

Pro Se

Vol. 29 No. 1 February 2019

Published by Prisoners' Legal Services of New York

Court Denies Motion for Summary Judgment for Failure to Exhaust Administrative Remedies Where CORC's Delay in Deciding Plaintiff's Appeal Rendered IGP Unavailable

In a legal action filed on August 4, 2017, Plaintiff Amar Bell is seeking damages for physical injuries inflicted by officers during a cell extraction that occurred on April 4, 2017. The defendants moved for summary judgment, arguing that because Plaintiff Bell failed to exhaust his administrative remedies, the court must grant judgment in the defendants' favor. Plaintiff Bell opposed the motion.

According to §1997e(a) of the Prison Litigation Reform Act (PLRA), prior to filing a lawsuit concerning prison conditions, a prisoner must exhaust any available administrative remedies. In New York State, the Inmate Grievance Program is the available administrative remedy. Thus, prior to filing federal claims, prisoners must follow each step in the DOCCS grievance system in a timely and proper manner. The steps for filing grievances and appealing grievance denials are set forth in Directive 4040 and at 7 N.Y.C.R.R. Article 701. Generally speaking, the steps a prisoner must take where the grievance involves, as Plaintiff's Bell's did, harassment by officers are:

1. Within 21 days of the day on which the incident about which he or she is filing the grievance took place, the prisoner

must submit a grievance to the Inmate Grievance Resolution Committee (IGRC). The IGRC then forwards harassment grievances to the superintendent for response. The superintendent is required to complete an investigation into the grievance within 25 days.

Continued on Page . . .

Also Inside . . .

	Page
Court Approves Community Opposition as a Lawful Consideration in Parole Decisions	7
DOCCS Practice of Confining Sex Offenders in RTFs Until SARA Housing is Approved	8
Claims that Plaintiff was Savagely Assaulted Following the Clinton Escape Survive Motion to Dismiss	12

Subscribe to Pro Se. See Page 5

THANK YOU!

A Message from the Executive Director, Karen L. Murtagh

As most of you know, in the last issue of *Pro Se* we included a questionnaire about educational and vocational programs within DOCCS. I explained in my Executive Director's message that I am currently serving on a New York State Bar Association's (NYSBA) Task Force on Incarceration, Release, Planning and Programming and that I am the Chair of the Task Force's subcommittee on education. I also explained that we were distributing the questionnaire because we wanted to hear from incarcerated individuals regarding their experiences with educational and vocational programs in prison.

I am thrilled to report that the response was overwhelming! To date we have received over 250 completed questionnaires. And not only did you provide incredibly insightful answers to the questions, but many of you took the time to attach additional information to explain your answers or shed light on issues that we had not even considered.

Your input highlighted the need for a number of improvements regarding educational and vocational programs within our prisons and jails, with the overriding theme of changing the way education is viewed in prison. One person said it best, "Education in prison should be a priority, not a privilege." You also shared ideas regarding how to effectuate such a change including:

- Provide in-depth orientation during reception regarding the importance of the educational and vocational screening process;
- Require certification by the New York State Department of Education of all teachers and instructors at prisons and jails, and regularly evaluate the teachers and instructors during classroom time;
- Train Offender Rehabilitation Counselors (ORCs) and parole officers regarding the availability of opportunities to continue education upon release, and mandate that they focus on and encourage their clients to take advantage of the opportunities; and
- Remove barriers to in-prison education such as conflicts with obtaining Limited Credit Time Allowance and monetary disincentives.

Many individuals also suggested the expansion and modernization of educational and vocational programs. Others focused on the importance of being able to continue their education upon release. A number of recommendations were made to accomplish these goals including, but not limited to:

- Provide all eligible incarcerated individuals with access to timely, appropriate, uninterrupted, modernized, certified programming, including special education services, adult basic education, pre-college and college programs;
- Expand the availability of vocational programs so that incarcerated individuals can enroll in *any* and all vocational courses that will assist in their reintegration into their communities upon release, and ensure that all available vocational programs provide students with marketable skills;
- Ensure proper certifications and licenses are provided to those who complete vocational courses;
- Expand the availability of and access to college programs;
- Ensure college credits earned during incarceration are transferrable upon release; and
- Make it an unlawful practice for *any* college or university in New York to ask about or consider an applicant's past arrest or conviction during the application process.

Your input has helped us better understand the barriers and hurdles that incarcerated people face when it comes to trying to focus on rehabilitation during incarceration. While there is no guarantee that any of the above suggested improvements will be made, you have provided us with invaluable insight and information concerning educational and vocational programs in prison and you have given us a blueprint from which to work. For that I cannot thank you enough.

... *Continued from Page 1*

2. Where the superintendent decides the grievance within 25 days and the grievant does not agree with the superintendent's decision, the grievant must appeal to the Central Office Review Committee (CORC) within 7 days. Where the grievant does not receive a decision from the superintendent within 25 days, he or she can submit an appeal to the CORC.
3. CORC has 30 days to decide the appeal. When CORC decides the appeal, the grievant has exhausted his or her administrative remedies.

Facts Relating to Exhaustion of Administrative Remedies

On April 18, 2017, Plaintiff Bell filed a grievance reporting that the defendants had used excessive force on him. The next day, the grievance was passed through to the Superintendent. After 25 days had passed and the Superintendent had not issued a decision, Plaintiff Bell appealed to CORC. CORC received Plaintiff Bell's appeal on May 26, 2017.

