Pro Se

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Albany County Supreme Court Rules that Videotape of Incident Is Not a Personnel Record

The petitioner in Matter of Darnell Green v. Anthony J. Annucci, Index No. 2156-17 (Albany Co. Sup. Ct. Sept. 11, 2017), made a Freedom of Information Law request for the videotape of an incident that took place on January 4, 2016. His request was denied, as was his appeal. The respondents' basis for denying the request was Public Officer's Law §87(2) and Civil Rights Law §50-a. The justification given was that the video was used to evaluate the performance of an officer towards continued employment and, because there was a substantial and realistic potential for this record to be used to harass or embarrass a DOCCS employee, was covered by §50-a.

The Freedom of Information Law is set forth in Article 6 of the Public Officers Law, at §§84 through 90. This Article reflects the legislative determination that the public should have access to the records of government in accordance with the Article's provisions, expresses this State's strong commitment to open government and public accountability, and imposes a broad standard of disclosure upon the State and its agencies. To implement this purpose, FOIL provides that all records of a public agency are presumptively open to public inspection and copying unless otherwise specifically exempted by the statute. The statutory exemptions are to be narrowly construed to provide maximum access; the agency seeking to prevent disclosure has the burden of showing that the requested records fall squarely within an exemption by stating a particularized and specific justification for denying access.

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PLS TESTIFIES AT ASSEMBLY HEARING ON MEDICAL CARE
A Message from the Executive Director, Karen L. Murtagh, Esq.

On October 30, 2017, PLS presented testimony before the Joint Legislative Hearing on Healthcare in New York State Correctional Facilities conducted by the Assembly Committees on Correction and Health and chaired by Assemblyman Weprin and Assemblyman Gottfried, respectively.

PLS' testimony focused on adequacy of care, including delay in treatment and continuity of care issues, barriers to providing adequate care, treatment of communicable diseases, pain medication and chronic pain management. Our testimony also proposed standards for addressing these issues and the development of a system of meaningful oversight that would help ensure that incarcerated New Yorkers are provided adequate medical care.

The state is legally obligated to provide adequate medical care to those in its care and custody under our Federal Constitution. *Estelle v. Gamble*, 429 U.S. 1066, 97 S.Ct. 798 (1977). In addition, New York State regulations require that incarcerated individuals receive "adequate health care and health services […] to protect their physical and mental well-being." New York Code Rules and Regulations Title 9 NYCRR §7651.1. Unfortunately, however, legal mandates do not guarantee that reasonably adequate care is always provided.

PLS receives over 500 complaints annually regarding inadequate medical care in New York State prisons. While these complaints cover a myriad of issues, the majority of the complaints center on delays in treatment and the failure to provide continuity of care. In our testimony we relayed numerous accounts of individuals suffering from delayed treatment, including one case where a patient waited over a year to have kidney stones removed, another waited over a year and a half for oral surgery that had been ordered due to extensive tooth decay and still another waited over three months to receive blood pressure medication that had been ordered by a physician. We also relayed numerous lack of continuity of care complaints where incarcerated individuals, upon being transferred to different prisons, had their medications/treatments interrupted or stopped completely, often before they had been examined by, or even talked to, a physician or other medical provider.

Our testimony also touched upon barriers to providing adequate care such as DOCCS' internal policies regarding substance abuse, including placing prisoners on waiting lists for drug treatment, punishing – rather than treating – drug use, and failing to provide medication assisted therapy for those addicted to opioids despite the position of the U.S. Surgeon General, who has described addiction as "a chronic disease that must be treated with urgency and compassion."

We concluded our testimony by setting forth the American Bar Association Standards governing health care for incarcerated people, "The Standard Minimum Rules for the Treatment of Prisoners," commonly referred to as "the Nelson Mandela Rules," and the recommendations set forth in the March 2009, Human Rights Watch report "Barred from Treatment: Punishment of Drug Users in New York State Prisons," urging the Legislature to adopt those standards. We also recommended that the Legislature increase oversight of DOCCS' provision of medical care by the State Department of Health. You can read our full testimony here: www.plsny.org or on our Facebook page: https://www.facebook.com/plsny/.

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The exemption in §87(2)(a) provides that an agency may deny access to records that are specifically exempted from disclosure by state or federal statue. Civil Rights Law §50-a provides that:

> All personnel records used to evaluate performance toward continued employment or promotion under the control of . . . a department of correction of individuals employed as correction officers . . . shall be considered confidential and not subject to inspection or review without the express written consent of . . . [the] correction officer . . . except as may be mandated by lawful court order.

In this case, the Department argued that the video requested by Mr. Green was used in the evaluation of an officer and is therefore protected from disclosure under Civil Rights Law §50-a.

