Pro Se

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Court Re-opens Discovery in Suit for Damages for Unlawful PRS

The plaintiffs in Betances v. Fischer, Index No. 11 CV 3200, (S.D.N.Y.), are a class of NYS prisoners and formerly incarcerated individuals who were subjected to post-release supervision that was not imposed by a sentencing judge. They brought an action for damages against DOCCS and Division of Parole (DOP) officials who, after the 2006 federal court decision in Earley v. Murray – a decision which concluded that the practice of administratively imposing post-release supervision was unconstitutional − continued to impose or honor administratively imposed post-release supervision. The district court granted summary judgment to the plaintiffs. The defendant DOCCS and DOP officials appealed. In September 2016, the Second Circuit upheld the lower court ruling that as of August 31, 2006, liability could be imposed on DOCCS and DOP officials for their failure to comply with the Earley decision and that these officials are not entitled to qualified immunity. The Circuit Court returned the case to the district court for resolution of the question of damages. See Betances v. Fischer, 837 F.3d 162 (2d Cir. 2016).

Back in front of the district court, the plaintiffs asked the court to allow them discovery on the issue of the class members' damages. Specifically, the plaintiffs noted, the defendants had not yet produced records concerning the length of time class members were illegally subjected to post-release supervision, the conditions illegally imposed on them, or the number of days that they spent illegally imprisoned for violating these conditions. According to the plaintiffs, the information that they requested is stored in the defendants' electronic databases.

The defendants took the position that, with a few exceptions (which would not include the records sought by the plaintiffs), discovery was closed.

On October 20, the court reopened discovery and referred the case to the magistrate for supervision of discovery and for settlement purposes.

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Emery Celli Brinckerhoff and Abady, LLP, represent the plaintiffs in Betances v. Fischer.

Also Inside . . .

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

NOTICE: PLS OPENS TWO NEW UNITS

A Message from the Executive Director – Karen L. Murtagh

PLS' MENTAL HEALTH PROJECT

On January 1, 2017, PLS is opening a **Mental Health Project (MHP),** thanks to a generous grant from the van Ameringen Foundation.[1] The goal of PLS' MHP is to address the needs of **youth between the ages of 18 and 21 (youth under 21) and veterans *(including anyone who has served in the military or armed forces)* who suffer from mental illness.**

PLS' MHP will be staffed by two part-time attorneys in our Ithaca office who will be exclusively responsible for representing members of the target populations. Our attorneys will help eligible clients obtain the mental health care they need and will work to ensure that they are not subjected to conditions that will exacerbate their mental illness. Because our resources are limited, we may not be able to accept every request for assistance we receive. However, even in those instances where we cannot accept a case, we will do everything we can to provide the resources necessary for individuals to advocate on their own.

As part of our MHP, we will also be regularly publishing articles in *Pro Se*, PLS' bi-monthly newsletter, that address mental health issues specific to youth under 21 and veterans. In addition, we are currently in the process of developing educational self-help materials for youth under 21 and veterans to help them understand and learn how to protect their rights.

You are eligible for services from PLS' MHP if:

1. You suffer from mental illness **AND**

2. Your mental illness is causing you to have issues relating to mental health care, the prison disciplinary system, solitary confinement, medical care, programming, education, housing, sentencing, jail time, or reentry preparation **AND**

3. You are between the ages of 18 and 21, **OR** have served in the military.

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

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

Please provide us with your name, date of birth, military service status (in what branch of the military you served and when the service took place), a brief summary of your issue and the relief you are requesting.

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

PLS' FAMILY MATTERS UNIT

Thanks to a grant from Judiciary Civil Legal Services, beginning January 1, 2017, PLS will be opening a new 'Family Matters' Unit. The Unit will be staffed by three part-time PLS staff attorneys. These attorneys will assist incarcerated parents who were convicted, or at the time of their conviction, living in *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond* County (or have children living in those counties), in challenging prison disciplinary proceedings that result in suspension or termination of visitation with children, drafting child visitation petitions, providing representation in court on visitation and support petitions, helping clients access court records, enforcing visitation orders and drafting child support modification papers.

The 'Family Matters' Unit will provide a new resource to incarcerated parents. This resource will allow parents who come from or have children in the eight identified counties to access our court system to help them maintain family ties during their incarceration. For those parents who are subject to child support orders, this will also help remove one of the major barriers to successful reintegration – the accumulation of insurmountable debt as a result of child support arrears.

You are eligible for services from PLS' Family Matters Unit if:

1. You are a prisoner whose county of conviction was *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond* ***OR***

2. ***You were living in one of these counties at the time of your conviction (although you were convicted in another county);***

3. You have a visitation or support issue involving children who reside in *Albany, Bronx, Erie, Kings, Nassau, New York, Queens or Richmond* County **AND**

4. You have been subjected to a recent prison disciplinary proceeding that resulted in suspension or termination of visitation with your children **OR**

5. You are interested in seeking or enforcing an order of visitation **OR**

6. You are having difficulty accessing child support or visitation documents **OR**

7. You have a child support issue.

If you meet the above eligibility requirements, please write to the PLS office that handles your prison (see back page for list of PLS offices and the prisons they serve).