On August 4, 2017, not having received a response from CORC, Plaintiff Bell filed his complaint in the United States District Court for the Northern District of New York. On July 31, 2018, the defendants moved for summary judgment, arguing that because CORC had not issued a decision on Plaintiff Bell's grievance before he filed his lawsuit, Plaintiff Bell had not exhausted his administrative remedies.

The Court's Decision on the Motion for Summary Judgment

In *Bell v. Napoli*, 2018 WL 6505072 (N.D.N.Y. Dec. 11, 2018), the court began its consideration of the defendants' motion with a discussion of *Ross v. Blake*, 136 Sup. Ct. 1850 (2016), the 2016 Supreme Court decision on exhaustion of administrative remedies in prisoner cases. In *Ross*, acknowledging that in some cases the administrative remedies

provided by departments of correction are not actually available to a prisoner, the U.S. Supreme Court recognized an exception to the requirement that prisoners exhaust their administrative remedies. The Court identified three circumstances in which a court might find that administrative remedies are not available:

1. The grievance system operates as a dead end with officers unable or consistently unwilling to provide any relief to **aggrieved inmates** (inmates who have filed grievances).
2. A grievance system might be so **opaque** (unclear), that it is, practically speaking, impossible to follow;
3. Prison administrators **thwart** (stop) prisoners from using the grievance system by **machination** (scheming), **misrepresentation** (giving prisoners bad advice about the grievance process) or **intimidation** (threats).

The *Bell* court then turned to *Williams v. Priatno*, 829 F.3d 118 (2d Cir. 2016), in which the Second Circuit considered the issue of whether the NYS DOCCS grievance system was available to a prisoner who attempted to file grievances while confined in a SHU cell. The plaintiff in *Williams* alleged that although he had delivered the grievance to an officer to forward to the facility grievance office, he never received a response. The defendants argued that even if the grievance was not submitted by the officer, the plaintiff was required to appeal to the Superintendent and to CORC. The Second Circuit rejected that argument, finding that the grievance scheme was so "opaque" and "confusing" as to be unavailable. *Id.* at 124. The Court went on to state that DOCCS grievance procedures set forth in 7 N.Y.C.R.R. 701.6(g), "only contemplate appeals of grievances that had actually been filed . . . and give no guidance whatsoever to an inmate whose grievance was never filed." *Id.* Thus, the *Williams* Court held, "the process to appeal an unfiled and unanswered grievance is prohibitively opaque, such that no inmate could actually make use of it." *Id.* at 126.

Turning to the facts before it, the *Bell* court noted that Plaintiff Bell had taken every step in the grievance process. The court also noted that as of August 8, 2018, CORC had not yet responded to Plaintiff Bell's appeal and that the 7 N.Y.C.R.R. 701.6(g)(2) permits untimely (beyond the 30 day deadline) CORC decision *only upon consent of the grievant*. The question before the court was whether there was a step that Plaintiff Bell should have known to take when CORC failed to issue a timely decision. Here, the court, pointed out, there are no instructions as to what a grievant should do when CORC fails to issue a timely decision just as there were no instruction as to what Plaintiff Williams should have done when his attempts to file a grievance were unsuccessful.

The court referenced several other decisions dealing with the issue of CORC's failure to decide appeals that it acknowledged having received. In *High v. Switz*, 2018 WL 3736794 (N.D.N.Y. July 9, 2018), (*rep't-rec*), *adopted*, 2018 WL 3730175 (N.D.N.Y. Aug. 6, 2018), the court held that because 7 N.Y.C.R.R. 701.5 provides no guidance on any action a grievant may take if he or she does not receive a timely CORC decision, after CORC neglected to decide the appeal, administrative remedies were no longer available to the plaintiff.

The District Court judge in *Rodriguez v. Reppert*, 2016 WL 6993383, at *2 (WDNY Nov. 30, 2016), also agreed that CORC's failure to issue a timely decision, and the absence of any mechanism to ask CORC to issue a decision after thirty days elapsed, rendered the administrative remedy unavailable to the plaintiff.

The *Bell* court found that 30 days having passed since CORC received Plaintiff's appeal and CORC not having issued a decision, and the regulations having no instructions on how to proceed if CORC, having acknowledged receipt of the appeal thereafter ignores the appeal, Plaintiff was unable to exhaust his administrative remedies. In this posture, the court wrote, CORC could delay a plaintiff's exhaustion indefinitely, making the remedy unavailable, by thwarting plaintiff's attempt to exhaust. Thus, the court found, Plaintiff Bell's failure to exhaust may be excused. Based on this

analysis, the court denied defendants' motion for summary judgment.

Amar Bell represented himself in this Section 1983 action.

News and Notes

Results of Readership Poll

We received a number of thoughtful responses to our question concerning what word best describes people who are in DOCCS custody. The overwhelming majority agreed that in our articles, *Pro Se* should use the word prisoner rather than incarcerated individual, inmate or offender. In the past, we have used the words prisoner, inmate, and incarcerated individual interchangeably. Going forward, we will use the term prisoner except when we are referencing or citing the language used in statutes, regulations, DOCCS directives and court decisions.

Thank you to the people who responded. We carefully considered your thoughts and suggestions.