The court rejected the Department's argument, finding that the video is not a personnel record under Civil Rights Law §50-a. In deciding this issue, the court first noted that the question of "whether a document is qualified as a personnel record under Civil Rights Law §50-a depends upon "its nature and its use in evaluating an officer's performance – not its physical location or its particular custodian." Personnel records, the court noted, "contain personal employment related information about a public employee."

The court then examined the nature of the video recording requested by the petitioner, finding that while the recording was used to evaluate the performance of the officer, this use was coincidental and not exclusive. Therefore, the court found that the video was a "mixed use material." Mixed use material is a record that can be used for several purposes, including officer evaluation. Further, the court found that the video footage was neither confidential nor personal, but rather was a video record of an event that occurred at a correctional facility. For this reason, the court held, the video recording is not a personnel record that warrants protection under FOIL.

In reaching this result, the court observed that if a video recording was treated as a personnel record, agencies could use Civil Rights Law §50-a to conceal any video recording – whether a police body cam video or a video of a cell extraction – by placing the video footage into a personnel file and using it to evaluate an officer's performance.

Based on this analysis, the court ordered the Department to disclose the video footage to the petitioner.

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Prisoners' Legal Services represented the petitioner Darnell Green in this Article 78 proceeding.

Information About Your *Pro Se* Subscription

It is important that you let *Pro Se* know your new location each time you are transferred. DOCCS does not forward *Pro Se* to prisoners. The individual prisons do try to notify us of prisoners who have been transferred but we may not hear about everybody who has moved. If you don't let us know your new location, you may miss issues of *Pro Se*.

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

News and Notes

UPDATE ON PLS' MENTAL HEALTH PROJECT

On January 1, 2017, PLS opened the **Mental Health Project (MHP),** thanks to a generous grant from the van Ameringen Foundation.[1] The goal of the MHP is to address the needs of **youth under 21 and veterans *(including anyone who has served in the military or armed forces)* who suffer from mental illness.**

The MHP is staffed by two part-time attorneys in our Ithaca office. Within PLS, the MHP is exclusively responsible for representing this target population. For the last year, the attorneys have been helping eligible clients obtain the mental health care they need and have worked to ensure that the Project's clients are not being subjected to conditions that exacerbate their mental health issues. We have helped clients move from SHU to therapeutic programs; obtained reductions in SHU time; persuaded DOCCS to provide medical care; engaged in discussions with DOCCS staff about establishing a veterans' housing unit in a maximum security prison; advocated for the transfer of a client to a prison where he can meet with a veterans outreach counselor; and are seeking special education services for youth between the ages of 18 and 21.

[1]The van Ameringen Foundation is a private grant making foundation located in New York City that was established by Arnold Louis van Ameringen in 1950. From its beginning, the Foundation has funded prevention, education, and direct care in the mental-health field, with an emphasis on those individuals and populations having an impoverished background and few opportunities, for whom appropriate intervention would produce positive change. See: http://vanamfound.org/history.

You are eligible for services from the MHP if:

1. You are a veteran or between the age of 18 and 21;

2. You suffer from a mental illness; **and**

   A. You are having issues relating to mental health care; **or**

   B. Medical care, programming, education, housing, sentencing, jail time or re-entry issues are affecting your mental health.

If you meet the above requirements, you should write to:

Prisoners' Legal Services
Mental Health Project
114 Prospect Street
Ithaca New York 14850.

Please provide us with your name, date of birth, military service status (if you are a vet), a brief summary of your issue and the relief you are requesting.

Letters to the Editor

To the People Changing Lives!

This is a letter of appreciation. Using ***Pro Se*** Volume 27, No. 4 (August 2017), I was able to obtain a favorable outcome at a Tier III hearing where I was charged with altered item, smuggling and weapon possession. The article on the decision Matter of Adams v. NYS DOCCS, 56 N.Y.S.3d 409 (4th Dep't. 2017), was about a hearing that was reversed because the respondents did not comply with the Directive that requires them to photograph the

weapon. I was found not guilty of the weapon charge because the Department did not produce a photograph of the weapon. Thank you for your time, patience, care and consideration.

Yours Sincerely,

Shaquill Battle

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 Nicholas Martin v. Tina M. Stanford, Index No. 2017-0431 (Sup. Ct. Cayuga Co. Oct. 18, 2017). Nicholas Martin successfully challenged the Parole Board's failure in assessing his application for parole release to consider his youth at the time of the commission of the crime for which he is now incarcerated. As a result of its conclusion that the Board had failed to consider petitioner's youth at the time that he committed the crime, the court ordered the Board to conduct a de novo hearing.

