Pro Se

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FOIL EXEMPTIONS NOT RELIED UPON DURING THE ADMINISTRATIVE PROCESS CANNOT BE RAISED IN A JUDICIAL CHALLENGE TO THE DENIAL

In the summer of 2014, pursuant to the Freedom of Information Law (FOIL), Reginald McFadden requested records from the Nassau County District Attorney's Office (DA) relating to the criminal investigation underlying his mid-1990's conviction. The request was denied and the denial was affirmed on appeal. Mr. McFadden then requested the same records from Nassau County Police Department (NCPD). The NCPD denied the request on the ground that it was not sufficiently specific. Mr. McFadden appealed the denial, but did not receive a response. In the summer of 2015, he filed an Article 78 proceeding to compel the DA and the NCPD to comply with this FOIL requests.

The court dismissed the petition as untimely with respect to the DA. The court ordered the NCPD to answer the petition. In its answer, the NCPD argued for the first time that the records were exempt from disclosure under Public Officers Law §87(2)(b), (2)(f) and, in effect, (2)(g) and delivered 28 pages of records to the court for an **in camera** (confidential) review. The petitioner made a motion for sanctions. The court denied the petition and the motion for sanctions.

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First Amendment v. Public Duty

A Message from the Executive Director, Karen L. Murtagh

We live in challenging times, made all the more challenging by the ever-evolving modes in how we communicate with each other through social media. And when a public employee's First Amendment right to free speech runs up against their public duty to "serve and protect," the wicket gets particularly sticky.

Case in point: Can employees of New York State Correctional Facilities post or positively comment on social media messages posts that promote or condone white supremacy, hate-speech, racism and violence?

This, of course, is not a hypothetical situation. As numerous newspapers have reported, DOCCS Correction Officer Gregory Foster II, who until he made an incendiary social media post, worked at Attica C.F., used social media to disseminate an appalling, racist message regarding the horrific shooting at Tops grocery store in Buffalo that left 10 people dead and three critically injured. Three other corrections officers "laughed" at the post.

DOCCS took strong and swift action against the individuals involved. DOCCS immediately suspended Officer Foster without pay and removed the three other officers. While the union contract between DOCCS and NYSCOPBA apparently prohibits DOCCS from terminating employees who have not either been convicted of a crime or found to have engaged in misconduct at a disciplinary proceeding, DOCCS did what it could do to send a strong message to all DOCCS employees that the State of New York does not tolerate this type of abhorrent behavior. For this I commend both DOCCS and the State I.G.

NYSCOPBA, to their credit, also issued a statement denouncing the vile and disturbing post stating, "This is a sickening display of disregard for all human life and NYSCOPBA does not condone such hatred."

Because private actions by public servants who take an oath to support the constitution and "to serve and protect" cannot be permitted to engage in behavior that completely contradicts and undermines that oath, it was critically important for DOCCS and NYSCOPBA to take these positions and call-out this despicable, reprehensible and hateful conduct.

Given the unfortunate prevalence of this sort of conduct on the part of public employees, it is useful to review the legal issues at play when the speech of public employees conflicts with the oath to serve and protect.

People who work for public institutions like prisons, jails, police departments, public schools and local government branches certainly have free speech rights. These rights are balanced against the duty that the institutions which employ these individuals have to ensure that such speech does not prevent the employees from faithfully discharging their duties. No doubt, it is a balancing act, and the evolution of social media has made it harder for such institutions to regulate their employees' speech in a constitutional manner.

It is beyond debate, however, that First Amendment rights are not unlimited. The U.S. Supreme Court has shown great deference to prison administrators when it comes to the curtailment of the First Amendment rights of incarcerated people to express themselves. Reasonable safety concerns always trump free expression claims.

The same must be true when weighing the First Amendment claims of law enforcement, including police and correctional employees. While, interestingly, federal caselaw has not found that law enforcement personnel have a constitutional duty to protect citizens in general, it has found such protection to be an inherent part of the job once a citizen is in custody – either detained upon arrest or incarcerated upon conviction.

According to Darren L. Hutchinson, a professor and associate dean at the University of Florida School of Law, "Neither the Constitution, nor state law, impose a general duty upon police officers or other governmental officials to protect individual persons from harm." However, Professor Hutchinson continues, according to Supreme Court precedent, the situation changes once a citizen is "in custody." In custodial situations, the government and its employees have a duty to protect persons in their care.

So, how does the duty to protect individuals from harm impact the First Amendment rights of corrections officers?

Prison officials and their employees, having taken an oath to uphold the Constitution, are under a legal duty to refrain from engaging in behavior that promotes violence against the public, including those under their charge and supervision. To paraphrase the official stance on this, "them's the rules and that's the gig." Those who don't abide do so at risk of legal consequence and loss of employment.

I know that institutional staff have an extremely difficult, dangerous job, and most display allegiance to the Constitution and comport themselves in accordance with the rules and their professional obligations. But those who demonstrate "deliberate indifference" to the constitutional rights of the people in their care, either because they actually intend to deprive them of their right to be free of physical assault, or act with reckless disregard for their safety, put their jobs at risk.

Sometimes we forget, and take for granted, that we are blessed in this country to have a social contract guided by laws, rules and regulations meant to make our society a better place for all. This social contract is premised on the belief that if everyone does their part and makes their best effort to abide by their professional responsibilities, we all benefit. And that's something in which we can all take great pride.

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On appeal, the Second Department, in *Matter of McFadden v. McDonald*, 204 A.D.3d 672 (2d Dep't 2022), affirmed the dismissal of the petition against the DA and the denial of the petitioner's motion for sanctions.

However, the Appellate Court found that the lower court had improperly denied the petition with respect to the NCPD. The agency denying access to its records, the Court noted, has the burden of demonstrating that they fall within a statutory exemption. This requires that the agency provide "a particularized and specific justification for denying access." Conclusory assertions that the records fall within an exemption are not sufficient; evidentiary support is required. Where a court is unable to determine whether the documents fall entirely within the scope of the asserted exemption, the court should review the records and order disclosure of all nonexempt, appropriately redacted material.