News & Notes

Exclusion of Individuals with Mental Illness from the Shock Incarceration Program

The DOCCS Shock Incarceration Program ("Shock Program") is an alternative-to-incarceration program for qualified prisoners who either volunteer for or are subject to court-ordered shock treatment. The program is six months of highly structured military-style discipline, exercise, work and educational programming, substance abuse treatment, pre-release counseling, and life skills counseling. After completing the Shock Program, the individual is eligible for discharge from prison to intensive community supervision.

DOCCS has Shock Programs at two locations: Lakeview Correctional Facility, for both men and women, and Moriah Correctional Facility for men. DOCCS reports that over 50,000 people have graduated from the Shock Program since it began in 1987.

There are specific requirements to qualify for the Shock Program. This article will focus on the blanket exclusion of prisoners with mental illness from the program. The article will also discuss how the Americans with Disabilities Act (ADA) creates legal rights for people with disabilities and how the ADA applies to the Shock Program.

Eligibility for the Shock Program

DOCCS allows prisoners to apply for the Shock Program under Section 867 of the New York Correction Law. Prisoners must meet requirements listed in New York Correction Law Section 865 to be eligible for the program. The prisoner must: a) be sentenced to an indeterminate term and eligible for parole within three years, or be sentenced to a determinate term and eligible for conditional release within three years; b) be under 50 years of age at the time of application, and between 16 and 49 years of age at the time of the commission of the crime for which s/he was sentenced; and c) have not been convicted previously of a violent felony in New York State or an equivalent crime in another jurisdiction. Certain other factors, which are not the subject of this article, may exclude individuals from the program, such as: additional offenses; outstanding warrants; commitments; open charges; or immigration status. The above-listed requirements apply both to individuals who are ordered to the Shock Program by the sentencing court and to individuals who apply for the program once they are in prison.

Exclusion Based on Mental Illness

Even if a prisoner meets all the above-listed eligibility requirements, DOCCS' Directive Number 0086 excludes all prisoners with mental health levels of 1, 2, or 3 from the Shock Program. These mental health levels are determined by Office of Mental Health (OMH) staff for prisoners on the OMH caseload. Thus, without any further review, OMH level 1-3 prisoners will not be admitted to the Shock Program. Interestingly, prisoners who do not have mental health levels of 1, 2, or 3 are assessed by DOCCS and/or OMH professionals to determine whether they are, in fact, medically and psychologically fit to participate in the Shock Program. There are very limited mental health services currently available at the shock programs: Moriah has no mental health staff, and Lakeview has some mental health staff available, but they cannot prescribe psychiatric medications.

There are differences in how DOCCS treats prisoners who are denied shock due to mental illness depending on whether they are court ordered or volunteer for the program. New York Penal Law Section 60.04 requires that prisoners who are court-ordered to the Shock Program, but excluded because of mental illness or a medical condition, be provided with an alternative placement so they may benefit the same as if they had completed the Shock Program itself. For example, women prisoners who are court-ordered for shock but who are excluded for mental health or medical reasons attend the CASAT program at Bedford Hills as an alternative to the Shock Program. Bedford Hills has a full

mental health satellite unit with services for individuals classified as OMH levels 1, 2, and 3.

Prisoners who have a mental health level of 1, 2, or 3 who apply to the Shock Program but who are not court-ordered, are not offered the alternative program. As a result, these prisoners with mental illness cannot benefit from voluntary enrollment in the Shock Program or an alternative.

Rights of Individuals with Disabilities Under Title II of the Americans with Disabilities Act

The ADA became effective in July 1992. In 1998, the U.S. Supreme Court ruled that Title II of the ADA, the so-called public entity portion of the law, applies to state correctional systems. Pennsylvania Department of Corrections v. Yeskey, 524 U.S. 206 (1998). Notably, Yeskey concerned a prisoner who sought entry into the Pennsylvania prison system's motivational boot camp, a program quite like the Shock Program, but he was denied the program due to a disability—hypertension.

Title II of the ADA requires that state agencies, like DOCCS, operate their programs, services, and facilities in a non-discriminatory manner for individuals with disabilities. That is, all programs, services, and facilities must be accessible to, and serve, people with disabilities. If necessary, the state agency must provide reasonable accommodations so that people with disabilities can access programs, services, and facilities in the same manner as individuals without disabilities. Blanket exclusions from programs based on, for example, a prisoner's mental illness, generally violate accessibility provisions of the ADA. Only if a prisoner with a disability is individually evaluated and still unable to participate, even if given an accommodation, would exclusion from the program be generally allowed.

DOCCS has established a blanket exclusion of prisoners with mental illness from the Shock Program. DOCCS offers no possibility of a reasonable accommodation for prisoners who are not court ordered to shock -- such as mental health treatment -- to allow participation in the Shock Program. This raises the issue of an ADA violation.

There are defenses that may be raised against an ADA claim in this context. For example, defenses could be that any accommodation would impose an undue hardship on DOCCS, or that the Shock Program would have to be "fundamentally altered" or changed to accommodate the prisoner with a disability. A full discussion of whether such defenses could ever succeed, and under what circumstances, is beyond the scope of this article.