Perseverance Furthers

In 2017, James Adams was charged and found guilty with assault on staff, violent conduct, refusing a direct order and possessing a weapon. When that decision was affirmed on appeal, Mr. Adams filed an Article 78 challenge arguing that the determination of guilt was not supported by substantial evidence and that his right to call witnesses had been violated when the hearing officer failed to investigate the reasons that two prisoner witnesses had refused to testify. Transferred to the Appellate Division, the Fourth Department, in *Matter of Adams v. Annucci*, 158 A.D.3d 1091 (4th Dep't 2018), reversed the hearing because the hearing officer had failed to investigate the reasons that the witnesses had refused to testify and remitted the matter for a new hearing. At the

re-hearing, Mr. Adams reports, he was found not guilty and the charges were dismissed.

PRO SE VICTORIES!

Subscribe to *Pro Se*!

Pro Se is published six times a year. *Pro Se* accepts individual subscription requests. With a subscription, a copy of *Pro Se* will be delivered, free of charge, directly to you via the facility correspondence program. To subscribe send a subscription request with your name, DIN number, and facility to *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

Pro Se Wants to Hear From You!

Send your comments, questions or suggestions about the contents of *Pro Se* to: *Pro Se*, 114 Prospect Street, Ithaca, NY 14850.

Please **DO NOT** send requests for legal representation to *Pro Se*. Send requests for legal representation to the PLS office noted on the list of PLS offices and facilities served which is printed in each issue of *Pro Se*.

Pro Se On-Line

Inmates who have been released, and/or families of inmates, can read *Pro Se* on the PLS website at www.plsny.org.

Scott Morehouse v. Anthony Annucci, Index No. 2317-18 (Sup. Ct. Albany Co. Oct. 19, 2018). Court finds DOCCS' designation of Scott Morehouse as a Central Monitoring Case (CMC) to be arbitrary and capricious. In 2017, when Scott Morehouse began serving a new sentence, DOCCS designated him as CMC because his previous criminal history included escape and he had a prior CMC designation for escape related behavior. In response to Mr. Morehouse's Article 78 challenge to the CMC designation, the respondent argued that the designation was appropriate because in 2007, Mr. Morehouse had written a letter to DOCCS counsel's office stating, "If I wanted to plan or escape from custody, nothing could stop me." The court found that the basis for the designation was arbitrary and capricious and an abuse of discretion. Directive 0701 provides that "an inmate can be designated CMC because of an escape or attempted escape or history of absconding from lawful custody/supervision." Here, the court found, there is no basis for finding that petitioner escaped or attempted to escape or had a history of absconding from supervision. Examining the letter that DOCCS used as its basis for designating Mr. Morehouse as CMC which was written "[n]early ten full years prior to his current CMC designation – stating that 'nothing could stop' petitioner if he wanted to plan an escape . . . the Court finds no language in Directive No. [0]701 – and the respondent has identified none – which supports or authorizes designation of an inmate as CMC based upon an inmate having made a threat of escape or indicated a willingness or inclination to escape."

Taliyah Taylor v. State of New York, Claim No. 129690 (Ct. Clms. Oct. 25, 2018). Taliyah Taylor won a victory after trial when the court found that she had proven that a food package that she had ordered arrived at the federal post office in Bedford Hills – the address that women at Bedford C.F. are required to use for packages – and had been picked up by DOCCS staff but had never been delivered to Ms. Taylor. The court awarded Ms. Taylor the full value of the items that she had ordered. The evidence upon which the

court relied was the purchase receipt, the U.S. Postal Service tracking record and the postal receipt. The tracking record showed that the package had arrived at the Bedford Post Office and on the same day was picked up by a DOCCS employee. Ms. Taylor also submitted DOCCS property claim forms. The court found Ms. Taylor to be a **credible** (truthful, believable) witness and commented that her presentation of evidence was well organized.

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

Finding that Petitioner Possessed Contraband Was Not Supported by Substantial Evidence

In *Matter of Telesford v. Annucci*, 166 A.D.3d 1155 (3d Dep't 2018), the petitioner was found guilty of possessing gang related material and violating facility correspondence rules. The misbehavior report alleged that Mr. Telesford attempted to mail documents with gang related references on them. According to the misbehavior report, the documents were discovered because Mr. Telesford was under a mail watch. When the court reviewed the record, it found that there was insufficient evidence to support the determination of

guilt as neither the misbehavior report nor the testimony and documentary evidence established a connection between the documents and the petitioner. That is, the evidence at the hearing did not show that the allegedly gang related materials belonged to the petitioner. The documents which had been recovered during the mail room review of what was alleged to have been a letter that petitioner was sending out of the facility consisted solely of three typewritten pages. These pages, the court wrote, "did not have any features or content that could identify petitioner as the author or the sender, and did not include the envelope in which the pages were allegedly discovered."

The officer who wrote the misbehavior report testified that the mail room had sent the three pages to him "as mail that the petitioner had attempted to send." However, the court noted, the officer did not testify that he had any personal knowledge that petitioner was the sender of the pages. A mail room supervisor testified that petitioner was the subject of a mail watch. She did not provide testimony that linked petitioner to the pages nor did she recall how the pages were found. Nor did the petitioner admit that the pages were his or otherwise connect himself to the them.

"In the absence of evidence connecting petitioner to the three typewritten pages," the court held, "the determination of guilt is not supported by substantial evidence." The court ordered the determination be annulled and that all references to the charges be expunged from the petitioner's DOCCS records.

Marcus Telesford represented himself in this Article 78 proceeding.

