d Dep't July 27, 2017), the court considered whether, when the petitioner raised his hand in the air with a clenched fist in the prison mess hall – either as a friendly greeting (as he testified) or as a gesture of solidarity and power with his peers – he had created a disturbance. Following the petitioner's gesture, inmate movement in the mess hall was disrupted for 15 minutes.

The court held that the misbehavior report and supporting testimony was substantial evidence that the petitioner had created a disturbance. Whether the gesture was a friendly greeting or a gesture of solidarity and support, the court found, was an issue of credibility for the hearing officer to resolve.

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Winfred Taylor represented himself in this Article 78 proceeding.

Self-Report of Swallowing a Weapon Supports Determination of Possession and Smuggling

When the petitioner in Matter of Bellamy v. Venettozzi, 56 N.Y.S.3d 479 (3d Dep't 2017), reported that he had swallowed a weapon several days before he made the report and it was now stuck in his throat, officers charged him with possessing a weapon and smuggling. After several forms of examination, it was determined that there was no weapon in the petitioner's throat or body, but that his throat was sore as a result of where the item had previously lodged.

At his hearing, petitioner was found guilty of both charges. He filed an Article 78 petition, alleging that the determination should be annulled because no weapon was seen on an x-ray or recovered. The court found that the misbehavior report, which relates that petitioner admitted that he had swallowed a weapon and indicated that the petitioner may have passed the weapon prior to reporting that he had swallowed it, was substantial evidence of guilt. Under these circumstances, the court affirmed the determination of guilty.

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Perry Bellamy represented himself in this Article 78 proceeding.

HO Violated Inmate's Fundamental Right to Attend his Tier III Hearing

Charged with assault, threats, refusing a direct order, interference, lying, destruction of state property and unhygienic attack, the petitioner in Matter of Micolo v. Annucci, 2017 WL 3176112 (3d Dep't July 27, 2017), attended the first session of his hearing but was not at the second session. According to the officers who were to escort him to the hearing, the petitioner complained that the restraints were too tight and refused to go to the hearing which was then concluded in his absence. After petitioner was found guilty, the issue in his Article 78 petition was whether he had made a knowing, voluntary and intelligent waiver of his right to be present at the hearing.

An inmate has a fundamental right to attend a prison disciplinary hearing. For this reason, if he or she does not attend, DOCCS must show that he or she made a knowing, voluntary and intelligent waiver of that right. To be knowing, intelligent and voluntary, DOCCS must show that the inmate was informed of the right and of the consequences of failing to appear (that the hearing would be conducted in the absence of the inmate). Here, while there was testimony from the officers who had attempted to escort the petitioner to the hearing that they had informed him of the consequence of not attending, a videotape of the interaction between the officers and the petitioner revealed that they had not advised him of the consequences of not attending the hearing. Further, there was no testimony at the hearing as to why the petitioner refused to go to the hearing and the hearing officer failed to ask the officers about the reason for the refusal.

The court further noted that while there was a form in the record of the hearing that stated that the petitioner was aware of the consequences of not attending the hearing, the petitioner had not signed the form and there was no indication on the form or anywhere else in the record as to the steps taken to either ascertain the legitimacy of the refusal or to inform him of the consequences of his failure to attend.

Based on these facts, the court held that the petitioner had not knowingly, intelligently and voluntarily waived his right to attend the hearing. Because the case involved the violation of a fundamental (constitutional) right, the court ordered the charges expunged from petitioner's records.

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Marcus Micolo represented himself in this Article 78 proceeding.

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PRO SE PRACTICE

JUDICIAL BASIC TRAINING

FEDERAL PRACTICE

The Structure of the Federal Courts

There are three levels of federal courts: the District Courts, the Courts of Appeals, and the United States Supreme Court. Federal actions are started in the District Courts by filing a complaint or, in the case of an action for habeas relief, a petition. There are four district courts in New York: the Northern District, the Southern District, the Eastern District and the Western District. Each district court hears cases that arise within a specific geographic area. PLS publishes an address packet that gives the address of each of the district courts and describes the geographic area from which the court accepts cases.