If you are denied an application for, or admission to, the Shock Program, you may file a grievance with DOCCS and then exhaust administrative remedies. Filing a grievance may result in your admission to the program and will also preserve your right to file a claim under federal law.

If you think you could participate in the Shock Program with an accommodation, it is important that you also file a request for reasonable accommodation with DOCCS. The directions for filing a request for reasonable accommodation are in DOCCS' Directive 2614. As stated in Directive 2614, to request an accommodation, you need to send your request in writing to the Deputy Superintendent for Program Services. See Directive 2614 for additional information. If you request and are denied an accommodation for the Shock Program, you should then file a grievance with DOCCS about the denial of the accommodation and be sure to exhaust administrative remedies.

People with mental health issues who have additional questions about participating in the Shock Program can write to Disability Rights New York, 725 Broadway Suite 450, Albany, NY 12207.

This article was written by the staff of Disability Rights of New York. DRNY is the Protection and Advocacy System for persons with disabilities in New York State and has federal statutory authority to investigate and, if necessary, pursue legal remedies for violations of the rights of individuals with disabilities, including individuals confined in state prisons.

Proving the Value of Lost or Destroyed Legal Work

DOCCS employees have a duty to exercise care when they take possession of a prisoner's property and move it from one place to another. Pollard v. State, 569 N.Y.S.2d 770 (3d Dep't 1991). If a prisoner's property is lost or destroyed as a result of an employee's negligent or intentional acts, after filing an administrative property claim and exhausting his or her administrative appeals, a prisoner can sue for damages in the New York State Court of Claims. The damages for negligently or intentionally lost or destroyed property are its fair market value, reduced by depreciation.

Although it is more difficult to recover damages for negligently lost or destroyed legal work, it is possible to place a value on certain types of legal work, such as trial transcripts and documents obtained through FOIL. To be compensable, the lost transcripts must have some future use. If the missing legal work could have been used in pending or future proceedings, its fair market value is the cost to replace or reproduce it. *See* 7 NYCRR 1700.8 [a] [4]; see also, Lamountain v. State of New York, Claim No. 99167 (Ct. Clms. December 1, 2000); Erdheim v. State of New York, Claim No. 97545 (Ct. Clms. May 23, 2000). In order to recover damages, the claimant must establish the identity and value of legal documents. Johnson v. State of New York, Claim No. 93968 (Ct. Clms. August 23, 2000).

Where a prisoner is successful in showing that his or her legal work was negligently or intentionally lost or destroyed, how can he or she establish the number of pages lost and the cost per page of replacing it? A prisoner recently advised ***Pro Se*** that he successfully established 1) that he had entrusted a DOCCS employee with his property; 2) the number of pages of legal work that was in his property when he gave it to the employee; 3) that DOCCS had lost his legal work, and 4) the cost of replacing those pages. He did this by submitting the property inventory form filled in when he turned the property over to DOCCS, the inventory form showing what property was returned to him, copies of cover letters from the court reporter documenting that his trial transcripts were sent to him and the number of pages in each volume, and the legal mail log showing that shortly after the cover letters were dated, there were entries showing that the prisoner had received legal mail from the court reporter.

PRO SE VICTORIES!

Matter of Joseph Vidal v. Kevin Bruen, Index No. 2438-16 (Sup. Ct. Albany Co. October 4, 2016). Court orders DOCCS to respond to Joseph Vidal's request for records. Joseph Vidal made three FOIL requests. When DOCCS did not provide him with the requested records, he challenged the denials in an Article 78 proceeding. DOCCS moved to dismiss the petition, arguing that Mr. Vidal had not appealed the denial of log book entries that he requested; that he was offered the opportunity to view a videotape [when Mr. Vidal had paid to receive a copy]; and that they had provided the page of a log book that Mr. Vidal had requested. The court found that contrary to the respondent's argument, Mr. Vidal had shown that he had appealed the denial of certain log book pages; that DOCCS must respond to Mr. Vidal's request for a copy of the videotape that he had already paid for; and that because it was unclear whether the undated log book page that DOCCS produced was the record requested by Mr. Vidal, DOCCS must send petitioner a print out of the log book for the date in question.

Matter of Frank J. Povoski, Jr. v. Philip Melecio, Index No. 15-2562 (Sup. Ct. Ulster Co. Oct. 7, 2016). Court orders DOCCS to correct petitioner's prison records. Frank Povoski asked the court to order the correction of two errors in his institutional records. Following the filing of an Article 78 proceeding seeking the correction of two errors in the petitioner's institutional records, the respondent corrected one error and the court dismissed the petition as moot. Mr. Povoski then brought a motion to re-argue, seeking to have the court order the correction of the second error. The first error – the error that DOCCS agreed needed to be corrected − was that Mr. Povoski had inflicted

serious injury during the crime. DOCCS agreed that a non-serious injury had been inflicted. The second error was related to Mr. Povoski's forcible contact score. The court found that in its prior decision it had not addressed the forcible contact score, and therefore granted the motion to reargue.