Matter of Eric Cherry v. Daniel Martuscello, Index No. 16-0128 (Sup. Ct. Greene Co. Sept. 19, 2017). After petitioner filed this article 78 challenge to a Tier III hearing, the Attorney General reversed the determination of guilt, expunged all references to the hearing, refunded the $5.00 Tier III charge and sought dismissal of the petition based on mootness. Petitioner argued the matter was not moot because the respondent had not returned the filing fee that the petitioner had paid to initiate the action. The court agreed and ordered that the respondent pay the petitioner the cost of the filing fee.

Matter of Rudolph Griffin v. Hon. Kevin Dooley, County Court Judge, and Rena Bonczek, Court Reporter, Index No. CA2017000488 (Sup. Ct. Broome Co. Aug. 24, 2017). Rudolph Griffin successfully challenged the respondents' refusal to produce transcripts in a criminal matter relating to the prosecution of his co-defendant. The respondents had refused to produce the transcripts because they believed that there was a sealing order. The court found that there was no sealing order in effect and ordered the production of the transcript.

Matter of Troy Britt v. Anthony Annucci, Index No. 6378-16 (Albany Co. Sup. Ct. April 4, 2017). After the AAG advised DOCCS to reverse the hearing and expunge the charges from Troy Britt's institutional record, and the Department did so, the Court dismissed petition. Mr. Britt had been found guilty of fighting, violent conduct and lying.

Shakim Abd Allah v. Anthony Annucci, et al., Index No. 16-CV-1841 (S.D.N.Y. Sept. 7, 2017). The court ruled that defendants had failed to show that plaintiff had not exhausted his administrative remedies and that contrary to the defendants' arguments, the plaintiff's allegations stated a claim that two of the defendants had violated his first amendment rights to practice his religion and his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Shakim Abd Allah's complaint alleged that the two prison administrators at Green Haven C.F. had violated his rights when they 1) denied him the right to attend two religious events that were

central or important to his faith, 2) failed to retain a Shia Muslim Chaplin to conduct Juma'ah services, which is fundamental to the practice of his religion, and 3) denied him the opportunity to hold fundraisers to purchase Shia educational materials.

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

Witness to Refute Officer's Testimony About Cell Maintenance Was Not Redundant

At a hearing into charges that Anthony Medina had forced synthetic marijuana down into the floor drain in a contraband watch cell, the officer who tested the substance testified that had the substance been tobacco, it would not have tested positive unless it had been contaminated by narcotics already in the drain. Another officer testified that the drains in contraband watch rooms were cleaned before inmates were placed in the rooms. He did not however, deny that if there were drugs in the drain, there could be cross contamination. In response to this testimony, Mr. Medina requested that a representative from the manufacturer of the drug test testify as to whether the sample could have been cross-contaminated if it had been exposed to narcotics previously deposited into the drain. He also requested as a witness the maintenance worker who had cleaned the cell before Mr. Medina was placed in it to testify as to whether he or she had cleaned the drain. The hearing officer refused both of the proposed witnesses, finding that their testimony would be redundant to the testimony of the officers.

After Mr. Medina was found guilty of possessing narcotics (among other charges) and his appeal was denied, he filed an Article 78 challenge to the hearing officer's determination of guilt. In Matter of Medina v. Five Points Correctional Facility, 61 N.Y.S.3d 381 (3d Dep't 2017), the court addressed the issue of whether the testimony of the two requested witnesses would have been redundant.

The court first noted that an inmate has a conditional right to call witnesses at a disciplinary hearing "so long as their testimony is material and not redundant and does not threaten institutional safety or correctional goals." It then noted that at the hearing, Mr. Medina had argued that the alleged contraband was tobacco that had falsely tested positive for narcotics because it was cross-contaminated by amphetamines that were already in the drain. The officer refuted this argument, testifying that there could not have been narcotics in the drain because the cell is cleaned before an inmate is placed in it. He did not deny that if the drain had not been cleaned, cross contamination could occur if tobacco was placed in a drain where drugs had previously been placed. Mr. Medina then asked that the hearing officer call as a witness a representative of the testing machine's manufacturer to testify about cross contamination.

The court ruled that the hearing officer properly found that the representative's

testimony would be redundant to that of the officer's with respect to the abstract possibility that contamination could occur and immaterial as to whether it had, as the representative would have no knowledge of whether there might have been narcotics in the drain.

The court reached a different result with respect to Mr. Medina's request that the hearing officer call the maintenance worker who was responsible for cleaning the cell before Mr. Medina was placed in it for the contraband watch. That witness, the court held, could refute the officer's testimony as to the procedures followed by facility staff with respect to the cleaning of the drains in the watch rooms, testimony which would not have been redundant. For this reason, the court wrote, Mr. Medina's right to call witnesses was violated. Because the hearing officer had provided a good faith reason for denying the request for the maintenance worker, the remedy for the violated right was a remittal for a new hearing.