Most significant to the decision in Mr. McFadden's case, the Appellate Court, citing *Matter of Scherbyn v. Wayne-Finger Lakes Board of Cooperative Educational Services*, 77 N.Y.2d 753, 758 (1991), noted that "It is a settled rule that **judicial review of an administrative determination is limited to the grounds invoked by the agency**." (emphasis added). A reviewing court may not affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

In affirming the NCPD's denial of the petitioner's FOIL request, the Appellate Court found, the lower court relied on the exemptions the respondent had not raised in its administrative denial. To provide the NCPD the benefit of justifications that it did not raise in the administrative process **contravenes** (goes against) Court of Appeals precedent in *Scherbyn*.

Here, the NCPD claimed in the administrative process that the petitioner had not sufficiently described the records that he was seeking. The petitioner, however, had repeatedly supplemented his request with more details than those suggested by the NCPD. And during the proceeding, the NCPD identified and compiled 28 pages of responsive records for the court to review. By its own actions, the NCPD demonstrated that the petitioner's request was sufficiently specific.

Accordingly, the Second Department modified the order and judgment and directed the NCPD to provide petitioner, after deleting identifying details, with the 28 pages of documents that it submitted to the court.

Reginald McFadden represented himself in this Article 78 proceeding.

NEWS & NOTES

Changes to DOCCS Package Rules

For quite a few years, DOCCS has been considering how to change the package program to better control the entry of weapons and drugs into New York State prisons. In 2018, the Department briefly implemented a "secure vendor" requirement which would have eliminated all packages except those from secure vendors. Secure vendors typically offer a limited inventory of

products at high prices. This program was so unpopular that DOCCS ended it before its implementation was complete.

The new rules, announced in a memo from Acting Commissioner Annucci to the incarcerated population, impose a restriction on the source of food items sent to incarcerated individuals: **Food items may only be sent by a vendor** which delivers by means of the U.S. Postal Service, FedEX, UPS, etc. **Friends and family members are no longer permitted to mail food directly to incarcerated individuals**.

DOCCS has adopted some other changes as well. Among these changes are the following:

- The number of food packages allowed is three packages per month. The combined weight of the monthly food packages cannot exceed 40 pounds. Formerly, the food package limit was two packages a month with a combined weight of 35 pounds.

- No canned goods are permitted in food packages.

- There is no limit on the number of non-food packages an incarcerated individual may receive from vendors.

- An incarcerated individual may receive two non-food packages a year directly from family member or friends.

- Books, magazines and periodicals may also be received from licensed charities.

This new program had a month-long trial run in the Wende Hub beginning on May 9, 2022. After that two hubs are added to the program every two weeks. Once the program is implemented in every prison, it will become permanent.

HALT Regulations

On March 31, 2022, the HALT Solitary law took effect. This law limits DOCCS' authority to place people in SHU and changes the term SHU to "segregated confinement." The law creates alternative units known as Residential Rehabilitation Units (RRU) for people who have been found guilty at prison disciplinary hearings and sets the minimum conditions of confinement for both segregated confinement (what used to be called SHU) and the RRUs. DOCCS has amended its regulations, located in 7 NYCRR, to reflect the changes brought about by HALT. This article discusses some of the amended regulations, including some that appear to conflict with corresponding provisions of the law.

7 NYCRR 1.5 is the definition section of the DOCCS regulations. Two of those definitions are important parts of HALT.

- 7 NYCRR 1.5(u) defines the term "special populations." As will be seen below, **people who fall within the definition of special populations can never be placed in segregated confinement (formerly known as SHU)**. Special populations are defined as:
  - women who are pregnant or in the first eight weeks of post-partum recovery;
  - anyone who is 21 or younger;
  - anyone who is 55 or older; or
  - anyone who suffers from a disability as defined in Executive Law §292(21) and whose disability impairs their ability to provide

self-care within the environment of a correctional facility.

The corresponding statutory provision, Correction Law §2(33) defines a disability based on Executive Law §292(21); it does not include the limiting language "whose disability impairs their ability to provide self-care in a correctional facility." The regulatory definition of disability should be the same as the statutory definition, with no additional language that could limit the population of people who cannot be placed in segregated confinement due to a disability.

- 7 NYCRR 1.5(v) defines the term "segregated confinement" as any form of cell confinement for more than 17 hours a day, other than confinement during a facility-wide emergency, or confinement for the purpose of medical or mental health treatment.

- 7 NYCRR 1.6 states that people in special populations cannot be placed in segregated confinement for any period of time. Although Residential Rehabilitation Units (RRU) are not defined in DOCCS' regulations, they are alternative units where people are entitled to be out of their cells at least 7 hours a day. People in special populations can be placed in RRU.

- 7 NYCRR 251-5.1(a) sets forth the new timelines for Tier 3 hearings. Where the accused person is confined pending a hearing, the hearing must be completed within 5 days of their placement in segregated confinement, unless they request a postponement for employee assistance or representation at the hearing.

- 7 NYCRR 251-5.1(b) states that a request for a postponement of a Tier III hearing must be made by the charged individual at their first appearance before the hearing officer. Under this regulation, failure to appear at the first session of the hearing will lead to waiver of the postponement request, and the hearing will be held without the charged person.

- 7 NYCRR 251-5.2 provides that a person who is confined pending a Tier III hearing can be represented at the hearing. The regulation limits representatives to: lawyers who are admitted to practice law; law students who are supervised by a member of the law school's faculty; paralegals who meet certain qualifications; and incarcerated individuals who meet certain qualifications. This provision does not mean that you are entitled to an appointed representative nor does it require that DOCCS provide you with a representative. If you are in pre-hearing segregated confinement and are able to find a representative, you are allowed to be represented.

- 7 NYCRR 254.7 addresses dispositions that can be imposed at Tier III hearings. *Under the new rule, a loss of visiting privileges can be imposed for the violation of any rule.* In addition, according to the regulation, a period of segregated confinement can be imposed as a Tier III penalty. This conflicts with the HALT legislation.

Under Correction Law §137(6)(k)(ii), only the most serious misbehavior can result in segregated confinement for more than for 3 consecutive days, or 6 days in a 30-day period, or in any period in RRU. This crucial piece of the HALT Solitary law has not been incorporated into DOCCS' regulations.