The court found that having deleted the word "serious" from the description of the injury inflicted during the commission of petitioner's crime, there was no support for the position that the forcible contact score should be "3." A forcible contact score of "3" denotes the infliction of a serious injury. Respondents, having conceded that the petitioner had not inflicted a serious injury, could not, the court held, maintain a public risk score of "3." Based on this analysis, the court ordered the respondents to change the Forcible Contact Score to "2," indicating that the petitioner's offense caused an injury to another, but not a serious injury.

Imhotep H'shaka v. State of New York, Clm. No. 127076 (Ct. Clms., Aug. 10, 2016). Claimant defeats argument that his claim was not timely filed. In seeking to defeat a claim for the negligent or intentional destruction of property, the defendant argued that the claim had not been filed within 120 days of the accrual of the claim. A property claim accrues when the claimant has exhausted his/her administrative remedies. For accrual purposes, a claimant is deemed to have exhausted his/her administrative remedies on the date on which he or she received the notice of final administrative determination.

Here, the property at issue was lost on August 24, 2015. After exhausting his administrative remedies, on January 25, 2016, the claimant served the claim on the Attorney General by certified mail, return receipt requested. The question before the court was on what date the claim had accrued. In a sworn document, the plaintiff averred that he received the final administrative determination on September 28, 2015. Thus, his claim, served on the attorney general on January 25, was timely.

The defendant relied on the affidavit of the Superintendent of Clinton C.F. as to when the final decision was received. This affidavit stated that the administrative appeal was denied on September 11, 2015 and sent to the claimant through interdepartmental mail on September 21. According to the Superintendent, interdepartmental mail is delivered to inmates within 1 to 2 days of when it is sent. Thus, the claimant would have received it no later than September 23. Based on this affidavit, the defendant argued that service on January 25 was not within 120 days.

The court found that the Superintendent's affidavit was insufficient to overcome the claimant's sworn assertion that he actually received the administrative appeal denial on September 28. Based on this finding, the court concluded that the claimant exhausted his administrative remedies, and that the claim accrued on September 28, 2015. Thus, the claim was timely served on January 25.

Matter of Damon Green v. Tina M. Stanford, Index No. 4057-16 (Sup. Ct. Albany Co. ____ __, 2016). Court orders denial of parole reversed and remits for a new hearing. Damon Green brought this Article 78 proceeding, arguing that the parole denial had to be reversed because the Board had not considered his age at the time of his crime – he was under 18 – in determining whether he should be released to parole supervision. As this issue went to press, the Attorney General had advised the court that the Board had indeed not addressed the petitioner's age at the time of the crime and therefore the Board was consenting to the issuance of an order awarding the petitioner a de novo interview to assess the suitability of his possible release to parole.

Matter of Thomas G. Hoyer v. Tina M. Stanford, Index No. 50348 (Sup. Ct. Seneca Co. Sept. 4, 2016). Attorney General agrees that Petitioner is entitled to a new hearing. As in the case summarized above, after Thomas Hoyer filed his Article 78 challenge to the Parole Board denial of his application for release to parole supervision, the Attorney General acknowledged that Mr. Hoyer's age – under 18 – had not been considered during the application assessment and agreed to a de novo parole review hearing.

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

Court of Appeals Finds Violation of Right to Call Witnesses

After confidential informants implicated the petitioner in Matter of Cortorreal v. Annucci, 2016 WL 6208144 (Ct. App. Oct. 25, 2016), he was found guilty of possessing drugs. Finding that a potentially relevant witness "was not properly addressed through testimony or denial," the Office of Special Housing reversed the determination of guilt and ordered a re-hearing.

At the re-hearing, the petitioner denied his guilt and requested ten inmate witnesses. Of these, eight refused to testify, and one of the refusing witnesses, who had also been requested at the first hearing, submitted an affidavit stating that at the time of the first hearing, an officer had told him in an intimidating and aggressive way, that it would not be a good thing to testify for the petitioner. In the affidavit, he also said that that he had been told what to write on the refusal form that was submitted at the first hearing.

In response to the affidavit, the hearing officer did not investigate the circumstances of the refusal to testify. Instead, he called as a witness the officer who had accepted the witness's refusal to testify at the re-hearing. That officer stated that he had not coerced the witness and had not witnessed anyone else coerce him, nor had the witness mentioned any coercion.

After the petitioner was found guilty at the re-hearing, he filed this Article 78 petition challenging the hearing based on the hearing officer's failure to investigate the witness's claim of coercion and on his acceptance of three refusal forms which did not provide a reason that the witnesses refused.

In addressing the issue of whether the hearing officer had adequately handled the claim of witness coercion, the Court held that when a hearing officer in a prison disciplinary hearing is confronted with a claim that the witness was coerced into refusing to testify at a hearing or a related proceeding, "the hearing officer has an obligation to undertake a meaningful inquiry into the allegation." The form that the inquiry should take – whether an in-person or telephone interview of the witness by the hearing officer or an investigation by an informed officer − depends on the circumstances surrounding the allegation.

In this case, the Court found that the hearing officer had failed to make a meaningful inquiry – either himself or through an officer – into the allegation of coercion. In fact, there was nothing in the record to indicate that the hearing officer or anyone else asked the witness whether his refusal to testify at the re-hearing was influenced by a prior threat or intimidation. Under these circumstances, the Court held, there was no meaningful determination of whether the refusal to testify at the re-hearing was because of intimidation at the time of the first hearing. While the Court noted that the witness had been transferred from the prison where the threat had been made to a distant prison, the Court "cannot accept" that a transfer to another prison eliminated the taint of the coercion. Having failed to make a meaningful effort to determine whether the refusal to testify was the product of coercion, the court found that the hearing officer had violated the petitioner's right to call witnesses.