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Anthony Medina represented himself in this Article 78 proceeding.

Testimony of Manufacturer of Drug Testing Machine Would Not Have Been Redundant

After Kenneth Paddyfote was found guilty of having used marijuana, he filed an Article 78 challenge to the hearing, arguing that the hearing officer had violated his right to call witnesses. The witness at issue was a representative of the manufacturer who made the drug testing machine. Paddyfote wanted his testimony to refute the testimony of the officer who performed the urinalysis test. The officer had testified about the operating procedures used to calibrate the machine. The hearing officer denied the witness finding that the testimony of the manufacturer's representative would necessarily be redundant to the testimony of the officer.

In Matter of Paddyfote v. Annucci, 2017 WL 4817223 (3d Dep't Oct. 26, 2017), the court, finding that it was unclear from the officer's testimony whether he had calibrated the machine in accordance with the manufacturer's instructions, ruled that the testimony of the representative would not have been redundant. However, because the hearing officer had given a good faith basis for his denial of the requested witness, the court ruled that the petitioner was entitled to a re-hearing rather than reversal and expungement of the charges.

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Kenneth Paddyfote represented himself in this Article 78 proceeding.

HO's Efforts Were Insufficient with Respect to Refusing Inmate Witness

As a result of an investigation, suboxone and heroine were found in Inmate X's locker. Phillip Blades was charged with smuggling and conspiring to introduce drugs into the prison. Following the hearing on these charges, Mr. Blades was found guilty. He then filed an Article 78 hearing, asserting that the hearing officer had failed to call an inmate witness who had agreed to testify.

In Matter of Blades v. Annucci, 60 N.Y.S.3d 724 (3d Dep't 2017), the court noted that Inmate X could testify as to how the drugs came to be in his cell. Mr. Blades had told his employee assistant that he wanted to call Inmate X as a witness. The employee assistant reported that Inmate X had agreed to testify. At the start of the hearing, Mr. Blades three times told the hearing officer that he wanted to call Inmate X. He also requested six other inmate witnesses. However, when the hearing officer reported back to Mr. Blades concerning which of his witnesses were willing to testify, she did not mention whether she had spoken Inmate X and if so, whether he was willing to testify.

Although the transcript reflects that the hearing officer failed to inform Mr. Blades about whether she had contacted Inmate X about testifying, the court noted that in the record there was a witness refusal form completed by the hearing officer that had been signed by Inmate X. The form indicated that he refused to testify because he did not want to get involved. Under these circumstances, the court found that while the hearing officer had taken the legally required steps to support a denial of a witness, her failure to provide the accused with written notice of the steps that she had taken amounts to a regulatory violation requiring that the matter be **remitted** (returned) for a new hearing.

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Phillip Blades represented himself in this Article 78 proceeding.

HO Failed to Independently Assess Reliability and Credibility of Confidential Informant

Based on an investigation that included information obtained from a confidential informant, Dominique Fields was charged with assaulting another prisoner, along with other charges. After being found guilty, Mr. Fields filed an Article 78 challenge, arguing that because of the hearing officer's failure to assess the reliability and credibility of confidential informant, the determination of guilt was not supported by substantial evidence.

In Matter of Fields v. Annucci, 60 N.Y.S.3d 711 (3d Dep't 2017), the court agreed with the petitioner. Citing Matter of Bridge v. Annucci, 19 N.Y.S.3d 607 (3d Dep't 2015), the court noted that "[a] disciplinary determination may be based upon hearsay confidential information provided that [the information] is sufficiently detailed and probative for the Hearing Officer to make an independent assessment of the informant's reliability." In this case, the hearing officer interviewed the investigating officer and author of the misbehavior report about the information that he had gotten from the confidential informant. The court stated, "Although the correction officer attested to the informant's past reliability, the substance of the information gleaned from the informant was too vague and insufficiently detailed to allow the Hearing Officer to independently assess the reliability and credibility of the informant." [citations omitted]. Because the hearing officer could not have concluded that the confidential information was reliable and credible from his interview with the investigating officer, the court concluded there was insufficient evidence that the accused was guilty of the charges. The court therefore annulled the determination of guilt and ordered DOCCS to expunge all references to the charges from the petitioner's prison records.

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Dominque Fields represented himself in this Article 78 proceeding.