Correction Law §137(6)(k)(ii) provides that before a person can be placed in segregated confinement for more than 3 consecutive days, or 6 days in a 30-day period, the individual must be found to have committed one of the following extremely serious acts:

A. causing or attempting to cause serious physical injury or death to another, or threatening serious injury or death, if the person has a history of causing serious injury or death;

B. compelling or attempting to compel another person to engage in a sex act by force or threat of force;

C. extorting another by force or threat of force;

D. coercing another to violate any rule by force or threat of force;

E. leading, inciting, or attempting to cause a riot or similar situation that results in hostage-taking, major property damage, or physical harm to another person;

F. possessing a deadly weapon or dangerous contraband; or,

G. escape, attempting to escape or facilitating an escape from a prison, or while under supervision outside a prison.

In addition, if a person is found to have committed one of these types of misbehavior, placement in segregated confinement or an RRU also requires a determination by the commissioner of DOCCS that the misbehavior was so heinous and destructive that the person's presence in general population would create a significant risk of serious physical injury and an unreasonable risk to the security of the facility.

Since DOCCS has not incorporated the provisions of Correction Law §137(6)(k)(i) and (ii) into their regulations, we are concerned that people may be placed in segregated confinement or in an RRU in violation of the law.

If you feel your rights under the HALT Solitary Law are being violated, you can write to the PLS office that responds to requests for assistance from individuals in the prison where you are confined (see back page for a list of PLS offices). You can also write to the New York State Justice Center, which is responsible for monitoring compliance with the HALT Solitary law at: NYS Justice Center for the Protection of People with Special Needs, 161 Delaware Avenue, Delmar, New York 12054-1310.

Law Enforcement FOIL Exemption Narrowed

On December 29, 2021, Governor Hochul signed legislation passed by the State Legislature amending the law enforcement exemption to the Freedom of Information Law (FOIL). FOIL is the tool that people use to obtain records from state and local government agencies. The law is intended to

promote open access to government records. The statute exempts several types of records from the records that must be disclosed. The law enforcement exemption is found in Public Officers Law §87(2)(e)(i). This exemption permits agencies to withhold records that are prepared or created for law enforcement purposes only to the extent that disclosure would:

i. interfere with law enforcement investigations or judicial proceedings, provided however, that any agency considering denying access pursuant to this subparagraph shall proceed in accordance with subdivision six of this section;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures …

The 2021 amendments to Public Officers Law §89(c) add the requirement that when an agency claims records are exempt from disclosure due to a law enforcement investigation, the agency must provide a "particularized and specific justification" for the denial of each record. This amendment is intended to make records more accessible to the public. The prior version of the law permitted agencies to withhold all of the responsive records. Under the new version of the law, the agency must provide a particularized and specific justification for each record.

Update: *Alcantara v. Annucci*

Since 2015, PLS has been working with the Legal Aid Society and Wilkie Farr & Gallagher on *Alcantara v. Annucci*, a challenge to the legitimacy of Fishkill Residential Treatment Facility (Fishkill RTF). The principal issue raised in *Alcantara* is whether the Fishkill RTF complies with relevant statutory provisions governing Residential Treatment Facilities (RTFs). In a recent decision, the Appellate Division, Third Department held that the Fishkill RTF is a lawful RTF, granted summary judgment to the state, and dismissed the *Alcantara* complaint. See, *Alcantara v. Annucci*, 203 A.D.3d 1483 (3d Dep't 2022).

In 2018, the state Court of Appeals decided *Matter of Gonzalez v. Annucci,* 32 N.Y.3d 461 (2018), a challenge to the Woodbourne RTF. After the Court of Appeals dismissed the claims in *Gonzalez,* the defendants in *Alcantara* moved for summary judgment, arguing that the decision in *Gonzalez* foreclosed the claims in *Alcantara*, arguing that the *Gonzalez* decision required the dismissal of the *Alcantara* case. The *Alcantara* defendants argued that the Fishkill RTF program satisfied the requirements of the relevant RTF statutes.

In response, the *Alcantara* plaintiffs argued that because the individuals in the Fishkill RTF did not have access to programs in the outside community and because there were inadequate program opportunities within the Fishkill RTF, the Fishkill RTF did not comply with the statutory definition of an RTF and was not actually an RTF. Because the lack of access to community programs was so clear in the record, plaintiffs asked the court not only to deny summary judgment to the

defendants, but to grant summary judgment to plaintiffs

In early 2020, the Albany County Supreme Court issued a decision on the competing requests for summary judgment. The Court divided the claims into those that address programs available to RTF residents within the walls of Fishkill, and those claims that address access to therapeutic programs in the outside community. The Court found that programs within Fishkill, mainly the 28-day RTF program, were adequate, and therefore with respect to programs inside Fishkill, the Court granted summary judgment to the state defendants. However, Supreme Court found that the statutory definition of an RTF, found in Correction Law §2(6), requires access to therapeutic programs in the outside community. In light of evidence that Fishkill RTF residents have no access to any outside therapeutic programs, the Court granted summary judgment in favor of the plaintiffs with respect to the lack of access to outside programs.

Thereafter, the defendants appealed from that portion of the Supreme Court decision that found the statute requires than an RTF provide access to community-based programs. The plaintiffs appealed from that portion of the decision that finding that the programs offered by the Fishkill RTF were adequate.

After numerous delays, the cross appeals in *Alcantara* were argued in the Third Department in February 2022, and a decision was issued in March. See *Alcantara v. Annucci*, citation above. The Third Department found that Fishkill RTF complies with relevant laws with respect to the both in-facility programming and the plaintiffs' claim that the statute requires that individuals in an RTF have access to programs in the community. For this reason, the Third Department granted summary judgment to the defendants with respect to in-prison programming and access to programs in the community.

Correction Law §2(6) defines an RTF as a "community-based residence in or near a community where employment, educational and training opportunities are readily available…" Plaintiffs argued that the language of Correction Law §2(6) means that therapeutic programs in the outside community must be "readily available" to the residents of an RTF, i.e., RTF residents must have access to programs in the outside community. It is undisputed that RTF residents are not able to leave the facility to participate in programs in the community. Plaintiffs argued that since Correction Law §2(6) defines an RTF as a facility where the residents have access to community programs, and since it is undisputed that Fishkill RTF residents have no meaningful access to community programs, the Fishkill RTF does not meet the statutory definition, and therefore is not a lawful RTF.