The Court also considered whether it is sufficient, for the purpose of honoring an inmate's

right to call witnesses, that when asked the reason he or she is refusing to testify, the witness replies that he or she does not want to get involved. In Matter of Barnes v. LeFevre, 511 N.Y.S.2d 591 (1986), the Court of Appeals held that when a requested witness refuses to testify and the record does not reflect the reason for the refusal, or that any effort was made to determine the reason, or that the hearing officer communicated with the witness to verify the refusal, there has been a violation of the right to call witnesses as provided in the regulations.

In Cortorreal, there were three witnesses who refused to testify and stated as their reason for refusing, "I do not want to get involved." The petitioner conceded that a witness refusal form, signed by the witness who refuses to give a reason is a sufficient basis for concluding that the accused's right to call witnesses was honored. However, the petitioner argued, when a witness refuses to testify but adds no substantive explanation to the witness refusal form beyond "I don't want to get involved" or "I don't want to testify," the witness has failed to give a reason for his refusal within the meaning of Barnes.

The Court disagreed, finding that when a refusing witness states that he or she does not want to testify, that is providing a reason. The statement clarifies, the Court wrote, "that the inmate will not testify because he or she does not wish to, and not because he or she is under compulsion or threat."

Based on these findings, the Court reversed the order of the Appellate Division and granted the petition.

The Albany Office of Prisoners' Legal Services represented Anthony Cotorreal in this Article 78 proceeding.

Second Department Orders Reversal and Expungement of Charge that Petitioner Lied During a Hearing

In Matter of Harvey v. Prack, 39 N.Y.S.3d 471 (2d Dep't 2016), the petitioner was found guilty of possession of a weapon. At his hearing, he told the hearing officer that he had been served with two assistant forms, one relating to his ticket and one relating to another inmate's ticket, but had not been served with the misbehavior report. After reviewing a videotape showing an officer at the petitioner's cell, and a log book entry for the same time indicating service of the misbehavior report, the hearing officer gave the petitioner a ticket for lying. The petitioner objected to the ticket and asked the HO to get a copy of the other inmate's assistance form, which, the petitioner said, would have the petitioner's signature on it. The hearing officer refused. The court found that the hearing officer's refusal to produce the other inmate's assistant form was an error and that the petitioner was prejudiced (hurt) by the ruling: "The fact that the petitioner was issued a ticket for lying based on a procedural objection that he raised at the hearing necessarily had an impact on the hearing officer's assessment of the petitioner's credibility."

Petitioner's defense at the hearing was that Inmate Y had planted the weapon in his cell and informed officers that there was a weapon in petitioner's cell, so that he could go into protective custody. According to the petitioner, Inmate Y wanted protective custody in order to separate himself from the numerous inmates to whom he owed money. Petitioner's testimony showed that Inmate Y had opportunity and motive to set up petitioner. Inmate Y refused to testify as petitioner's witness but was called as the hearing officer's witness. He denied having set up the petitioner. Finding that his questions were irrelevant, the hearing officer refused to allow the petitioner to ask Inmate Y why, if he had been moved to start alcohol and drug treatment, he had never the entered the treatment program and whether he owed people money.

The court found that whether Inmate Y owed other inmates money and the reason that Inmate Y was moved to a different block were relevant to petitioner's defense. The hearing officer's refusal to ask these questions, the court found, meant that there was virtually no testing of Inmate Y's credibility.

Finally, the court was troubled by the fact that the hearing officer was not informed of the identity of the confidential informant (CI) who had reported that petitioner had a weapon in his cell. Although the petitioner thought the CI was Inmate Y, the hearing officer was unable to assess the petitioner's defense without knowing the CI's identity.

Based on these circumstances, the court held that the petitioner did not receive a fair hearing and that the minimum due process standard was not met. For that reason, the court ordered the respondents to reverse the hearing and expunge all references to the charges from the petitioner's records.

Umar Harvey represented himself in this Article 78 proceeding.

After Filing of Article 78 Challenge to First Re-hearing, DOCCS Cannot Conduct a Second Re-hearing

In February 2016, the Department conducted a re-hearing (Re-hearing 1) related to charges that arose in December 2015. The accused prisoner was again found guilty and he appealed. After obtaining a final administrative decision affirming Re-hearing 1, on April 1, 2016, the accused prisoner's attorney submitted a request for reconsideration, seeking reversal due to the failure to fully electronically record the hearing. On April 26, the accused prisoner filed an Article 78 challenge to Re-hearing 1. On April 28, two days after the petition was filed, the Department, having granted the request for re-consideration and ordered a new hearing, conducted a second re-hearing (Re-hearing 2) at which the petitioner was again found guilty. The petitioner did not attend the hearing, appearing only to tell the hearing officer that because he had filed the Article 78 action, the Department did not have the authority to hold Re-hearing 2.