Like the District Courts, each Federal Court of Appeals handles appeals from cases that were decided by the District Courts within a specific geographic area. The Court of Appeals that hears appeals from cases filed in the District Courts in New York is the Second Circuit Court of Appeals. The Second Circuit also hears appeals from the District Courts of Connecticut and Vermont.

Prisoners have a *right* to appeal to the Second Circuit District Court decisions relating to lawsuits based on Section 1983, Americans With Disabilities Act (ADA), and Religious Land Use and Institutionalized Persons Act (RLUIPA). (These, along with habeas corpus actions, are the most common bases for lawsuits filed in the federal courts by prisoners). Unless the District Court issues a Certificate of Appealability (COA) at the time that it denies a

petition for a writ of habeas, prisoners must get permission to file an appeal from a denial of a petition for habeas relief.

The United States Supreme Court hears appeals from decisions made by the federal Courts of Appeals and from some decisions issued by the state courts. There is *no right* to appeal to the Supreme Court. The losing party must petition the court to hear his/her appeal.

The Life of a Federal Case

Filing and Service

A Section 1983 federal case begins with the filing of a summons and complaint in the District Court. After a case is filed, it must be served on the defendants. Rule 4 of the Federal Rules of Civil Procedure (FRCP) explains how to serve the defendants. Rule 12 of the FRCP provides that the defendants have 21 days from the date that they are served with the summons and complaint to file their answers. They can request additional time for filing their answers from the court.

Where the plaintiff is seeking relief from the defendants under §1983, RLUIPA, or the ADA, the action is known as a plenary action. Unless the action is dismissed or the parties settle, a plenary action is one in which a full trial will be held on the merits of a complaint following discovery. With the exception of Petitions for Writs of Habeas Corpus, the actions that prisoners typically file in federal court are plenary actions. The following stages describe the life of a federal case filed pursuant to one of these three statutes.

Pre-Trial Discovery

Once the defendants have answered, discovery begins. This is the period during which the **parties** (the plaintiff and the defendants) are required to exchange certain information with each other and are entitled to ask each other for materials relating to the claims and defenses raised by the complaint and answer. Rules 26 through 37 of the FRCP describe the discovery process.

Rule 26 requires that the parties disclose certain information to each other. The information that the parties must disclose includes the names and contact information of each person likely to have discoverable information, and the subject of the information, that the party may use to support its claims or defenses, a copy of all documents that the party has in its possession that it may use to support its claims or defenses, and information about the damages sought by the plaintiff.

After the parties have engaged in the disclosure required by Rule 26, the plaintiff seeks information in the possession of the defendants that may be relevant to proving his/her case at trial and also seeks information relating to the defenses raised by the defendants. The defendants seek information in the possession of the plaintiff that may cast doubt on his/her claims, and/or is supportive of the defenses raised in the Answer.

Discovery requests for written materials are called **Requests for Production of Documents**. Rule 34 controls document requests.

Rule 30 of the FRCP describes the deposition process. At a deposition, one party, usually through his/her lawyer, questions the opposing party, or the opposing party's witness, about the events that gave rise to the lawsuit. A deposition is a proceeding that is not held in front a judge. A court reporter is present to record the questions and answers. The person answering the questions, called the deponent, is **under oath** (has sworn to tell the truth). Although no judge is present at a deposition, it is a court proceeding. If the parties disagree about whether a question must be answered, the

parties or their attorneys can contact the judge by phone.

Other forms of discovery include **Interrogatories** (written questions posed by one party to which the opposing party must give written answers) and **Requests for Admissions** (a series of factual statements posed by one party that the opposing party must admit or deny). These procedures are described in Rules 33 and 36, respectively, of the FRCP.