Limits on the Right to Advice of Counsel with Respect to Tier III Hearings

Eon Shepherd was charged with using controlled substances. At his hearing, he requested the opportunity to consult with his lawyer to prepare his defense. The hearing officer granted adjournments totaling more than a month to allow Mr. Shepherd to contact his retained counsel. During this period, Mr. Shepherd contacted but did not meet with his lawyer. In Matter of Shepherd v. Annucci, 61 N.Y.S.3d 386 (3d Dep't 2017), the court held that the hearing officer had provided the petitioner with a reasonable opportunity to seek and receive the assistance of his attorney.

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Eon Shepherd represented himself in this Article 78 proceeding.

HO's Decision to Call 3 out of 45 Witnesses Did Not Violate Accused's Due Process Rights

According to the misbehavior report, while walking from the chapel to the yard, Donovan Cunningham three times – once after being ordered not to do so – yelled a Rastafarian chant, causing other prisoners to yell a response back. At his hearing, the hearing officer denied Mr. Cunningham's request to call all 45 prisoners who were on the call out sheet but allowed him to call 3 witnesses. After he was found guilty of violating a direct order, Mr. Cunningham filed an Article 78 challenge to the hearing, asserting that the hearing officer had violated his right to call witnesses. In Matter of Cunningham v. Annucci, 59 N.Y.S.3d 907 (3d Dep't 2017), the court held that as calling 42 other inmates would have been impractical and there was no indication that further testimony from those inmates would not have been redundant, the hearing officer did not err in limiting the number of prisoner witnesses who testified.

Donovan Cunningham represented himself in this Article 78 proceeding.

HO's Efforts to Locate Witnesses Was Sufficient

In 2011, Shadron Rambert was found guilty of assaulting an officer and related charges. The Third Department annulled that determination of guilt and remitted the matter for a rehearing. At the 2015 rehearing, Mr. Rambert was again found guilty. He challenged this hearing based on the hearing officer's failure to locate three witnesses who Mr. Rambert asserted had witnessed the incident. In Matter of Rambert v. Annucci, 59 N.Y.S.3d 909 (3d Dep't 2017), the court noted that as of the date of the 2015 hearing, the record showed that the three witnesses had been released from custody and were not subject to parole supervision; their phone numbers were no longer in service and no other contact information was on file. Under the circumstances, the court found that the hearing officer had made reasonable and substantial efforts to locate the witnesses.

Shadron Rambert represented himself in this Article 78 proceeding.

Conduct Constituted Harassment But Did Not Constitute Stalking

In Matter of Townsely v. Rodriguez, 59 N.Y.S.3d 721 (3d Dep't 2017), the petitioner was found guilty of stalking and harassment after the hearing officer determined that the petitioner had sent a correction officer a greeting card containing a personal message that said she was special and wished her a happy belated birthday. Because the proceeding raised an issue of substantial evidence, pursuant to CPLR 7804(g), it was transferred to the Appellate Division.

Rule 101.22 provides that an inmate shall not stalk an employee, visitor or other person. Stalking is defined as including, but not limited to, conduct directed at a specific employee, visitor or other person where the inmate knows, or reasonably should know, that such conduct is likely to cause reasonable fear of material harm to the physical health, safety or property of such person. Here the court found that the conduct described in the misbehavior report did not constitute a violation of the rule prohibiting stalking and reversed the determination of guilt made with respect to that charge.

The court found that the determination of guilt with respect to the charge of harassment was supported by substantial evidence. Rule 107.11 provides that an inmate shall not harass an employee or any other person verbally or in writing. Prohibited conduct includes, but is not limited to, using insolent, abusive, or obscene language or gestures, or *writing or otherwise*

communicating messages of a personal nature to an employee or any other person including a person subject of an order of protection with the inmate or who is on the inmate's negative correspondence list. In this instance, the court ruled, sending an employee a birthday card with a personal message was a violation of the rule and upheld the hearing decision as to that charge.

Taydon Townsley represented himself in this Article 78 proceeding.

HO Can Reject Victim's Statement That the Accused Did Not Assault Him

An investigation into how a prisoner was injured led to a misbehavior report charging Atiq Weston with fighting and violent conduct. The victim refused to testify at the hearing. However, on his witness refusal form, he wrote that he had not been in fight, and in other records, he reported that he had been injured when he fell out of bed. The correction officer who investigated the incident testified that the victim's injuries were not consistent with having fallen out of a bed. A nurse confirmed that information.

In Matter of Weston v. Annucci, 62 N.Y.S.3d 202 (3d Dep't 2017), the court found no merit in the petitioner's argument that the hearing officer failed to consider the victim's statement that there had not been a fight. The court noted that the hearing officer read the statement into the record and made it a part of the record. The court found that the determination of guilt was based on other evidence showing that petitioner was in a fight with the victim and the victim's injuries were not consistent with a fall but were consistent with a fight.

