

Pro Se

Vol. 26 No. 5 October 2016

Published by Prisoners' Legal Services of New York

Second Circuit Agrees that DOCCS and Parole Executives are Liable for PRS Violations

In 2011, Paul Betances filed a class action suit seeking damages for the unlawful imposition and enforcement of post-release supervision. In August 2015, in Betances v. Fischer, 144 F.Supp.3d 441 (S.D.N.Y. 2015), the district court granted summary judgment to the plaintiffs, finding that the defendants, executives for DOCCS and the Division of Parole, had failed to make reasonable efforts to comply with Earley v. Murray, 451 F.3d 71 (2d Cir. 2006), a Second Circuit decision holding that it was unconstitutional for DOCCS to administratively impose post-release supervision when a term of post-release supervision had not been imposed by the sentencing judge. The defendants appealed, and on September 16, 2016, in Betances v. Fischer, 2016 WL 4926153 (2d Cir. Sept. 16, 2016), the Court of Appeals for the Second Circuit, affirmed the District Court's decision.

Background

In 1998, the New York state legislature amended the state's sentencing laws to require that when courts impose a determinate sentence, they also impose a period of PRS. Between 1998 and 2006, many judges failed to impose PRS, and when defendants arrived at DOCCS, DOCCS would administratively add to their determinate sentences the longest period of PRS that the judge could have imposed. As a result of this policy, DOCCS imposed PRS on at least 8,100 prisoners upon

whom the sentencing judges had not imposed PRS. Eighteen-hundred (1,800) of these prisoners were released to parole supervision. A percentage of those prisoners released to serve periods of PRS that were not imposed by their sentencing judges, were returned to prison and served some or all of the administratively imposed PRS in prison.

In 2006, in Earley v. Murray, 451 F.3d 71, *reh'g denied*, 462 F.3d 147 (2d Cir. 2006), the Second Circuit held that pursuant to the U.S. Constitution, only a judge can impose PRS and that the periods of PRS imposed on prisoners by DOCCS

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ATTICA REVISTED

A Message from the Executive Director – Karen L. Murtagh

“Blood in the Water: The Attica Uprising of 1971 and Its Legacy,” a recently published book authored by Heather Ann Thompson, recounts in gripping detail the events that led up to the takeover of Attica prison, the four days of negotiations to obtain improvements in conditions of confinement, the assaults committed by the state police under orders to re-take the prison, the attempts to cover up what the State Police did during the re-taking of the prison and the various investigations into the uprising and its aftermath. Among the telling circumstances of the uprising was that it was spontaneous; the events that shocked the state and nation were ignited by a misunderstanding, a miscommunication. While the uprising was not planned, given the tensions of life at Attica, it should have been predicted.

History is replete with other examples of tragic events that are triggered by misunderstandings or miscommunications. The tragic massacre of Native Americans at Wounded Knee was set in motion when a deaf man didn't understand an order that was issued; North Korea declared war on South Korea after the U.S. Secretary of State, in an informal speech, accidentally omitted South Korea from a list of countries that the U.S. was willing to protect; Greece invaded Bulgaria after 15 years of hostility, when a Greek soldier was shot after allegedly crossing the border into Bulgaria while chasing after his dog; and the list goes on. These events weren't planned, but they were predictable.

They were predictable because underlying the misunderstanding or miscommunication in each of these events was a level of distrust and disrespect that catapulted any miscommunication to a point of no return. That is what happens when human beings have lost all trust in others or believe that others have no respect for them.

As for the events at Attica in September 1971, Ms. Thompson explains, the incident that ignited the uprising began when a prisoner was accused of hitting an officer and was locked in solitary confinement. The next morning a few more incidents occurred and a group of prisoners were locked in a tunnel together. The prisoners believed that this was a set up and that the officers planned to attack them. To prevent an assault by the officers, when the officers returned, the prisoners attacked them. As word of the fight between officers and prisoners spread throughout the prison, other prisoners began to arm themselves. By the time the officers released the prisoners in the tunnel, they found that other prisoners had begun taking control of the prison.

But why did the prisoners in the tunnel believe that the officers were going to attack them? The answer to this question is rooted in the deterioration of relations between prisoners and prison officials and in the deplorable conditions of confinement at Attica.