Dispositive Motions

There are two pre-trial motions that can dispose of a case before trial. The **Motion to Dismiss** is described in Rule 12 of the FRCP. It permits a court to dismiss an action before discovery begins where the defendant persuades the court that even if the plaintiff is able to prove all the facts alleged in his complaint, s/he will not be entitled to the relief that s/he is seeking. One reason a case might be dismissed is the failure to allege a federal claim. For example, a prisoner brings a §1983 for inadequate medical care alleging that as a result of the defendant's negligence, he suffered injuries. He does not allege that the defendants were deliberately indifferent to a serious medical need. This would be an Eighth Amendment violation. Because negligent medical care does not rise to the level of an Eighth Amendment violation, the defendants will move to dismiss the action.

Usually upon completion of discovery, but sometimes at an earlier point, a party may move for **Summary Judgment**. See Rule 56 of the FRCP. In making this motion, the party making the motion – the movant – states that based on the evidence submitted with the motion and the party's statement of undisputed facts, the moving party is entitled to a judgment on the merits. The basis of the motion is that the undisputed evidence shows that the moving party is entitled to judgment on the merits. The party against whom summary judgment is sought responds to the motion by submitting evidence which the party alleges shows that there are **material facts** (those facts which are critical to deciding who wins the case) in dispute. The responding party can also make a cross motion for summary judgment, asserting that the undisputed evidence shows that it is entitled to summary judgment. If the court concludes that material issues of fact are in dispute, it will set the case for trial. If the court decides there are no material facts in dispute and both parties have moved for summary judgment, it will grant judgment to one side or the other. Even if the party opposing summary judgment has not cross moved for summary judgment, the court will grant judgment to the moving party only if the court determines that the plaintiff has submitted enough evidence to show that s/he is entitled to a judgment in his/her favor.

Trial

Both the plaintiff and the defendant have the right to request a jury trial. Only if both waive their rights to a jury, will the case be tried before a judge. The primary difference between a jury trial and a bench trial is that in the former, a group of twelve people without legal backgrounds decide whether the plaintiff has established that his or her rights were violated and in the latter, a single person with a legal background, determines whether the facts show that the plaintiff is entitled to a judgment in his/her favor. Assuming that one of the parties requests a jury, the trial begins with jury selection and ends with a verdict.

Following jury selection, each party has the chance to make an opening statement. An opening statement gives each party the chance to tell the jury its theory of the case and what evidence it will produce in support of its theory.

After the opening statements, the plaintiff puts on evidence to prove his or her claim. Evidence is introduced through witnesses and comes in the form of testimony, records, photographs, etc. After the plaintiff has called all of its witnesses, the judge decides whether the plaintiff has made a **prima facie case (**has produced enough proof that the jury could issue a verdict in its favor). If the plaintiff has not produced enough evidence, the judge will dismiss the case. If the plaintiff has produced enough evidence, the defendant is given the opportunity to put on a defense. Defense evidence is introduced by the same process as the plaintiff's evidence.

After the defense **rests** (finishes putting on its case), the parties make closing arguments. In his/her closing argument, the plaintiff tells the jury how the evidence supports his/her theory of liability. Following closing arguments, the court instructs the jury on the law, and the jury leaves the court room to deliberate. The result of the jury's deliberations is its verdict.

Petition for a Writ of Habeas Corpus

A petition for a writ of habeas corpus is an action seeking release from prison or jail. A habeas corpus action is a summary action. Unlike a plenary action, a summary action generally does not involve pre-trial discovery or a trial. Rather, a summary action is decided on the papers that the parties submit to the court.

The party who brings the summary case is called the petitioner. S/he starts the action by filing a petition. Attached to the petition are exhibits that the petitioner alleges show that s/he is entitled to the relief that s/he seeks, and filed with the petition is a **brief** (a written legal argument) that explains why the petitioner is entitled to the relief that s/he is requesting.

The person against whom the petition is filed is called the respondent. Instead of filing an answer, the respondent files a response. Attached to the response are the documents that the respondent claims show that the petitioner is not entitled to the relief s/he seeks. The respondent also submits a brief that explains why the court should not grant the relief requested by the petitioner.

The court makes its decision based on the materials submitted by the parties.

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Contact *Pro Se* at 114 Prospect Street, Ithaca, NY 14850.

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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.

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