Atiq Weston represented himself in this Article 78 action.

Court of Claims

Court Credits Prisoner's Version of Assault by Corrections Officers

In Sanders v. State of New York, 2017 WL 4767742 (Ct. Clms. Sept. 22, 2017), plaintiff sued the State of New York for damages relating to the injuries that he received when he was assaulted by correction officers at Coxsackie C.F. Mr. Sanders asserted that after being ordered to face the wall for a pat frisk, he felt a wave of vertigo and in response, put his left hand on his head. When he did that, Mr. Sanders testified, Officers Pecore and Byrne forced him to the ground and as Officer Byrne held his hands behind his back, Officer Pecore put him in a brace hold and punched him in the back of the head, forehead and left eye, as Mr. Sanders yelled, "I'm sick, I'm sick. Why are you punching me?" According to his testimony, Officer Pecore punched him 15 to 20 times in rapid succession.

Photographs of Mr. Sanders' injuries were introduced along with medical records documenting that Mr. Sanders had difficulty opening his mouth due to the swelling in his eye. Mr. Sanders testified to a pain level of 7 out of 10, that he could not eat for three weeks following the assault and that his neck was still painful and was worse in the wintertime.

The documentation of the incident showed that Mr. Sanders was disciplined for assaulting staff. According to the Unusual Incident Report, Mr. Sanders was visibly agitated when Officer Pecore ordered him to the wall for a pat frisk and then punched Officer Pecore above his right eye and swung at Officer Byrne. Officers Pecore and Byrne forced Mr. Sanders to the floor where he continued to struggle violently. To explain Mr. Sanders' injuries, the reports stated that he fell face first onto the floor,

landing on the left side of his face. In their reports, Officers Pecore and Byrne admit to repeatedly striking Mr. Sanders in the rib area to try to gain control of his hands.

At the trial, Officer Pecore, who had retired, did not testify. Officer Byrne testified that he did not see Mr. Sanders punch Officer Pecore but saw that Officer Pecore had been punched in the right eye by Mr. Sanders. He testified that once Mr. Sanders was on the floor, he continued to struggle and Officer Byrne thought that punches to the Mr. Sanders' ribs were necessary to subdue him. By way of comparison, his testimony at the trial was detailed while his testimony at Mr. Sanders' Tier III hearing was, as characterized by the court, "scant."

The court found that Mr. Sanders' detailed testimony was credible. "Particularly compelling," the court wrote, was Mr. Sanders testimony that after the officers rushed him to the ground, Officer Byrne held his hands behind his back while Officer Pecore put him in a brace hold and punched him 15 to 20 times in the back of his head, his forehead and left eye.

The court also found that Officer Byrne's testimony was not credible but rather "appeared to be calculated to conform to the details set forth in the report used to refresh his recollection." Further, the court noted, Officer Byrne's testimony did not explain how Mr. Sanders' came to have severe swelling and bruising to his left eye and the left side of his face. The court was unable to give the written accounts of incident much weight because they were internally inconsistent, even as to the source of the injury to Officer's Pecore's face.

The court found that after the officers forced Mr. Sanders to the ground and secured him in a brace hold with his hands behind his back, Officer Pecore punched Mr. Sanders 15 to 20 times and that the use of force was excessive. As a result of the excessive use of force, Mr. Sanders had a swollen face and bruised left eye and was in pain for three weeks. For this injury, the court awarded damages.

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Terry Sanders represented himself in this Court of Claims action.

Miscellaneous

Court Upholds Removal from Job That Was Not in Accord with Directive

In Matter of Rodriguez v. Central Office Review Committee, 60 N.Y.S.3d 728 (3d Dep't 2017), the petitioner challenged the denial of his grievance seeking restoration to his former job based on the Department's failure to follow the procedure set forth in Directive 4803. The court affirmed the lower court's dismissal of the petition. The court first found that the petitioner had not relied on this directive either in his facility grievance or in his Article 78 petition. Thus, the court held, the petitioner had failed to preserve this argument.

As courts sometimes do, the court went on to note that had the issue been preserved, "[it] was not persuaded" that the alleged violation of certain provisions – i.e., the requirements that prior to termination, the prisoner be counselled in writing and be given a misbehavior report – provide a valid independent basis for petitioner's grievance. The court stated that "even assuming that a technical violation of the directive occurred," it finds that the denial of the grievance was rational as petitioner has no right to any particular job assignment. Further, in light of the security concerns implicated and the discretion traditionally afforded to prison administrators, the court found no basis upon which to conclude that the grievance determination should be overturned.

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Carlos Rodriguez represented himself in this Article 78 action.