In the spring of 1971, prisoners had written a letter to Governor Rockefeller complaining of the conditions at Attica and asking him to intervene. Prisoners were only being given one roll of toilet paper a month and one shower a week; they were placed in solitary confinement without any due process protections; they were not allowed to practice their religion; they had extremely limited contact with the outside world; they were being denied essential and basic medical treatment; they were being harassed physically and verbally and they had no avenue to air their grievances or to obtain legal assistance to challenge their conditions of confinement. Governor Rockefeller did not respond to the letter. When prisoners in NYS (and across the country) learned that a San Quentin inmate had been shot in an altercation with corrections officers, tensions were furthered heightened. Distrust and disrespect permeated the atmosphere, and timing and poor communications conspired to create an avoidable and tragic situation.

“Those who do not learn history are doomed to repeat it,” is an oft quoted phrase. On September 13, 2016, 45 years after the Attica uprising, Attorney General Eric Schneiderman and Thomas J. Ruller, Director of the New York State Archives, announced the creation of a new public website hosting a digital collection of documents relating to investigations and litigation arising from the 1971 Attica prison uprising and its aftermath. The first set of documents that will be available will be from the *Al Jundi v. Rockefeller* lawsuit brought by prisoners and families of prisoners killed in the prison retaking who sued the State of New York.

This is a step in the right direction and, while additional documents relating to the uprising (including the third section of the Attica report filed by former NYS Court of Appeals Judge Bernard Meyer in 1974), should also see the light of day, important steps are being taken to avoid the mistakes of the past. PLS, a critical part of the post-Attica reforms, is and remains a proud and long-standing bulwark in that effort.

. . . . *Continued from Page 1*

were a nullity. Following this ruling, DOCCS continued to impose PRS and the Division of Parole continued to conduct parole revocation proceedings for individuals on administratively imposed PRS and to return individuals to prison whom were found to have violated the conditions of administratively imposed PRS. This practice continued until at least April 2008.

In April 2008, the New York State Court of Appeals ruled that for a term of PRS to be included in the sentence, *New York state law* requires that it be imposed by the sentencing court. The Court of Appeals did not reach the question of whether this was also required by the U.S. Constitution. After this decision, a resentencing program was implemented and many people upon whom DOCCS had imposed PRS went before their sentencing judges, some of whom imposed PRS and others of whom re-imposed the original sentence, that is, a determinate term with no PRS.

The Betances lawsuit seeks damages for people upon whom DOCCS imposed PRS and who were required to serve PRS even though a judge had not sentenced them to PRS. The primary defendants whom the plaintiffs sought to be held accountable for this illegality were then Commissioner Brian Fischer (now retired), then DOCCS Counsel Anthony Annucci, (now Acting Commissioner), and Terence Tracy, Counsel to the Division of Parole (DOP).

Defendants' Claim That They Are Entitled to Qualified Immunity

A motion for summary judgment brought on the basis that the defendant government officials are entitled to qualified immunity will not be granted where:

- 1) the facts taken in the light most favorable to the officials establish the violation of a constitutional right; and
- 2) the officials' actions violated clearly established statutory or constitutional rights of which a reasonable person would have known.

In reviewing the current decision on qualified immunity, the Court noted that in a 2013 decision the Court had concluded that in 2006, after its decision in Earley, it was clearly established that where the sentencing court had not included PRS in a defendant's sentence, DOCCS could not add PRS to a defendant's sentence without violating the Constitution. Thus, the only issue before the Court in 2016 was whether the defendants had taken objectively reasonable efforts to relieve the burdens of those unlawfully imposed terms of PRS after the defendants knew that administratively imposing PRS violated federal law. Thus, the questions before the Court were:

1. When would the defendants have reasonably known that DOCCS's and DOP's actions violated federal law; and
2. After the defendants reasonably would have known that their conduct violated federal law, did they make an objectively reasonable effort to comply with the Earley holding.

The three defendants admitted that they were aware of the Earley decision – Defendant Annucci in June 2006; Defendant Tracy by December 2006; and Defendant Fischer in January 2007. Based on these dates and the fact that the Second Circuit did not deny the defendants' motion for a re-hearing in Earley until August 31, 2006, the Court concluded that Defendant Annucci could reasonably have waited until after August 31, 2006 to take action. The Court remanded to the district court the issue of the dates after which it would have been unreasonable for Defendants Fischer and Tracy to have failed to take action.