Insufficient Evidence Leads to Reversal of Determination of Guilt

In the course of investigating a contraband smuggling operation, DOCCS security staff monitored Anthony Malave's phone calls with his wife. During one of the calls, the staff alleged, Mr. Malave asked his wife if she had "one bill." Corrections officials believe this to be code for a \$100.00 bill. When Mr. Malave's wife next visited her husband, corrections staff allege, during the visit she told Mr. Malave that she had "one bill" and some twenties. Based on these conversations, corrections staff believed that money had been exchanged during the visit and they charged with Mr. Malave with smuggling, violating facility telephone procedures, violating facility visiting room procedures and exchanging personal identification numbers.

In *Matter of Malave v. Venettozzi*, 166 A.D.3d 1268 (3d Dep't 2018), the petitioner challenged the determination of guilt, arguing that it was not supported by substantial evidence. The court agreed. According to the decision, the transcript of the telephone conversations that formed the basis of the charges does not support the charge that the petitioner asked his wife to bring money to him or that she did so. The wife's testimony at the hearing was that her husband asked her to get a large bill to put in a birthday card for her mother and that she left the money in her purse in the car during the visit. She added that she sometimes got cards from petitioner during visits and brought the cards to the post office to mail. In fact, the package room records showed that Mr. Malave gave his wife a card during the visit that she left with. Finally, the court found, there was no evidence that the two had actually exchanged money during the visit or that the petitioner used the phone or the visit to facilitate such an exchange. Based on this analysis of the records before it, the court found that the determination of guilt must be annulled and granted the petition.

The Law Office of Thomas Terrizzi represented Anthony Malave in this Article 78 proceeding.

Parole

Court Approves Community Opposition as a Lawful Consideration in Parole Decisions

In 1991, Keith Applewhite was convicted of murder in the second degree and sentenced to 25 years to life. He had his third parole hearing in 2017. At that hearing, Parole Board Commissioners considered "*unspecified* community opposition" to his parole release. After Mr. Applewhite was denied parole release, he filed an Article 78 challenge to the decision, arguing that the Parole Board's consideration of the unspecified community opposition was beyond the scope of the factors listed in Executive Law §259-i. Executive Law §259-i is the statute that sets forth the factors that the Board of Parole must consider in deciding applications for release to parole supervision.

In *Matter of Applewhite v. New York State Board of Parole*, 2018 WL 6797465 (3d Dep't Dec. 27, 2018), the court rejected the petitioner's argument that consideration of community opposition was prohibited by Executive Law §259-i. While the law requires consideration of the factors listed in the statute, the court wrote, it does not prohibit consideration of other factors. Further, the court held, consideration of community opposition was related to the Board's assessment of whether an inmate will live and remain at liberty without violating the law, whether such release is compatible with the welfare of society and whether an inmate's release will deprecate the seriousness of the underlying crime as to undermine respect for the law – statutory factors that the Board must consider in rendering its parole release decisions.

The court also found that in denying parole release to the petitioner, the Board put greater weight on the seriousness of his offenses and the consistent community opposition to his release than it put on the community support for his release, his positive program and vocational accomplishments,

his relatively clean prison disciplinary record, his post release plans and his low score on the COMPAS Risk and Needs Assessment Instrument. The court found that the Board of Parole considered the appropriate statutory factors and sufficiently set forth its reasoning and that the determination to deny release did not show irrationality bordering on impropriety and was not arbitrary or capricious.

For these reasons, the court affirmed the lower court's dismissal of the Article 78 proceeding.

Keith Applewhite represented himself in this Article 78 proceeding.

DOCCS Practice of Confining Sex Offenders in RTFs Until SARA Housing Is Approved

In *People ex rel. McCurdy v. Warden, Westchester County C.F.*, 164 A.D.3d 692 (2nd Dep't 2018), the Second Department addressed the issue of whether, other than for a 6 month period immediately following parole release, DOCCS has the statutory authority to place a parolee in a residential treatment facility (RTF). After Mr. McCurdy was released to parole supervision, he was found guilty of violating parole and a sanction of a 90 days drug treatment program was imposed. Following completion of the 90 day drug treatment program, Mr. McCurdy expected to be released to parole supervision. Instead, he was told that he would be held in an RTF until he could locate SARA compliant housing and was then first placed in a residential treatment facility located at Fishkill C.F. and later transferred to the RTF at Queensboro C.F. Sexual Assault Reform Act (SARA) compliant residences are located more than 1,000 feet from a school.

While in the Queensboro RTF, Mr. McCurdy was charged with a parole violation and moved to Westchester County C.F. While at Westchester County C.F., he filed a habeas petition challenging alleging that his confinement was a nullity because DOCCS did not have the authority under Executive Law §259-c(14), Correction Law §73(10) or Penal Law §70.45(3) to place him in a residential

treatment facility upon his completion of the drug treatment program.

The lower court, concluding that Mr. McCurdy was not entitled to immediate release, converted the action to an Article 78 and granted the petition to the extent of ordering that Mr. McCurdy be transferred to the Queensboro RTF where he was to remain until SARA compliant housing was available. DOCCS appealed the order.

The Second Department reversed the lower court decision, holding that DOCCS has the statutory authority to place level 3 sex offenders in RTFs at any time while they are under parole supervision. To put its analysis in context, the court set forth four basic principles of statutory construction:

1. Statutes that relate to the same subject matter must be constructed together unless a contrary legislative intent is expressed;
2. The courts must harmonize various provisions of related statutes and **construe** (interpret) them in a way that renders them internally compatible;
3. Where there is a conflict between a general statute and a special statute governing the same subject matter, the specific statute prevails; and
4. The court should not construe statutory language in a way that nullifies some statutory language.