Prisoners Cannot Compel DOCCS to Use Article 75 to Discipline Employees

Following a guilty determination at a Tier III hearing, Shawn Green brought an Article 78 action seeking to reverse the hearing and to compel DOCCS and the Acting Commissioner of Health to take disciplinary action under Civil Service Law Article 75 against two DOCCS employees and several health services providers. The incident that led to this lawsuit began when Mr. Green was taken to a community emergency room to have his foot examined. The decision in Matter of Green v. Annucci, 61 N.Y.S.3d 375 (3d Dep't 2017), states that during the examination, Mr. Green became "verbally combative" and refused to comply with orders to remove his boot and sock, following which he was charged and found guilty of refusing a direct order. After the hearing, Mr. Green made a written request that the DOCCS Commissioner take disciplinary action against the hearing officer and the author of the misbehavior report, alleging that they had engaged in misconduct during the hearing and were biased. In addition, Mr. Green filed four grievances asserting he had received improper medical care and four complaints to the Office of Professional Medical Conduct (OPMC). CORC denied the grievances and the OPMC responded that either it did not have authority to discipline the professionals named in the complaint or that the alleged conduct was not professional medical misconduct.

The court denied the petition and the Third Department agreed, holding that "the extraordinary remedy of mandamus is available to compel a governmental entity or officer to perform a ministerial duty but does not lie to compel an act which involves an exercise of judgment or discretion." (A duty is ministerial when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts). Further, the court held, while Civil Service Law §75 affords certain rights to public employees charged with incompetence or misconduct, petitioner is not a public employee and the statute does not give him a right to require that DOCCS charge any of its employees with misconduct; the decision as to whether to charge an employee with misconduct lies solely within DOCCS's discretion and judgment.

With respect to the OPCM, the court ruled that the petitioner had failed to show that he is entitled to compel OPCM to investigate complaints over which the OPMC had no jurisdiction or to exercise its discretion to prosecute alleged medical misconduct.

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Shawn Green represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

District Court Judge Agrees that Defendant Annucci is Liable for the Unlawful Imposition of PRS

In August 2006, in Earley v. Murray, 462 F.3d 147 (2d Cir. 2006), the Second Circuit held that Anthony Annucci, then DOCCS Counsel, had unlawfully imposed a term of post release supervision (PRS) on Sean Earley. Two years later, Mr. Earley filed an action for damages against Anthony Annucci for that time that Mr. Earley was either on administratively imposed PRS or in prison as a result of a finding that he violated administratively imposed PRS. Plaintiff Earley then moved for summary judgment and Defendant Annucci cross moved for summary judgment based on qualified immunity.

A court can grant a motion for summary judgment where there are no disputed issues of fact and the case therefore can be decided by application of the law to those undisputed facts. A defendant is entitled to qualified immunity

when his or her conduct, although unconstitutional or in violation of a federal statute, did not violate clearly established statutory or constitutional rights about which a reasonable person in the defendant's position would have known. A defendant whom the court finds is entitled to qualified immunity cannot be held liable for compensatory or punitive damages for his or her conduct.

In ***Pro Se***, Volume 27, Number 3 (June 2017), we reported that the magistrate judge in Earley v. Annucci, 2017 WL 1207076 (N.D.N.Y. Feb. 28, 2017) had ruled that Plaintiff Earley was entitled to summary judgment and that Defendant Annucci was not entitled to qualified immunity after August 31, 2006 (the date upon which the Second Circuit rejected the defendants' argument that the administrative imposition of PRS did not violate the plaintiff's right to due process of law). Following the February 28 decision, Defendant Annucci filed objections to the magistrate judge's decision.

On September 29, 2017, Judge Scullin, Senior United States District Judge, rejected Defendant Annucci's arguments and adopted the magistrate judge's report, recommendation and order in its entirety. Earley v. Murray, 2017 WL 4342105 (NDNY Sept. 29, 2017). The court agreed that Plaintiff Earley was entitled to damages for the period August 31, 2006 through June 27, 2007, the date upon which plaintiff was released from DOCCS' custody.

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Muldoon Getz & Reston and the Eaton Law Firm represented Sean Earley in this Section 1983 action.

PRO SE PRACTICE

Defeating the Charge of Interfering With an Employee

Rule 107.10 of the Standards of Inmate Behavior provides that: An inmate shall not physically or verbally obstruct or interfere with an employee at any time. This rule is not usually the primary charge in a misbehavior report but frequently is added to misbehavior reports as a secondary or more minor charge in the same way that refusing a direct order is added to a charge of fighting or violent conduct. In the past, the sanction imposed following a finding of guilt at a Tier III hearing appeared to have been determined by the most serious rule that an inmate is found to have violated; having been found guilty of interference in addition to more serious charges was unlikely to result in a more severe penalty than would have been imposed for violating solely the more serious charge. Thus, in appealing determinations of guilt made at Tier III hearings, inmates and their advocates tended to focus on obtaining a reversal of the more serious charges, which in turn would lead to a more significant reduction of the sanctions.