The Court found that Defendants Annucci, Fischer and Tracy did not take the first meaningful steps to remediate DOCCS's and DOP's PRS practices until April 2008. The Court found that the steps that the defendants took were meaningful but the delay in taking them was not reasonable. Thus, the Court held, there was an unexcused delay of between 14 and 19 months between August 2006 and the first significant remedial efforts that was objectively unreasonable.

Based on this analysis, the Court affirmed the district court's decision finding that Defendants Annucci, Fischer and Tracy were not entitled to qualified immunity and remanded the case to the district court for further proceedings

News and Notes

Settlement Reached with DOCCS on New Hepatitis C Policy

Last year, PLS filed Corris v. Koenigsmann, et al., Case No. 9:15-cv-01205 (N.D.N.Y. 2015), a lawsuit challenging DOCCS' policy of only providing Hepatitis C monitoring and treatment to prisoners who were drug-free for at least six months. Recently, to settle this lawsuit, DOCCS agreed to include in the group of prisoners eligible for treatment, those prisoners who have a history of drug or alcohol use but who otherwise medically qualify for Hepatitis C treatment and monitoring. On August 12, 2016, DOCCS amended its Hepatitis C Primary Care Practice Guidelines ("Hepatitis C Policy"). This policy change makes New York one of the first states in the country to explicitly include incarcerated people with addiction issues in its Hepatitis C treatment plan.

Hepatitis C is a viral infection that affects the liver and can lead to serious liver problems. It is transmitted through blood-to-blood contact only. Although new treatments are highly effective, they are also very costly.

The plaintiff in this case received misbehavior reports for urinalysis violations but had advanced liver disease and otherwise qualified for Hepatitis C treatment. The lawsuit alleged that current medical standards followed by the American Association for the Study of Liver Diseases, the Infectious Diseases Society of America, and the National Institutes of Health do not support a drug-free requirement. Instead, the medical community urges treatment, even for active drug users, because treatment decreases both the costs of further healthcare and the likelihood of virus transmission.

The Department's Hepatitis C Policy recommends treatment for patients with stage 3 or 4 fibrosis, which indicates high levels of liver inflammation from the virus. Under the new guidelines, if a patient qualifies for Hepatitis C treatment, but has a recent history of substance abuse, he or she must still be evaluated for treatment by an Infectious Disease Specialist (IFD). The new Hepatitis C Policy states: "Evidence of substance abuse (drug and/or alcohol) in the past six months shall not serve as a *per se* exclusion for any care or treatment. Evidence of such substance abuse instead may only be considered as one factor among all others in assessing and evaluating each individual's needs and suitability for care and treatment. Such evidence also may be noted but shall not in any case be used to prevent any Initial Work Up and referral to the IFD and/or specialist. If you have an inmate/patient who qualifies for Hepatitis C treatment and has a drug or alcohol-related incident in the past six months, submit the inmate/patient for all Initial Work Up tests and refer to the IFD/specialist to be evaluated individually."

Although there are other requirements to meet before being approved for Hepatitis C treatment, a history of drug use or misbehavior reports for drug or alcohol use can no longer be used to deny treatment. The Department's Hepatitis C Policy is available through the Freedom of Information Law (FOIL). Prisoners can request a copy of the policy by writing to the DOCCS Records Access Officer at State Office Campus, Building 2, Albany, NY 12226.

The Plattsburgh Office of Prisoners' Legal Services represented Adam Corris in this Section 1983 litigation.

How NYS's Anti-Discrimination Policies Affect the Formerly Incarcerated Applying for State Funded Housing

In May 2016, New York State Homes and Community Renewal, a state agency, issued guidelines for applying New York State's Anti-Discrimination Policies when assessing applicants for state funded housing who have criminal convictions. Among those providers to whom the

guidelines apply are providers of Section 8 housing. Included in the guidelines are the following:

- The provider may only consider convictions or pending arrests for offenses that involve physical danger or violence to persons or property or that adversely affect the health, safety and welfare of other people.
- Even where convictions for such offenses exist, those convictions cannot be an automatic bar to the applicant being selected for housing.
- In assessing the significance of a criminal conviction, no one factor can be considered in isolation; the interplay between the factors must be taken into account. For example, a reviewer may look for evidence of rehabilitation if an applicant was convicted of a serious crime.
- The provider must give the applicant information explaining the procedures and policies pertaining to background checks and the applicant's right to review, contest and explain the information revealed by the background check and to present evidence of rehabilitation.