The Third Department held that Correction Law §2(6) only addresses *where an RTF must be located*. It does not govern DOCCS' responsibilities for establishing programs or securing rehabilitative opportunities for RTF residents. The Court interpreted the relevant statutes as *permitting, but not requiring* DOCCS to let RTF residents leave the facility to attend programs in the outside community.

The Third Department agreed lower court's decision that the programs for RTF residents inside Fishkill are legally sufficient. Those programs include the 28-day RTF program, the RTF work program, access to the Fishkill law library, and access to GED classes.

The Third Department granted summary judgment to the state and dismissed the entirety of the *Alcantara* case. Plaintiffs' lawyers intend to make a motion for permission to appeal to the Court of Appeals, the highest court in the state court system. If the Court of Appeals grants the motion for permission to appeal, the merits of the *Alcantara* case, and in particular, the question of whether an RTF must offer its residents access to programs in the outside community, will be before the state's highest court.

PRO SE VICTORIES!

***Matter of Paul White v. Anthony Annucci*, Index No. 9208-21, Sup. Ct. Albany Co. Feb. 7, 2022). In this Article 78 challenge to a prison disciplinary hearing, the court found that the hearing officer wrongfully excluded the petitioner from the hearing, violated the petitioner's constitutional right to call witnesses and engaged in misconduct – specifically, bullying – that showed an intent to undermine the petitioner's ability to present a defense. The court therefore annulled the hearing and ordered expungment of the charges.**

The case began when petitioner's lawyer mistakenly sent him a money order to pay for a FOIL request. The envelope was given to the law librarian who gave it the petitioner. The petitioner gave it to ORA Younglove, the prison administrator to whom money orders are required to be given. Younglove charged petitioner with possession of contraband, unauthorized possession of money, smuggling, refusing a direct order, and facility correspondence violation.

At his hearing, the petitioner requested that ORA Younglove, the law librarian and the petitioner's lawyer be called as witnesses and explained the testimony he expected each to give. In response, the hearing officer stated that he had not asked for an explanation and warned the petitioner to stop interrupting or he would eject the petitioner from the hearing. The hearing officer then found the witnesses' testimony was not relevant, stated that he would decide which witnesses to call and again accused the petitioner of interrupting him.

The hearing officer called ORA Younglove as a witness. He denied every question that the petitioner tried to ask ORA Younglove on the grounds of relevance and again warned the petitioner that he would be ejected from the hearing. Petitioner asked the hearing officer to stop yelling at him whereupon, in response to an inaudible comment from the petitioner, the hearing officer ejected the petitioner from the hearing.

When the hearing officer asked ORA Younglove whether the petitioner could have followed the prescribed procedure and turned the money over to an officer, the ORA replied, "He did." The hearing officer replied, "So he failed to do what he was supposed to do," to which the ORA made no response.

The hearing officer found the petitioner guilty of possessing money, refusing a direct order and violating facility correspondence program rules.

In discussing the claim that the hearing officer denied the petitioner's right to call witnesses, the court noted that the remedy for a violation of an individual's right to call witness depends on whether the hearing officer's denial of the witness was willful or

the result of a good faith, "albeit failed," effort to call the witness to testify. Here, the court found, the hearing officer stated that he was not calling the law librarian because "all agree this money order was not found and turned in by the staff." In so stating, the court noted, the hearing officer failed to account for the fact that the law librarian gave the money order to the petitioner, who gave it to ORA Younglove.

The hearing officer also denied the petitioner's request that his lawyer be called as witness, finding that this testimony was not relevant. This finding, the court held, failed to account for the fact that the lawyer had caused the erroneous mailing in the first place, and thus his testimony was highly relevant.

In a footnote, the court noted that the lack of fundamental fairness of the hearing "literally jumps off the pages of the transcript." The court concluded that the hearing officer's bullying of the petitioner showed that he intended to undermine the petitioner's ability to present a defense and that these actions were worsened by his abrupt decision to eject the petitioner from the hearing.
The court held that as a result of the wrongful ejectment of the petitioner from the hearing, the willful exclusion of relevant witnesses, and the obstruction of petitioner's questioning of ORA Lovejoy, the appropriate remedy was vacatur of the finding of guilt and expungement of the petitioner's records.

Michael Kelsey Successfully Uses IGP to Resolve Programming Issue. In December 2021, Michael Kelsey notified the Hudson C.F. Acting Deputy Superintendent of Programs that portions of the facility's sex offender program (SOP) were being conducted in a classroom where the sessions were video and audio recorded. Recording these sessions, Mr. Kelsey stated, were not in accord with Partial Waiver of Confidentiality that SOP participants are required to sign. The Acting Deputy Superintendent of Programming responded that the recordings are not preserved unless there is an incident during the session.

On March 1, 2022, Mr. Kelsey filed a grievance concerning the recording of the SOP sessions. On March 28, after investigating the claim, the Superintendent responded that the facility had installed a switch so that the audio recording could be turned off during the SOP sessions.

***Matter of Julio Nova v. Mr. Anthony Rodriguez*, Index No. 4236-21 (Sup. Ct. Albany Co. Feb. 23, 2022). Over respondent's opposition, in a challenge to a prison disciplinary hearing, the court ordered the expungement of the charges from the petitioner's prison records.** After the petitioner filed an Article 78 petition challenging a Tier III hearing, the respondent informed the court that he agreed that the hearing officer's failure to personally investigate whether certain witnesses were willing to testify violated the petitioner's right to call witnesses. The respondent argued, however, that because this was a regulatory as opposed to a constitutional violation, the proper remedy was reversal and a new hearing. The petitioner argued that the **equities** (fairness) required the court to reverse the hearing and expunge the charges. The court, citing *Matter of Vidal v. Annucci*, 149 A.D.3d 1366, 1368-1369 (3d Dep't 2017), agreed with the petitioner, holding that because the petitioner had already served the sanction – 180 days in SHU – and the length of time that had passed since the incident, the equitable remedy of annulment and expungement was appropriate.