When the court applied the principles to the statutes at issue, it found that they did not conflict:

- Executive Law §259-c(14) requires that level 3 sex offenders live in housing that is more than 1,000 feet from a school;
- Penal Law §70.45(3) permits DOCCS to place a person subject to a term of post release supervision in an RTF for the first 6 months of his/her term of post release supervision.

- Correction Law §73(10) allows DOCCS to use RTFs as residences for people who are under community supervision. Community supervision includes people who are serving terms of post release supervision.

The court concluded that none of these laws conflict with each other. Penal Law §70.45(3) allows DOCCS to require people being released to post release supervision to spend the first 6 months of the term of post release supervision in an RTF. Correction Law §73(10) allows anyone on post release supervision to be placed in an RTF. Executive Law §259-c(14) which prohibits level 3 sex offenders from living within 1,000 feet of a school can be enforced by placing level 3 sex offenders who have completed their terms of incarceration in RTFs until SARA compliant housing is available.

In December 2018, the Court of Appeals granted Mr. McCurdy's motion for leave to appeal.

Elon Harpez of The Legal Aid Society represented Chance McCurdy in this Article 78 proceeding.

Court of Claims

DOCCS' Employee's Negligence Was Sole Cause of Accident

In November 2013, Jessie Davis was transferred from Marcy C.F. to Mid-State C.F. As he was being processed in the draft room at Mid-State C.F., he was ordered to sit on a table to have his leg irons removed. At the time, he had just gotten off the bus. His hands were cuffed and his feet shackled. A chain connected his handcuffs to his leg irons and he had a chain around his waist. Mr. Davis did not see anything wrong with table; nonetheless, he told the officer that he was too heavy to safely sit on it. (Mr. Davis weighed 250 pounds). The officer again ordered Mr. Davis to sit

on the table. Mr. Davis complied with the order, whereupon the table collapsed and Mr. Davis fell to the floor where he lost consciousness.

Forty days before he fell, Mr. Davis had had knee surgery. According to Mr. Davis, when he fell he felt a shooting pain all the way down his leg to his foot. Throughout the next three months, Mr. Davis complained to facility health services about the pain that he was experiencing until he was paroled in mid-January, 2014. During the period before he left prison, he received analgesic balm and was told to do stretching exercises.

In 2018, Mr. Davis went to trial on his claim that the State was liable for the injuries he suffered as a result of the 2013 fall. At the trial, the court considered only the issue of **liability** (whose fault it was that Mr. Davis sat on a table that was not able to sustain his weight). In reaching its result, the court did not consider any evidence relating to the extent of Mr. Davis's damages.

At the trial, one member of the security staff admitted that usually prisoners sat on the benches to have their leg irons removed. He said that it was "an oversight" that Mr. Davis had been required to sit on the table. A second officer testified that immediately after the fall, Mr. Davis told that officer that he (Mr. Davis) was fine. This officer also said that prisoners sit on a bench to have their leg irons removed.

Liability

In *Jessie Davis, Jr. v. State of New York*, Claim No. 125370 (Ct. Clms. Nov. 8, 2018), the court first noted, citing *Preston v. State of New York*, 59 N.Y.2d 997 (1983), that the State has a duty to maintain its facilities in a reasonably safe condition, including its correctional facilities. As the Court in *Sanchez v. State of New York*, 99 N.Y.2d 247, 252 (2002), wrote, "Having assumed physical custody of inmates, who cannot protect and defend themselves in the same way as those at liberty can, the State owes a duty of care to safeguard inmates." Further, the State's duty to protect inmates is limited to the risks of harm that are reasonably foreseeable. See, *Sanchez* at 255. Finally, when faced with a decision of whether to obey an order

and risk injury or to be subjected to disciplinary measures, an inmate may not be faulted for his or her decision to obey an order that results in injury. See, *Eimers v. State of New York*, Claim No. 120047 (Ct. Clms. Collins, J. Oct. 28, 2013).

The court then applied these legal principles to the evidence before it. The court found that the defendant had a duty to protect the claimant and that the defendant had breached that duty when correction staff ordered claimant to sit on a table for removal of the leg irons: “The testimony received at trial established that claimant was directed to utilize the table for a purpose outside of its intended use and created the dangerous condition that allegedly caused the claimant’s injuries. The use of a table for holding the full body weight of an inmate, as opposed to a chair or bench, is a dangerous condition and the Court finds that it is reasonably foreseeable that a table may collapse if a person sits on it.”

Based on this analysis, the court found the defendant 100% liable for the claimant’s injuries.

Stephen Dratch of Franzblau Dratch, P.C., represented Jessie Davis in this Court of Claims action.

Fourth Department Affirms Lower Court’s Failure to Protect Finding

In *Pitts v. State of New York*, 166 A.D.3d 1505 (4th Dep’t 2018), the defendant asked the appellate court to find that the Court of Claims had erroneously found the defendant 100% liable for the injuries that the claimant received when he was attacked by another inmate as a result of the negligence of the Department of Corrections and Community Supervision. The Appellate Division refused to do so. Rather, it held that the lower court properly determined that the defendant’s failure to continuously post officers in the recreation yard – there was a thirty minute period each day during shift change when there was no direct supervision of the prisoners in the yard – was the proximate cause of the claimant’s injuries. In support of this conclusion the court cited to the testimony of prison personnel that there had been an increase in

incidents in the yard during the shift change. Based on this evidence, the court held that “a fair interpretation of the evidence supports the court’s determination that defendant’s decision to remove officers from the yard during the shift change was a proximate cause of claimant’s injuries.”