The respondents argued that the Article 78 challenge to the Re-hearing 1 should be dismissed because 1) the Department had already reversed the hearing challenged in the proceeding and petitioner had received the relief that he was seeking in the petition; 2) the Department did not have notice that the Article 78 had been filed; 3) the petitioner's lawyer had requested that the Department reconsider the its affirmation of the hearing and 4) because Re-hearing 2 had been held, it must be challenged through the administrative appeal process.

The petitioner argued that 1) after reversing Re-hearing 1 on April 1, the Department had no authority on April 28 to conduct Re-hearing 2 because petitioner had already commenced the Article 78; 2) the Department had notice that he had filed the Article 78 when he objected to Re-hearing 2 by letter and by making a formal statement at Re-hearing 2 that the Department had no jurisdiction to conduct that re-hearing and refused to participate in the hearing. In addition, the petitioner's attorney notified the respondent that because the petitioner had filed the Article 78 challenge to Re-hearing 1, the respondent did not have the authority to conduct Re-hearing 2.

Citing Matter of Rahman v. Coughlin, 492 N.Y.S.2d 116 (3d Dep't 1985), the court in Matter of Paige v. Annucci, 2016 WL 6561602 (Sup. Ct. Franklin Co. Sept. 29, 2016), ruled that once the petitioner had filed his Article 78 challenge to Re-hearing 1, the Department lacked the authority to convene a second re-hearing without first getting the court's permission. And, it noted, "inasmuch as the respondent [had] concluded that the February 2016 [hearing] was deemed to be insufficient due to the failure to electronically record the hearing, the respondent concedes that the reversal was necessary." As such, the court reversed the February 2016 hearing (Re-hearing 1).

The court rejected the respondent's argument that because the petitioner had received a re-hearing in April 2016 (Re-hearing 2), he had received the relief sought in the petition, pointing out that the

petition sought dismissal and expungement of the charges as well the reversal of the hearing. Notwithstanding the respondent's argument that a re-hearing is the appropriate remedy for failing to electronically record the original hearing, the court noted that the petitioner did not participate in the hearing because the Department lacked the authority to conduct it and had advised the respondent of this.

The court then addressed the issue of remedy. On this issue, the court noted that at the February 2016 hearing (Re-hearing 1), the petitioner asked that a particular officer with firsthand knowledge of the events be called as a witness. However, the officer had retired and the unanswered phone calls to the officer which the hearing officer averred he had made were not recorded. In addition to this witness, the hearing officer had wrongfully failed to call two other witnesses. And finally, the court found that the passage of time since the charges were first filed created an impediment to the petitioner's defense as the underlying incident was now "remote in time." The violation of the petitioner's fundamental right to call witnesses, in combination with the passage of time between the incident and the reversal of the hearing, the court held, made expungement of the charges the appropriate remedy.

Samuel Paige represented himself in this Article 78 proceeding.

HO's Failure to Inquire as to Reason for Witness Refusals Leads to Expungement

In Matter of Darious Ferguson v. NYS DOCCS, Index No. 3001-16 (Sup. Ct. Albany Co. Sept. 19, 2016), the petitioner argued that the challenged hearing must be reversed because the hearing officer, without sufficient explanation, denied his request for 19 proposed witnesses.

The petitioner was charged with fighting, threats, and violent conduct. At his hearing, he proposed calling 19 witnesses to support his defense. These witnesses did not testify and the hearing officer failed to provide any reason for not calling them or any forms showing that they had refused to testify. After he was found guilty, the petitioner filed an Article 78 challenge to the determination of guilt.

The court noted that an inmate has a conditional right to call witnesses at a prison disciplinary hearing and that 7 NYCRR 254.5(a) requires that when a request for a witness is denied, the hearing officer provide the inmate with a written statement stating the reasons for the denial.

Here, the court found, the administrative record was **bereft of** (lacking) any sign that the hearing officer made an effort to contact the proposed witnesses to determine if they would testify. The only reference to the 19 witnesses was the hearing officer's comment that the request was "out of hand," and that he could not compel testimony. Thus, the court found, the hearing officer had failed to provide an individualized basis for any of the purported refusals. Under these circumstances, the court held, the hearing officer violated the petitioner's right to call witnesses and the hearing must be reversed and the charges expunged from the petitioner's disciplinary records.

Stephen Dratch of Franzblau Dratch, P.C. represented the petitioner in this Article 78 proceeding.

Court Finds DOCCS Established that Petitioner Waived Right to Attend the Hearing

In Matter of Daniels v. Annucci, 37 N.Y.S.3d 470 (3d Dep't 2016), after he was found guilty of conspiring to bring drugs into the prison, smuggling, making a three way telephone call and violating facility visiting room procedures, the petitioner filed an Article 78 challenge, arguing that he was denied his right to attend the hearing. The court disagreed, finding that the testimony of an officer that he had attempted to escort the petitioner to the hearing, and that when the petitioner had

refused to leave his cell, he had advised the petitioner that the hearing would proceed in his absence, combined with the exclusion form documenting the petitioner's refusal to attend the hearing and informing him that the hearing would continue in his absence and the officer's testimony that the petitioner had refused to sign the exclusion form, were sufficient to show that the petitioner had waived his right to attend. Further, the court held, by failing to attend the hearing, the petitioner had failed to preserve any procedural issues that may have arisen at the hearing.