Pro Se Victories! *features summaries of successful pro se administrative advocacy and unreported pro se litigation. In this way, we recognize the contribution of jail house litigants. We hope that this feature will encourage our readers to look to their advocacy skills in resolving 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

Insufficient Evidence Supported Charge of Creating a Disturbance

In *Matter of Hogan v. Thompson*, 164 N.Y.S.3d 537 (3d Dep't 2022), the Court considered whether the hearing officer's determination of guilt with respect to the charge of creating a disturbance was supported by substantial evidence. The rule at issue, set forth at 7 NYCRR 270.2(B)(5)(iv), provides that an incarcerated individual "shall not engage in conduct which disturbs the order of any part of the facility." Such disruptive conduct includes "loud talking in a mess hall, program area, or corridor ...."

In finding Mr. Hogan guilty, the hearing officer relied only on the misbehavior report. This report alleged that petitioner was observed arguing with another incarcerated individual in the dorm hallway, drawing the attention of incarcerated individuals who were in the area. The Court noted what the report did not allege that:

- the petitioner was screaming;
- the petitioner was speaking in a loud or boisterous manner; or
- the petitioner's behavior triggered a response by other nearby incarcerated individuals.

The Court also noted that the petitioner was not found guilty of other charges, for example fighting, from which an inference could be drawn that his conduct was disruptive.

"In short," the Court wrote, "as the misbehavior report fails to identify the manner in which petitioner's conduct disturbed the order of the facility, we cannot say that the respondent's determination is supported by substantial evidence."

Based on this finding the Court ordered the determination annulled and ordered the respondent to expunge all references to this matter from the petitioner's institutional record.

John Hogan represented himself in this Article 78 proceeding.

Nurse's Visual Identification of Drug Is Sufficient Proof

In *Matter of Wiggins v. Venettozzi*, 203 A.D.3d 1362 (3d Dep't 2022), the petitioner was charged with drug possession, possession of contraband and smuggling. The misbehavior report alleged that during a pat frisk of the

petitioner, an officer discovered four orange **sublingual** (medication intended to be placed under the tongue) strips when he searched the petitioner's coat. The officer turned the strips over to a NARK II tester, following which a facility nurse identified them as sublingual suboxone. After a hearing, the petitioner was found guilty of the charges. After completing the administrative appeal process, the petitioner filed an Article 78 challenge to the hearing.

In his Article 78 petition, the petitioner argued that the strips were not properly drug tested and therefore the determination of guilt was not supported by substantial evidence. The Court rejected this argument, holding that once the facility nurse had visually identified the drugs as suboxone, there was no need for drug testing. Also, because the identification was made by the nurse, and there were no positive drug test results, DOCCS was not required to provide the petitioner with contraband test forms.

Dwayne Wiggins represented himself in this Article 78 proceeding.

Court Rejects Three Arguments Made by Petitioner

In *Matter of Rivera v. Annucci*, 203 A.D.3d 1371 (3d Dep't 2022), the misbehavior report alleged that after receiving confidential information, a DOCCS investigator listened to and recorded three telephone calls between the petitioner and his brother. The investigator concluded that the calls showed that the brothers were conspiring to smuggle synthetic marijuana into the prison where the petitioner was confined. The misbehavior report charged the petitioner with smuggling and conspiring to possess drugs. The hearing officer found the petitioner guilty of the charges. After exhausting his administrative remedies, Mr. Rivera filed an Article 78 challenge to the hearing.

The Court found that the misbehavior report, testimony of the investigator and the recorded calls in which the petitioner can be heard using coded language to ask for synthetic marijuana constituted substantial evidence that the petitioner was guilty of the charges. Citing *Matter of Liggan v. Annucci*, 171 A.D.3d 1325 (3d Dep't 2019), the Court also held that actual possession or successfully smuggling the drugs into the prison was not required to show violation of the rule; rather the violation of the rules occurred when the petitioner and his brother conspired to bring the drugs into the prison.

Petitioner also argued that the hearing officer improperly relied on confidential information. The Court disagreed, finding that although confidential information led to the investigation, the determination of guilt was based on the contents of the recorded telephone conversations.

Alex Rivera represented himself in this Article 78 proceeding.

Observed Behavior Was Substantial Evidence of Intoxication

After finding Gilberto Ballester-Perez incoherent (lacking the ability to communicate), with slurred speech and unable to walk, an officer took Mr. Ballester-Perez to the infirmary to be assessed. While he was there, a nurse deemed him to be under

the influence of an unknown substance. In addition to these facts, the resulting misbehavior report alleged that when Mr. Ballester-Perez was later interviewed about the incident, he admitted to smoking an unknown substance. He was then charged with and found guilty of being under the influence of an unidentified intoxicant. After the determination of guilt was affirmed on administrative review, Mr. Ballester-Perez filed an Article 78 petition challenging the sufficiency of the evidence supporting the determination of guilt.

In *Matter of Ballester-Perez v. Reardon*, 203 A.D.3d 1372 (3d Dep't 2022), the Court found that a memorandum and inmate injury report written by the nurse who examined Mr. Ballester-Perez on the day of the incident and the petitioner's testimony at the hearing that prior to the incident, he had smoked a cigarette given to him by another incarcerated individual, was sufficient evidence to support the determination of guilt.

Because the petitioner had not raised this issue at the hearing, the Court rejected the petitioner's argument that to be supported by substantial evidence, the identity of the substance had to be determined through urinalysis testing or other scientific testing. In spite of not having to decide the issue, the Court wrote that the argument lacked merit because the basis of the intoxication charge was the petitioner's observable behavior and the nurse's medical assessment, as opposed to scientific testing. Finally, the Court rejected the petitioner's argument that the nurse and the officer who found him in the bathroom should have been required to testify, holding that because petitioner had not requested them as witnesses, the hearing officer was not required to present petitioner's case for him.

Gilberto Ballester-Perez represented himself in this Article 78 proceeding.