There remain two automatic bars to admission to state-sponsored housing. Individuals who were convicted of producing methamphetamine in a house or who are required to be lifetime registrants on the sex offender registry are ineligible for state sponsored housing.

A Letter from President Obama to a New York State Prisoner

Mary Vorhees, a prisoner at Bedford Hills C.F., wrote to President Obama to thank him for issuing federal clemencies, to invite him to visit a women's prison in New York State and to inform him of the difficulties that prisoners in New York State are experiencing as a result of the Board of Parole's decisions denying parole based on the nature of the crimes that they had committed. President Obama sent her the following response:

Dear Mary,

Thank you for writing. As President, I believe that all people, including those who have made mistakes – even significant mistakes – have the capacity to make the right choices and to have positive impact on others. I visited El Reno Federal Penitentiary to underscore my commitment to making sure our justice system is not just a punishment system, but one that also rehabilitates, allows people to repay their debt to society, and empowers individuals to forge a brighter future for themselves, their families, and their communities.

Thank you, again, for your message. If you have faith in yourself and work hard to pursue a productive path, you can affect not only your own life, but also the lives of those close to you. I wish you all the best.

Sincerely,

Barack Obama

PRO SE VICTORIES!

Matter of Santiago Gomez v. Superintendent, Franklin C.F., Index No. 287-16, (Sup. Ct. Albany Co. June 1, 2016). Santiago Gomez successfully opposed the respondent's motion to dismiss for non-exhaustion his claim that he was wrongfully denied a limited credit time allowance (LCTA). The respondent took the position that to exhaust his administrative remedies, the petitioner had to use the grievance system. The respondent did not dispute that Mr. Santiago had filed an appeal from the denial of his application for a LCTA and that his appeal had been denied. Mr. Santiago defeated this argument by pointing out that the requirements of the Inmate Grievance Program do not apply where an individual decision or disposition of any current or subsequent program or procedure has a written appeal mechanism that extends to review outside the facility. The court agreed with the petitioner that because an appeal from the denial of an application for a limited time

credit allowance is decided by the DOCCS Central Office – an appeal mechanism that is outside the facility – he had exhausted his administrative remedies.

Matter of Myron Dukes v. Tina Stanford, Index No. 210-16 (Sup. Ct. Albany Co. Aug. 1, 2016). Myron Dukes appealed a denial of parole release, arguing that the Parole Board’s failure to consider his “youth and attendant circumstances” at the time of the offense violated the Third Department’s holding in Matter of Hawkins v. NYS DOCCS, 30 N.Y.S.3d 397 (3d Dep’t 2016). The court agreed and ordered a new hearing.

DOCCS Reverses 39 Determinations Challenged in Pro Se Article 78 Proceedings

Between March 1 and September 16, 2016, the administrative determinations challenged in the below listed Article 78 actions were administratively reversed and expunged at the request of the Assistant Attorneys General assigned to represent the respondents. Congratulations to all of you who persevered in your efforts to obtain justice from the courts!

Matter of Christopher Shapard v. Anthony Annucci

Matter of Jeffrey Hill v. Anthony Annucci

Matter of Terry Daum v. Donald Venettozzi

Matter of Timothy Vail v. Corey Bedard

Matter of David Roye v. Anthony J. Annucci

Matter of Carmine Corrieri v. Anthony J. Annucci

Matter of Alfonso Rizzuto v. Albert Prack

Matter of Terrence James v. Albert Prack

Matter of Jermain Boykin v. Albert Prack

Matter of James R. Mercer Jr. v. David Stallone

Matter of Dwight Vaughn v. Robert F. Cunningham

Matter of Jean L. Frantz v. Joseph T. Smith

Matter of Jessie J. Barnes v. Karen Bellamy

Matter of Kendale Robinson v. Albert Prack

Matter of Jahmel Clark v. NYS DOCCS, et al. (4 hearings)