Dominic Pellegrino, Esq., of Rochester represented Duval Pitts in this Court of Claims action.

Miscellaneous

Videotape of Prison Incident is Not Exempt from FOIL Disclosure

In *Matter of Darnell Green v. Annucci*, 59 Misc.3d 452 (Sup. Ct. Albany Co. 2017), the petitioner made a Freedom of Information Law (FOIL) request for a copy of a videotape of an incident in a prison. The respondent denied the request, asserting that the videotape was part of an officer’s personnel record and therefore exempt from disclosure under Public Officer’s Law (POL) §87(2)(a). Section 87(2)(a) of the Public Officers Law creates an exception from the general rule that records are subject to disclosure for records that are “specifically exempted from disclosure by state or federal statute.” The respondent asserted that the videotape was protected by Civil Rights Law §50-a. Civil Rights Law §50-a provides that all personnel records used to evaluate performance toward continued employment or promotion under the control of any department of corrections shall be considered confidential and not subject to inspection or review. The statute contains only two exceptions to confidentiality; officer consent, Civil Rights Law §50-a (1), and court authorization, Civil Rights Law §50-a (3). The petitioner argued that videotapes of prison incidents are not personnel records.

In assessing this claim, the court, citing *Capital Newspapers Div. of Hearst Corp v. Burns*, 67 N.Y.2d 562, 566 (1986), first noted that the State has a “strong commitment to open government and

public accountability and imposes a broad standard of disclosure upon the State and its agencies.” Any exemptions to the public’s access to state records should be “narrowly construed to provide maximum access” and “the agency seeking to prevent disclosure has the burden of showing that the requested material falls squarely within a FOIL exemption.” *Id.*

The question before the court was whether the videotape is a personnel record as that phrase is used in the Civil Rights Law §50-a. While the respondent argued that the videotape was actually used to evaluate an officer, the court disagreed that it was a personnel record “under the statute.” DOCCS’ use of the videotape to evaluate the performance of an officer, the court wrote, was a coincidental use and not the videotape’s exclusive or primary use. The court adopted the phrase “**mixed use material**” to describe the videotape, meaning that it could be used for several purposes. Further, the court concluded, the videotape is not confidential or personal but rather is a “video record of an event and incident that occurred at a [prison].” To hold that it was a personnel record the court concluded, “would allow every video recording to be withheld under POL §87(2)(a). Finally the court found, the videotape at issue was “very different than the [grievances about officer misconduct] which [were] at issue in *Prisoners’ Legal Services of NY v. NYS DOCS*, 73 N.Y.2d 26, 31 (1988).

Based on this analysis, the court granted the petition and ordered the respondent to disclose the video footage to the petitioner within 30 days.

Prisoners’ Legal Services of New York represented Darnell Green in this Article 78 action.

Court Orders DOCCS to Reinstate Petitioner to His Job

In *Matter of Oliveira v. Graham*, 132 A.D.3d 1036 (3d Dep’t 2015), the petitioner challenged the respondent’s decision to terminate his assignment as an occupational industry clerk in the Corcraft Program. The stated reason for the termination was the respondent’s determination that petitioner possessed condoms that were found near the

petitioner’s work station. Following the termination, petitioner filed a grievance asserting that the actual reason for the termination was discrimination and harassment based on petitioner’s perceived sexual orientation. The grievance was referred to the superintendent who advised the petitioner that the matter had been transferred to the DOCCS Inspector General (IG). Petitioner appealed this decision to the Central Office Review Committee (CORC). He then filed an Article 78 petition asking the court to order DOCCS to reinstate him to his job and to direct the IG to complete its investigation and issue its report.

In response, the respondents filed an answer and attached a copy of the IG report and the CORC decision. They submitted the IG report *in camera* (for the court’s eyes only). The court granted the petition to the extent that it ordered CORC to issue a new decision based on consideration of the IG report. CORC then affirmed its prior decision denying the grievance and finding that the termination was properly based on security concerns.

Petitioner then made a motion to review challenging the amended determination. The lower court denied his motion.

On appeal, the respondents conceded, and the court agreed, that petitioner’s grievance was improperly handled; because it was a sexual orientation discrimination claim, it should have been investigated by the Office of Diversity Management. [That was the procedure in place when this case arose]. Further, the IG report, upon which CORC relied in its second decision, did not address the allegations of discrimination based on sexual orientation; rather, the IG’s office was focused on determining to whom the condoms belonged and it concluded that there was no evidence to substantiate a finding that the condoms belonged to petitioner.

Based on the evidence in the record, and absent any evidence that the petitioner’s removal from the programs was necessary due to security concerns, the court found that CORC’s second decision denying the petitioner’s grievance was arbitrary and capricious and without a rational basis. For that reason, the court ordered the respondents to annul

the grievance determination, grant petitioner's grievance and reinstate petitioner to his job.

Daniel Oliveira represented himself in this Article 78 proceeding.

Prisoners Who Voluntarily Leave Shock Lose Their Eligibility for Merit Release

Petitioner applied for and was accepted into the shock incarceration program. During the first month of participation, he signed out of the program due to back pain. Five years later, when he was close to his merit release date, DOCCS informed him that he was not eligible for merit time consideration because he had left the shock program. When he filed an Article 78 petition challenging this decision, the Supreme Court dismissed the petition and the petitioner appealed. In *Matter of Galunas v. Annucci*, 166 A.D.3d 1182 (3d Dep't 2018), the Appellate Division affirmed the dismissal.