Sentence & Jail Time

Caution: Concurrent Sentences May Not Be Calculated as You Expect

In April 2002, after being convicted of a federal offense, Eric Williams was sentenced to a two-year determinate term and three years of community supervision. Roughly a year later, He was sentenced in Suffolk County Court to 25 years to life. The Suffolk County Court did not state whether the state sentence was concurrent or consecutive to the federal sentence. According to the Penal Law §70.25(4), where a court is silent with respect to a sentence which is imposed while the defendant is serving another sentence, the sentence runs consecutively to the previously imposed sentence. A month later, the Orange County Court sentenced Mr. Williams to a two-year determinate term and three years of post-release supervision, to be served concurrently with the federal sentence.

Between April 2002 and February 2004, Mr. Williams was in federal custody. He was then transferred to state custody.

In 2013, the Suffolk County conviction was overturned and Mr. Williams was released from state custody pending a new trial. Mr.

Williams was again convicted and in 2015, was sentenced to 25 years to life. The sentencing judge did not mention either the federal sentence or the 2002 Orange County sentence.

Mr. Williams then brought an Article 78 proceeding challenging DOCCS' failure to credit the time he spent in federal custody between April 18, 2002 and May 28, 2003 to the Orange County sentence which, on May 29, 2003, the Orange County Court had imposed to run concurrently to his federal sentence. The Supreme Court, Albany County dismissed the petition but concluded he was entitled to credit for the period May 29, 2003 through February 13, 2004 against the Orange County sentence. Petitioner appealed to the Third Department.

In *Matter of Williams v. New York State Department of Corrections and Community Supervision, Office of Sentencing Review*, 202 A.D.3d 1254 (3d Dep't 2022), the Appellate Court rejected the petitioner's claim that he was entitled to credit for the time between April 19, 2002 – the date upon which he began to serve his federal sentence – and May 29, 2003 – the date upon which the Orange County sentence was imposed.

The Court started its analysis by referencing Penal Law §70.30(2-a). This section of the law provides that where a person who is serving a previously imposed undischarged term of imprisonment imposed by a court of another jurisdiction is sentenced to an additional term of imprisonment by a New York State court to run concurrently with such undischarged term, the additional term shall commence when the person is returned to the custody of the jurisdiction which imposed the previously imposed sentence.

In Mr. William's case, he was sentenced in Orange County on May 29, 2003 and returned to federal custody on May 29. At sentencing, the County Court made it clear that the Orange County sentence would begin running on May 29 (as opposed to April 19, 2002). In light of these facts and the law, the Third Department held that other than the period May 29, 2003 through February 13, 2004, the petitioner was not entitled to any additional credit against the Orange County sentence for time that he spent in federal custody.

Eric Williams represented himself in this Article 78 proceeding.

Court of Claims

DOCCS Was Negligent But the Claimant Was Also Responsible

In late October 2016, Terrance Head fell in a shower at Adirondack C.F. He filed a negligence claim seeking compensation for the resulting injuries. In 2021, the case came to trial. Mr. Head was the only witness. Mr. Head testified that as he was showering in an open room with four shower heads, the heel of his right shower shoe got caught in a hole in the middle of the floor, causing him to fall backwards onto the ground, injuring his back. He further testified that the hole had been in the shower when he arrived at Adirondack in December 2015.

A month before he fell, Mr. Head had informed an officer of the hole. The officer said that they knew about the hole and would try to fix it.

Petitioner also testified that he had showered in the shower room three or four times a week since he arrived at Adirondack. Mr. Head's attorney argued that the defendant was liable for Mr. Head's fall because the hole in the floor was a dangerous condition about which the defendant had constructive knowledge.

The defendant argued that the Mr. Head had fabricated the story and that the photographs of the hole showed only a minimal height difference between the undamaged floor and the hole such that it was not a dangerous condition.

In deciding the case, *see Terrance Head v. State of New York*, Claim No. 13110 (Ct. Clms. Jan. 26, 2022), the court noted that the State has a duty to maintain its premises in reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury and the burden of avoiding the risk. To succeed in a court of claims action for negligence, the claimant must prove that:

- a dangerous condition existed;
- the state either created the dangerous condition or had actual or constructive notice of the condition and failed to correct the problem within a reasonable period of time; and
- the dangerous condition was the proximate cause of the claimant's accident.

Constructive notice, the court wrote, requires a showing that the particular condition existed for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it.

The court found the claimant to be "generally credible" and concluded that his testimony was neither fabricated nor unreliable. Thus, the court credited the claimant's testimony that the fall occurred when the heel of his shower shoe was caught in the hole in the shower room floor and that he had previously complained about the hole.

Turning to the question of whether the hole was a dangerous condition, the court noted that whether a defect is so trivial as to preclude liability requires consideration of factors such as the dimensions of the defect, and the circumstances surrounding the injury including the width, depth, elevation, irregularity and appearance of the defect as well as the time, place and circumstances of the injury. Reviewing a photograph of the hole, the court found that it clearly depicted a height differential between the hole and the surrounding surface and it appeared large enough for a shower shoe to have gotten caught in the hole. Thus, the court concluded, the credible evidence established that the hole was a dangerous condition.

With respect to the issue of the state's notice of the defect, the court found that the photograph showed that the hole was at least twice as large as the shower drain. Thus, with respect to the issue of notice, the court concluded that the defect was visible and apparent and had existed for at least 10 months. This was a sufficient length of time to allow the defendant to observe the hole and fix it. Thus, the defendant had constructive notice of the defect. In addition, Mr. Head's testimony established that a month before he fell, he provided actual notice of the hole to an officer.

The court also found that the evidence at trial proved that the defendant's agents had failed to remedy the defect.

Finally, the court concluded that the defect was a substantial cause of the events which produced the injury. Thus, the claimant had shown that the defendant was negligent in maintaining the shower room in a reasonably safe condition and that the defendant's negligence was the proximate cause of the claimant's injuries.

Nonetheless, the court found that the claimant was also responsible for his injuries because he was aware of the defect and could have used a showerhead that would not have placed him near the hole. For this reason, the court found that the claimant was 50% liable for his injuries. This means that whatever damages the court decides are appropriate, the claimant will only receive 50%.

Brian Dratch of The Dratch Law Firm, P.C., represented Terrance Head in this Court of Claims action.