Wendell Daniels represented himself in this Article 78 proceeding.

Hearing Officer Did Not Violate Petitioner's Right to Contact His Attorney

Prisoners do not have the right to either retained or assigned counsel at their disciplinary hearings. See Matter of Jeckel v. New York, 975 N.Y.S.2d 697 (3d Dep't 2013). They do however, have the right to a reasonable opportunity to seek and receive the assistance of an attorney. Id. In Matter of Baxton v. Annucci, 2016 WL 5172560 (3d Dep't 2016), the petitioner challenged a Tier III hearing based on the assertion that he was denied the opportunity to contact his attorney for assistance in preparing his defense. The court rejected his claim, finding that the record of the hearing showed that the hearing officer twice adjourned the hearing for a total of three weeks to provide the petitioner with the opportunity to talk to his lawyer but that the petitioner had not done so. Under these circumstances, the court held, the hearing officer had provided the petitioner with a reasonable opportunity to seek legal assistance.

James Baxton represented himself in this Article 78 proceeding.

Court of Claims

Claimant Must Show Hearing Result Would Have Been Different If Rights Had Been Honored

In Bottom v. State of New York, 2016 WL 5509124 (4th Dep't 2016), the plaintiff asked the court to find that he had wrongfully been confined to SHU and award him damages for anxiety and mental distress. The lower court dismissed the claim, finding that the State was entitled to absolute immunity. On appeal, the Fourth Department disagreed with that finding, but nonetheless upheld the dismissal on other grounds.

The Facts

After photographs of family members and friends at a memorial services for a member of the Black Panther Party were found in his cell, the claimant was charged with violating Rule 105.14, unauthorized organization. At his hearing, the claimant asked that three officers be called as witnesses to testify that they had reviewed the photos and had permitted the claimant to possess them. The hearing officer refused to call the witnesses, found the claimant guilty and imposed punishment. After the claimant had spent 66 days in SHU, the hearing was reversed. He then brought this claim for unlawful confinement to SHU.

Absolute Immunity Defense & Violation of Due Process

The defendant State of New York moved to dismiss the claim, arguing that the State is absolutely immune from claims relating to the disciplinary determinations of its hearing officers. The court ruled that where the actions of correction personnel violate the due process safeguards set forth in 7 NYCRR parts 252 through 254, they are not immune from suit. See, Arteaga v. State, 532 N.Y.S.2d 57 (1988). Further, in ruling that the proffered testimony of the claimant's witnesses was

irrelevant, the court wrote, the hearing officer had improperly limited the scope of evidence and as a result, failed to consider whether the possession of alleged contraband violated Rule 105.14. The court concluded that the proposed testimony was material and relevant because it tended to support the claimant's defense and also should have been permitted as evidence of mitigating circumstances with respect to the punishment imposed.

Changing the Outcome of the Hearing

In order to prevail on his claim of unlawful SHU confinement, in addition to showing that his rights to due process of law were violated, a claimant must show that had his rights been honored, it would have changed the outcome of the hearing. See, Moustakos v. State, 21 N.Y.S.3d 502 (4th Dep't. 2015). Here, the court found, the claimant had failed to produce evidence proving that had the witnesses been called, he would not have been found guilty. Based on this finding, the court affirmed the dismissal of the claim.

Anthony Bottom represented himself in this Court of Claims action.

Miscellaneous

Court Dismisses Challenge to Removal from Treatment Program

After the petitioner in Matter of Smith v. DOCCS, 142 A.D.3d 1212 (3d Dep't 2016), filed his Article 78 petition seeking an order requiring the Department to restore him to a treatment program, the respondent moved to dismiss the petition for failure to exhaust administrative remedies. The lower court agreed with the respondent and dismissed the petition. The appellate court agreed with the lower court. Petitioner was removed from the program in January 2014. The grievances upon which he relied to show that he had exhausted his administrative remedies were filed before that date. The letter of complaint that the petitioner filed after he was removed from the program, the court ruled, did not constitute a grievance, as that term is defined in 7 NYCRR 701.2(a). Based on these findings, the court affirmed the lower court's decision.

Ken Smith represented himself in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Denies Motion to Dismiss Claim of Retaliatory Use of Force

In a federal §1983 action for damages filed in 2014, Raheem Ford made the following allegations. Between August and November 2011, Mr. Ford filed seven grievances against officers who were members of the Order of the Brotherhood (The Brotherhood), a group of officers at Coxsackie C.F. who were known to assault inmates. In December 2011, Mr. Ford was assaulted by several members of The Brotherhood, in retaliation either for the grievances or for the verbal altercation he had with an officer. During the assault, the officer fractured Mr. Ford's jaw, broke his facial bones and fractured his eye socket.

Shortly after Mr. Ford filed the complaint, the defendants filed a Rule 12(b)(6) motion to dismiss the complaint for failure to state a claim. A Rule 12(b)(6) motion requires the court to dismiss a complaint where, even if all of the allegations in the complaint are true, they would not establish that the defendants violated the plaintiff's constitutional rights. The motion was referred to a Magistrate Judge for a report and recommendation.