Seven N.Y.C.R.R. 280.2(d)(i) provides that an inmate is ineligible for merit time consideration if the inmate entered a shock incarceration program but failed to complete the program for any reason other than an intervening circumstance beyond his or her control. Petitioner argued that his reason for not completing the program was that due to back pain, he was physically unable to perform the training and drills. Thus, his reason for not completing the program was an intervening circumstance beyond his control and he should be eligible for merit release.

According to the Appellate Division decision, the record showed that the petitioner's medical condition was reviewed before a decision was made to admit him into the shock program and that he had voluntarily left the program, as opposed to having been disqualified due to not being physically able to participate. As the plaintiff had not attached his medical records to his petition, the court found that the petitioner had failed to establish that he was unable to continue the shock program for reasons relating to his physical condition and thus this withdrawal was not due to "an intervening circumstance beyond [his] control."

For this reason, the court affirmed the lower court's dismissal of the petition.

Matthew Galunas represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Claims that Plaintiff was Savagely Assaulted Following the Clinton Escape Survive Motion to Dismiss

At the time that Richard Matt and David Sweat escaped from Clinton C.F., Luis Zenon was living in a cell on the Honor Block of Clinton C.F. that was close to Mr. Matt's and Mr. Sweat's cells. On the day of the escape, Mr. Zenon alleges in a complaint that he filed in the United States District Court for the Northern District of New York, he was handcuffed and taken to a room where he was aggressively questioned, slapped in the face and choked three times. A few days later, with only the clothing that he was wearing, Mr. Zenon was shackled, put in a van with two other inmates and taken to Great Meadow C.F. Upon his arrival there, he passed out from the stress of the transport and the pain caused by the handcuffs which were so tight that they constricted the circulation in his wrists. While he was on the ground, an officer kicked him in the face and as he was escorted to his cell, he was kicked in the stomach numerous times.

For the next 31 days, Mr. Zenon was in a SHU cell 24 hours a day, in the same clothes, with no personal belongings. He was allowed to shower every few days in a filthy shower stall. He had no paper and nothing to write with. He could not make phone calls. He could not file a grievance. After another prisoner called Mr. Zenon's family, and a family member called Great Meadow about Mr. Zenon's condition, Mr. Zenon was threatened with retaliation. Mr. Zenon was not given a misbehavior report or given an opportunity to challenge his SHU confinement.

Attached to Mr. Zenon's §1983 complaint were articles from the New York Times about the treatment of the prisoners housed in the Clinton

Honor Block after Mr. Matt and Mr. Sweat escaped and a report written by the New York State Correctional Association based on its interviews with the Honor Block inmates. According to the district court judge in *Zenon v. Downey*, 2018 WL 6702851 (N.D.N.Y. Dec. 20, 2018), based on the New York Times article and the Correctional Association Report, “inmates described a strikingly similar catalogue of abuses, including being beaten while handcuffed, choked, and slammed against cell bars and walls.”

Causes of Action

The complaint sets forth six causes of action:

1. Defendant Down and the John Doe officers and their supervisors violated the plaintiff's Eighth Amendment rights on June 6 at Clinton C.F. when Defendant Down and the John Doe officers assaulted the plaintiff and the supervising officers did not intervene.
2. The John Doe officers who transported the plaintiff to Great Meadow C.F. and escorted him to his SHU cell violated the plaintiff's Eighth Amendment rights when they tightened the cuffs to the point that his circulation was affected and kicked him in his face and punched him in the stomach.
3. The Superintendent, the First Deputy Superintendent, the Deputy Superintendent of Security, the SHU Sergeant and John Doe supervisors and officers at Great Meadow C.F. violated plaintiff's Eighth Amendment rights and his Fourteenth Amendment right to substantive due process of law by conspiring to subject him to conditions of confinement that were repugnant to the conscience of mankind.
4. The defendants listed in the preceding paragraph and the John Doe Decision-maker to Transport Clinton Inmates to Great Meadow SHU conspired to deprive the Plaintiff of his Fourteenth Amendment

right to be free from the deprivation of liberty without due process of law when they confined the plaintiff to a SHU cell for 31 days without a hearing.

5. The Acting DOCCS Commissioner and the DOCCS Deputy Commissioner of Facility Operations and the Superintendent, the First Deputy Superintendent, the Deputy Superintendent of Security, and Supervisors of Clinton C.F. violated the plaintiff's Eighth Amendment rights by failing to protect the plaintiff from what they knew or should have known the line correctional staff would do to Clinton Honor Block inmates following the escape of Mr. Matt and Mr. Sweat.
6. The Central Office defendants named in the preceding paragraph and the Great Meadow supervisory defendants named in paragraph 3 above, violated the Plaintiff's Eighth Amendment rights by failing protect the plaintiff from what they knew or should have known the line correctional staff would do to the Clinton Honor Block inmates who were transferred to Great Meadow C.F. following the escape of Mr. Matt and Mr. Sweat.

Motion to Dismiss

The named Central Office defendants and named Great Meadow and Clinton C.F. supervisory defendants moved to dismiss the complaint. (Going forward, these defendants will be called the Supervisory Defendants). Federal Rule of Civil Procedure 12(b)(6) requires the court to dismiss a complaint if it fails to state a claim on which relief may be granted. In considering a motion to dismiss, when there are well pleaded factual allegations, a court must take them as true and draw all reasonable inferences in the plaintiff's favor.