One Year SOL for State Claims of Wrongful Confinement

In *Patterson v. State of New York*, 203 A.D.3d 1243 (3d Dep't 2022), the Third Department reminds us that the statute of limitations for filing a claim for wrongful confinement is one year from the date upon which the confinement ended. In *Patterson*, the claimant was released from SHU confinement on October 10, 2018. He served a Notice of Intention to File a Claim (NOI) on the Attorney General in December 2018. (Claimants much either serve an NOI or a claim within 90 days of date of when the claim accrues). On October 24, 2019, he filed a claim.

The defendant moved for summary judgment on the claim because it had not been filed within a year of when the claimant was released from SHU. The lower court granted judgment to the defendant and the claimant appealed.

The Appellate Court affirmed the lower court's decision, holding that because the claim was not filed until October 24, 2019, more than one year had passed since the claim accrued and the claim was therefore untimely.

Bernard Patterson represented himself in this Court of Claims action.

IMMIGRATION MATTERS

This month's column focuses on *Patel v. Garland*, 142 S. Ct. 1614 (2022), a recent decision by the Supreme Court on the question of federal court jurisdiction over immigration cases—a seemingly straightforward topic which has become exceedingly complex after a series of Congressional enactments limiting the federal courts' ability to review immigration cases.

To understand *Patel*, some background on immigration procedure is helpful. As a general rule, immigration in the United States is a creature of federal administrative law. This means that immigration decisions are handled by administrative agencies created by Congress, such as the Department of Homeland Security ("DHS") and the Department of Justice ("DOJ"). In deportation

cases, noncitizens are placed in removal proceedings by DHS, and then must appear for hearings before the Executive Office of Immigration Review ("EOIR"), a component of DOJ. Under EOIR rules, a noncitizen's removal proceedings are first adjudicated by an Immigration Judge ("IJ") sitting in immigration court. If the IJ issues an adverse decision, the noncitizen can appeal to the Board of Immigration Appeals ("the Board"). The Board reviews both the facts and legal conclusions determined by the IJ.

What can a noncitizen do if the Board issues an adverse decision? The answer to this question has varied considerably over time. Until 1961, a noncitizen could challenge a deportation order by filing a habeas corpus petition in federal district court (the federal court which conducts trials). But in 1961, Congress amended the Immigration and Nationality Act ("INA"), the statute governing immigration, to mandate that petitions for review filed in federal circuit courts of appeals "shall be the sole and exclusive procedure for the judicial review of all final orders of deportations." 8 U.S.C. §1105a(a) (1994).

In 1996, however, Congress enacted two major pieces of federal legislation—the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") and the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"). These new laws sought to drastically restrict the ability of noncitizens to obtain federal court review of deportation orders.

Perhaps the most **draconian** (very severe) limitation was directed at "criminal aliens," and provided that *no* federal court review whatsoever was available to noncitizens convicted of certain criminal offenses. This drastic rule was struck down by *I.N.S. v. St. Cyr*, 533 U.S. 289, 290 (2001), in which the Supreme Court found that "a serious Suspension Clause issue would arise if the 1996 statutes have withdrawn that power from federal judges and provided no adequate substitute." (The Suspension Clause, contained in Article I, Section 9, Clause 2 of the United States Constitution, provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). Congress responded to *St. Cyr* by amending the INA in 2005 so that noncitizens convicted of criminal offenses could seek review of "constitutional questions and questions of law." 8 U.S.C. § 1252(a)(2)(D).

The Supreme Court's May 16, 2022, decision in *Patel* concerns another provision of AEDPA and IIRIRA, 8 U.S.C. §1252(a)(2)(B)(i), under which "no court shall have jurisdiction to review . . . any judgment regarding the granting of" certain discretionary immigration decisions. For discretionary applications, such as applications for lawful permanent resident (or "green card") status, a noncitizen must not only demonstrate that he or she is eligible for relief, but also that he or she warrants a favorable exercise of discretion as "a matter of administrative grace." *Matter of Marques*, 16 I. & N. Dec. 314, 315 (BIA 1977). A discretionary determination is made by looking at the totality of the applicant's life, including family ties in the United States, employment history, tax payment, criminal history, and so on, to ascertain whether a noncitizen deserves to be granted immigration benefits.

In *Patel*, petitioner Pankajkumar Patel applied for discretionary adjustment of status, but his application was denied after an IJ concluded that he had falsely represented himself to be a U.S. citizen, making him ineligible for adjustment. Patel had checked a box stating that he was a U.S. citizen when applying for a Georgia drivers' license, and the IJ did not credit his assertion that he only checked the box by mistake. The IJ also rejected his argument that the misrepresentation was immaterial because U.S. citizenship was not required to obtain a Georgia drivers' license. Patel sought review by the Board, which affirmed the IJ's decision, then appealed to the Eleventh Circuit, which concluded that it lacked jurisdiction under 8 U.S.C. §1252(a)(2)(B)(i). The Eleventh Circuit's decision rejected the view of several other circuit courts, which found that the statute did *not* prohibit federal court review of factual findings underlying *non-discretionary* aspects of discretionary decisions, such as whether a noncitizen is statutorily ineligible for relief.

Justice Barrett, writing for a five-Justice majority, held that the Eleventh Circuit was correct and that 8 U.S.C. § 1252(a)(2)(B)(i) bars federal court review of facts underlying eligibility determinations. In so holding, Justice Barrett looked to the statutory text, which stripped jurisdiction over "any judgment regarding the granting of relief" in certain enumerated discretionary applications. Justice Barrett noted that the word "any" "has an expansive meaning," while the word "regarding" "has a broadening effect, ensuring that the scope of a provision covers not only its subject but also matters relating to that subject." 42 S. Ct. at 1622 (citations omitted). Thus, Justice Barrett reasoned that the most natural reading of the statutory text is that it "prohibits review of *any* judgment *regarding* the granting of relief" in those cases. 142 S. Ct. at 1622 (emphasis in original). This accordingly encompassed even those factual questions underlying non-discretionary aspects of a discretionary decision, such as statutory eligibility.