In Ford v. Martuscello, 2016 WL 5322166 (N.D.N.Y. June 23, 2016), the court denied the defendants' motion. The court noted that in assessing whether a claim for retaliatory violation of constitutional rights states a claim, the court assumes that the allegations in the complaint are true. Then the court must decide whether 1) the conduct at issue was protected, 2) the defendants took adverse action against the plaintiff and 3) there

was a causal connection between the adverse action and the protected conduct. See, Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). The third step in the analysis can also be framed as whether the protected conduct was a substantial or motivating factor in the defendants' decision to take action against the plaintiff.

Applying this analysis to the facts before it, the Ford court held that there was no dispute over whether an assault constitutes an adverse action; it does. The questions before the court were:

> 1) Whether the plaintiff had plausibly alleged facts suggesting that he engaged in protected activity; and
>
> 2) Whether the protected activity was a substantial or motivating factor for the assault.

As to the first question, the court found that filing grievances is a constitutionally protected activity. See, Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995). Verbal disagreements with officers, however, are not constitutionally protected activities. See, Williams v. Smith, 2015 WL 1179339 (N.D.N.Y. Mar. 13, 2015).

As to the second question, the court noted that the plaintiff alleged that three defendants targeted him in retaliation for the grievances that he had filed against other officers. The fact that the officers who assaulted him were different from the officers named in his grievances was not fatal. See, Jean-Laurent v. Lane, 2013 WL 600213 (N.D.N.Y. Jan. 24, 2013). Here, the court ruled, it is sufficient that the plaintiff alleged that the officers against whom he filed grievances and the officers who assaulted him were all members of the The Brotherhood and that he believed that filing of grievances was the motivating factor for the assault. In addition, the court found that the close proximity in time between the filing of the grievances and the assault raised an inference that the filing of the grievances against members of The Brotherhood was a substantial or motivating factor for the assault. See Espinal v. Goord, 558 F.3d. 119 (2d Cir. 2009).

Based on these findings, the court recommended that defendants' motion to dismiss the complaint for failure to state a claim be denied.

Raheem Ford represented himself in this Section 1983 action.

Court Dismisses §1983 Action Seeking Damages for Wrongful Interference with Mail

In Robert E. Thomas v. Washburn, 2016 WL 6791125 (W.D.N.Y. Sept. 7, 2016), the court reviewed the caselaw discussing when interference with outgoing personal mail might constitute a violation of a prisoner's First Amendment rights. The court's consideration of this issue was required when the defendants moved to dismiss the case for failure to state a claim. In the context of a complaint alleging a violation of a constitutional right, a motion to dismiss a case for failure to state a claim – known as a Rule 12(b)(6) motion – will be granted when the court finds that even if the plaintiff proves the allegations in his or her complaint, he or she will not have established that his or her constitutional rights were violated.

In Thomas v. Washburn, the plaintiff sought damages for, among several other claims, two defendants' wrongful interference with his mail, which, the plaintiff alleged, violated his First Amendment rights. He alleged that on three occasions in June and August of 2011, defendants working in the mail room at Southport C.F., without authorization, opened and read his non-legal outgoing mail. Based on what the defendants read in his letter, the plaintiff was charged with and found guilty of violating several prison rules. The defendants moved to dismiss this claim, arguing that even if the plaintiff could prove that they engaged in this conduct, the conduct did not violate the plaintiff's First Amendment rights.

The court first turned to the Second Circuit Court of Appeals decision in Hall v. Curran, 818 F.2d 1040 (2d Cir. 1987). In Hall, the Court noted that "under the First Amendment, interference with an inmate's outgoing non-legal mail **is permitted if**

the alleged interference furthers 'an important or substantial governmental interest unrelated to the suppression of expression . . . [and] . . . [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.' " Hall, quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974). This analysis grew out of standard adopted by U.S. Supreme Court in Thornburgh v. Abbott, 490 U.S. 401 (1989), which held that prison regulations affecting a prisoner's receipt of non-legal mail, must be reasonably related to legitimate penological concerns. In addition, the Thompson court noted, "the penological interests which justifies interference with outgoing private mail must be more than just the general security interest which justifies most interference with incoming mail." Unless the challenged interference is part of a regular pattern or practice of such interference, absent other prison concerns with the particular inmate whose mail is being opened, the interference is not a violation of the inmate's First Amendment rights. Courts have held that limited interference with an inmate's outgoing mail, without a legitimate penological concern is not a constitutional violation. Rickett v. Orsino, 2013 WL 1176059 (S.D.N.Y. Feb. 20, 2013); Green v. Niles, 2012 WL 987473 (S.D.N.Y. Mar. 23, 2012). In both of these cases, the courts found that two instances of interference with the plaintiffs' outgoing mail did not violate their First Amendment rights.

Applying the law set forth in the preceding paragraphs to the facts before it, the court held that even if the plaintiff could prove the allegations in his complaint – that his non-legal outgoing mail had been interfered with 3 times – he could not show that his First Amendment rights had been violated. The court therefore granted the defendants' motion to dismiss the First Amendment claims.

Robert Thompson represented himself in this Section 1983 action.

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