Recently, though, the Department revised the forms that comprise the Statement of Disposition Rendered. The forms now require the hearing officer to note how many times in the last 5 years, and in the last 10 years, a prisoner has been found guilty of violating the same rule(s) that the hearing officer found him guilty of violating. These findings are then used in determining the appropriate penalty to be imposed. As a result, multiple violations of the charge of interfering – which at the time that they occurred, appeared not to be particularly serious with respect to the punishment imposed – are taking on more significance.

This calls for a pro-active approach to the more minor charges at Tier III hearings. Rather than focusing wholly or primarily on the most significant charges, it is now important to also seek the dismissal of the more minor charges whenever possible. The purpose of this article is to explain the limits of an interference charge and to urge prisoners to actively seek the dismissal of the equivalent of less serious rule violations when they are also facing more serious charges.

Rule 107.10 prohibits an inmate from physically or verbally obstructing or interfering with an employee. To sustain a determination that an inmate violated Rule 107.10, the charging officer must show that the accused inmate 1) engaged in physical or verbal conduct that 2) prevented an employee from doing his or her job.

Examples of the situations where the charge is appropriate include:

1. While an officer is attempting to break up a fight between inmates, the accused inmate physically tries to prevent the officer from doing so. Matter of Guillory v. Annucci, 1 N.Y.S.3d 581 (3d Dep't 2015).

2. After a counselor provided the accused inmate with information with which he did not agree, the accused inmate became loud and verbally abusive, preventing the counselor from speaking with other inmates. Matter of Burr v. Goord, 715 N.Y.S.2d 921 (3d Dep't 2000).

In the first case, the prisoner by engaging in conduct that physically tried to prevent an officer from doing his job of maintaining order and protecting the health and safety of inmates, interfered with the officer's ability to perform his job. In the second case, the prisoner verbally prevented the counselor from interacting with other inmates.

Examples of situations where the charge of interference was found to be unsubstantiated:

1. After an officer turned down the volume on the television, the accused inmate became agitated and disruptive. Matter of Telford v. Fischer, 889 N.Y.S.2d 698 (3d Dep't 2009) (AAG agreed that this did not constitute interference; there were no allegations or testimony that the conduct prevented the officer from doing his job).

2. After the accused inmate incorrectly advised another inmate that an officer had misplaced his legal work, the other inmate became agitated and could not perform his job as a porter. Matter of Green v. Smith, 835 N.Y.S.2d 772 (3d Dep't 2007) (finding that nothing in the misbehavior report or the officer's testimony indicated that the accused inmate's conduct interfered with an employee).

3. After negotiations between Departmental staff and the accused inmate, a representative of an inmate committee, did not resolve as the accused inmate had hoped they would, he tore up a requisition form and left the office. Matter of Ramirez v. Schultz, 787 N.Y.S.2d 57 (2d Dep't 2004) (Charge of interference not supported by substantial evidence as there was no physical contact and the accused did not engage in any improper behavior that caused the involved employee to respond in a manner that interfered with his duties.)

4. The accused inmate's misrepresentation caused officers to conduct an otherwise unnecessary gallery wide search. Matter of Smythe v. McClellan, 641 N.Y.S.2d 144

(3d Dep't 1996) (finding that there was no verbal or physical interference).

5. After an inmate overdosed on a medication that the accused inmate was taking, the nurse had to interrupt her typical duties to confiscate the accused inmate's medication, count the number of pills he had and author a misbehavior report. Matter of Tevault v. Fischer, 878 N.Y.S.2d 796 (3d Dep't 2009) (finding that the accused inmate did not physically or verbally interfere with the nurse, there was no evidence that the pill count precluded her from responding to any medical situation, and in any event, it was not petitioner's conduct that necessitated the pill count).

The common thread in these five decisions is that the involved employee did not show that the conduct by the accused prisoner prevented the employee from doing a specific task that he or she would have been doing had the employee not been verbally or physically deterred by the accused prisoner.

A review of both the text of Rule 107.10 and the case law analyzing the rule shows that the charge is actually limited to very specific conduct but is frequently inappropriately used as an add-on to more serious charges. In the future, prisoners who are accused of violating the rule prohibiting interference with an employee should carefully review the facts that are alleged and request that the charge be dismissed where evidence does not show that the accused inmate engaged physically or verbally with the employee or where there is no evidence that the conduct actually prevented the employee from doing a specified task that he or she would otherwise have been doing.

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