Justice Gorsuch wrote a dissenting opinion in which Justices Breyer, Kagan, and Sotomayor joined. In Justice Gorsuch's view, the phrase "regarding the granting of relief" meant that the jurisdictional bar applied only to the discretionary decision to grant relief, and not to the non-discretionary question of whether a noncitizen is eligible for relief in the first place. For Justice Gorsuch, the statute should be interpreted to allow federal courts to review non-discretionary eligibility determinations for "substantial evidence," under which an agency's decision must "be supported by reasonable, substantial and probative evidence in the record when considered as a whole." *Singh v. Garland*, 6 F.4th 418, 426 (2d Cir. 2021). Finding merit in Patel's argument that EOIR committed a glaring mistake in his case, Justice Gorsuch observed that, under the majority's view, "a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court may even hear the case." 142 S. Ct. at 1637. In closing, Justice Gorsuch lamented that "the majority's novel expansion of a narrow statutory exception . . . turns an agency once accountable to the rule of law into an authority unto itself." 142 S. Ct. at 1637.

WHAT DID YOU LEARN?

1. **Under the 2021 amendment to the New York State FOIL law, when an agency claims an exemption from disclosure on the ground that the records were prepared or created for law enforcement purposes, the agency must also:**

   a. present a particularized and specific justification for the denial of each requested record.
   b. demonstrate that the requested record is related to a continuing police investigation.
   c. show that the requested record constitutes trial evidence.
   d. provide a sworn statement generally to the effect that denial of the request would serve the public interest and the fair administration of justice.

2. **If the Court of Appeals agrees to hear the *Alcantara* case, the high court will determine whether:**

   a. DOCCS is allowed to provide community-based programs to incarcerated persons.
   b. the claims made by the plaintiffs in *Gonzalez v. Annucci* are supported by state constitutional law.
   c. a program operating as a Residential Treatment Facility must offer residents access to community-based programs.
   d. the Fishkill Correctional Facility access to GED classes and the prison law library.

3. **According to the ruling in *Paul White v. Annucci*, the hearing officer violated the accused person's right to:**

   a. present a timely appeal.
   b. secure public funding for legal services.
   c. present a defense.
   d. remain silent.

4. **DOCCS modified the audio recording capability of the system in the classrooms where sex offender programming was held after Michael Kelsey:**

   a. filed a federal civil rights action.
   b. staged a hunger strike.
   c. wrote a letter to a member of the State Legislature.
   d. filed a grievance.

5. **Based on the case of *Julio Nova v. Mr. Anthony Rodriguez*, it would be *most* likely for an Article 78 court to expunge the charges after finding that the hearing officer violated the petitioner's regulatory right to call witnesses where the petitioner has:**

   a. served the sentence imposed at the hearing and a significant period of time has passed since the incident took place.
   b. asked the court for an order terminating the litigation.
   c. failed to show the relevance of the requested witness.
   d. acknowledged that a new hearing would constitute a fair outcome.

6. **Applying the approach taken by the Court in *Matter of Hogan v. Thompson*, one can conclude that a conviction on the charge of creating a disturbance is *most* likely to be upheld when the hearing officer relies on a misbehavior report:**

   a. explaining how other incarcerated individuals responded to the petitioner's conduct.

   b. reciting without more the language of the rule establishing the offense.
   c. detailing the disciplinary history of the petitioner.
   d. reiterating the petitioner's claim of innocence.

7. **As the Court explained in *Matter of Williams v. NYS DOCCS*, when a person subject to an undischarged prison sentence is sentenced in a new case and the sentencing judge in this new case orders that the two sentences run concurrently, the undischarged sentence begins to run on the day:**

   a. determined by the judge who imposed the undischarged sentence.
   b. the defendant is returned to the jurisdiction of the previously imposed sentence.
   c. determined by the judge who imposed the new sentence upon the consent of the judge who imposed the previously imposed sentence.
   d. the DOCCS Office of Sentencing Review determines to be in the best interest of facility security.

8. **In the Court of Claims case *Terrance Head v. State of New York*, the Court found that the claimant was equally responsible for his injuries because he:**

   a. failed to prove that the hole in the floor constituted a dangerous condition.

   b. could not rebut the State's claim that DOCCS did not know about the hole.
   c. abandoned his claim that the State was fully responsible for his injury.
   d. could have avoided this known dangerous condition but did not do so.

9. **In *Patterson v. State of New York,* the Court ruled that to avoid dismissal based on the statute of limitations, a claim for wrongful confinement must be filed one year from the:**

   a. start of the wrongful confinement.
   b. date the wrongful confinement ended.
   c. filing of the grievance contesting the confinement
   d. end of the hearing that led to the wrongful confinement.

10. In an Article 78 proceeding involving a FOIL request, the Third Department, in *Matter of McFadden v. McDonald*, held that a state agency opposing the disclosure of requested records is barred from:

a. providing a particularized and specific justification for denying access.
b. appealing an order mandating disclosure.
c. relying on exemptions that were not raised during the administrative process.
d. presenting State constitutional issues to the Article 78 court.

Answers

1. a	**6. a**
2. c	**7. b**
3. c	**8. d**
4. d	**9. b**
5. a	**10. c**

Notices

Your Right to a Education

- If you have a learning disability and are under 22 years old, or
- If you are an adult and have a learning disability, or
- If you need a GED, or
- If you have questions about access to academic or vocational programs, please write for more information to:

Maria E. Pagano – Education Unit
Prisoners' Legal Services of New York
14 Lafayette Square, Suite 510
Buffalo, New York 14203
(716) 854-1007

Pro Se
114 Prospect Street
Ithaca, NY 14850

PLS OFFICES

Requests for assistance should be sent to the PLS office that provides legal assistance to the incarcerated individuals at the prison where you are in custody. Below is a list of PLS Offices and the prisons from which each office accepts requests for assistance.

PLS ALBANY OFFICE: 41 State Street, Suite M112, Albany, NY 12207
Adirondack • Altona • Bare Hill • Clinton • CNYPC • Coxsackie • Eastern • Edgecombe • Franklin Gouverneur • Great Meadow • Greene • Hale Creek • Hudson • Marcy • Mid-State • Mohawk Otisville • Queensboro • Riverview • Shawangunk • Sullivan • Ulster • Upstate • Wallkill • Walsh Washington • Woodbourne

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Auburn • Cape Vincent • Cayuga • Elmira • Five Points

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