Claim that the Supervisory Defendants Violated the Plaintiff's Right to Due Process of Law

Segregated housing, the *Zenon* court ruled, deprives a prisoner of a liberty interest when 1) it imposes an atypical and significant hardship on him or her in relation to the ordinary incidents of prison life and 2) the state has granted its inmates by regulation a protected liberty interest in remaining free from that confinement. The court found that New York, through its regulations, has created a protected liberty interest in remaining free from segregated confinement.

The court then turned to the issue of whether the plaintiff's confinement to a SHU cell for 31 days imposed an atypical and significant hardship on the plaintiff. If DOCCS regularly imposes hardships of comparable severity on other prisoners, then freedom from such conditions is not a right which the federal constitution protects. This means the court must compare the conditions plaintiff experienced to the conditions of general population and routine segregated confinement.

Since plaintiff's confinement was relatively short – 31 days – the court looked at the conditions to which the plaintiff was subjected in deciding whether he had stated a claim. For example, in *Palmer v. Richards*, 364 F.3d 60, 65 (2d Cir 2004), in the context of a defendant's motion for summary judgment, the Court held that where a prisoner who was confined to SHU for 77 days without hygienic products, personal clothing and food, family pictures, and reading and writing materials, and was not permitted to communicate with his family, the defendant was not entitled to summary judgment. (That is, proof of these facts would be sufficient to support a judgment in the plaintiff's favor).

Here, the court found, if Plaintiff Zenon's allegations are true, the conditions of confinement were even more severe than those experienced by Plaintiff Palmer. Plaintiff Zenon was physically abused on the way to SHU, he was locked up 24 hours a day for 31 days and had no contact with his family or medical attention. In addition, Plaintiff Zenon had no reason to think the conditions would ever change. The conditions deviated not only from

normal SHU conditions, they also violated numerous DOCCS regulations.

Where plaintiff had a liberty interest in not being confined for 31 days under such conditions, he was entitled to adequate notice of the reasons for the confinement and an opportunity to be heard within a reasonable period of time. He had neither. For this reason, the court held, the complaint states a claim that his SHU confinement violated the Fourteenth Amendment.

Plaintiff's Claim that the Defendants Violated his Right to be Free from Cruel and Unusual Punishment

The wanton infliction of unnecessary pain on a prisoner violates the Eighth Amendment. To be liable for damages, a defendant must inflict a sufficiently serious injury (objective component) and must inflict it with a culpable mental state (subjective component).

The *Zenon* court concluded that the harsh conditions of confinement to which the defendant subjected the plaintiff, in combination with the unnecessary uses of force – the choking, kicking, punching and painfully tight cuffs – if proven, could violate the Eighth Amendment.

Supervisory Liability

To support a claim of supervisory liability, the plaintiff must show that:

1. The defendant participated directly in the alleged constitutional violation;
2. The defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong;
3. The defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom;
4. The defendant was grossly negligent in supervising subordinates who committed the wrongful acts; or

5. The defendant exhibited deliberate indifference to the rights of prisoners by failing to act on information indicating that unconstitutional acts were occurring.

According to the *Zenon* court, supervisory liability can be imposed when supervisory defendants are deliberately indifferent to a constitutional violation, directly participate in a constitutional violation or are involved in the creation of a policy or custom under which unconstitutional practices occur. Thus, the court wrote, “a supervisory official violates the Eighth and Fourteenth Amendment when he or she acts with deliberate indifference to the fact that his subordinates are abusing prisoners.”

Here the court found, the complaint plausibly alleges that the Clinton C.F. supervisors consciously disregarded a high risk that their subordinates would harm the plaintiff: “It is plausible to infer that the widespread coordinated abuses during the closely monitored investigation could not have happened without the Clinton C.F. supervisors knowing acquiescence or willful blindness. For this reason, the court declined to dismiss the claims against the Clinton C.F. supervisors.

Finding that there were allegations of a similar pattern of abuses imposed exclusively on the Honor Block prisoners who were transferred to Great Meadow, the *Zenon* court also declined to dismiss the claims against the Great Meadow C.F. supervisors.

Finally, the *Zenon* court found that the plaintiff had not alleged enough facts to support the claim that the Acting Commissioner or the Deputy Commissioner of Facility Operations ordered the abuses at Clinton or Great Meadow or that they knew or should have known about in time to

prevent them. As a result, the court dismissed the claims against these two supervisory defendants.

Leo Glickman of Stoll, Glickman and Bellina, LLP, represented Luis Zenon in this Section 1983 action.

Requests for Legal Assistance

If you need assistance with a legal issue, please do not address your letter to *Pro Se*. At the end of this issue, there is a list of PLS offices and the prisons each office serves. Write to the office that serves your prison. Mail sent to *Pro Se* should be about *Pro Se* issues only (add to the mailing list, change of address, Letters to the Editor, etc.). Sending your request for legal assistance to *Pro Se* will delay a response to your letter.

Pro Se
114 Prospect Street
Ithaca, NY 14850

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, Cocksackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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

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

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

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

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

Pro Se Staff

EDITORS: BETSY HUTCHINGS, ESQ., KAREN L. MURTAGH, ESQ.
COPY EDITING AND PRODUCTION: ALETA ALBERT