Matter of Steven Makas v. Donald Venettozzi

Matter of Albert Robinson v. Anthony J. Annucci

Matter of Sharef Redmon v. Joseph T. Smith

Matter of Darnell Ballard v. Steven E. Racette

Matter of Paul Thompson v. Anthony J. Annucci

Matter of Eric Tolliver v. Brian Fischer

Matter of John Zoccoli v. Anthony J. Annucci

Matter of Javon Gonzalez v. Albert Prack

Matter of Tony Williams v. Donald Venettozzi

Matter of James Chao v. Timoth Hollingshead

Matter of Daryl Lawrence v. Anthony J. Annucci

Matter of Curtis Stays, v. Anthony J. Annucci

Matter of Corey Flood v. Albert Prack

Matter of Tyrone Houston, v. Anthony J. Annucci

Matter of David Guifre v. Anthony Annucci

Matter of Andre Boyd v. Anthony J. Annucci

Matter of Robert Haigler v. Paul Chappius

Matter of Michael Kirshtein v. NYS DOCCS

Matter of Derek Simmons v. Michael Kirkpatrick

Matter of Jasper Mitchell v. DOCCS

Matter of Naldy Rodriguez v. Albert Prack

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

Conflict Between Officer's Testimony and Videotape Not Fatal to Evidentiary Sufficiency

In Matter of Redmon v. Smith, 35 N.Y.S.3d 672 (3d Dep't 2016), the petitioner argued that the determination of guilt was not supported by substantial evidence because there was a conflict between the officer's testimony regarding which hand the petitioner used when he slapped the victim in the visiting room and the videotape of the incident and because, contrary to the testimony of the officer and what was on the videotape, the victim testified that the petitioner had not slapped her.

The court disagreed. It found that the conflict between the videotape and the officer's testimony was resolved by the officer's testimony that the videotape was accurate. Further, the court held, it was the hearing officer's responsibility to resolve the conflict between the victim's testimony and what could be observed on the videotape. The hearing officer credited the officer's testimony and the events shown on the videotape over the victim's testimony.

Sharef Redmon represented himself in this Article 78 proceeding.

Insufficient Nexus Between Drugs and Petitioner Leads Court to Reverse Determination of Guilt

After the petitioner, who was the last patient for the day, left the dental office, the dentist found synthetic marijuana on the floor near the dental chair. Petitioner was found guilty of possessing the

contraband. In his Article 78 challenge to the determination of guilt, Matter of Funches v. NYS DOCCS, 34 N.Y.S.3d 797 (3d Dep't 2016), the petitioner argued that the evidence was insufficient to support the determination of guilt. While the evidence showed that the dentist had found the contraband after Mr. Funches left the chair, she also testified that she had not cleaned the area around the dental chair prior to petitioner's arrival. Rather, she testified, the cleaning of that area is the responsibility of her assistant. The assistant did not testify. There was also an absence of testimony with respect to how many inmates had received dental treatment that day and when the area was cleaned prior to the discovery of the contraband. Under the circumstances, the court held, that the possibility that another inmate had dropped the contraband "cannot be eliminated." The court therefore concluded that a reasonable inference could not be made that the petitioner had possessed the contraband simply because he was the last patient treated before its discovery. Based on this analysis, the court found that the determination of guilt was not supported by substantial evidence and reversed the hearing.

Travis Funches represented himself in this Article 78 proceeding.

Failure to Follow Mail Watch Procedures Results in Reversal of Determination of Guilt

Based on information obtained by reading the petitioner's mail, petitioner was found guilty of numerous rule violations. He challenged the determination of guilt in an Article 78, arguing that the respondent's failure to follow the regulations governing when the superintendent can authorize a mail watch should result in a reversal of the hearing. In Matter of Ramos v. Annucci, 34 N.Y.S.3d 914 (3d Dep't 2016), the court noted that the regulation, 7 N.Y.C.R.R. §720.3(3)(e), requires that the authorization to open, inspect and read outgoing correspondence set forth specific facts forming the basis for the action. The authorization in the record failed to set forth the specific facts that formed the basis for authorizing

the opening of the petitioner's mail. Accordingly, the court ruled, the determination of guilt had to be annulled.

Main Street Legal Services in Long Island City represented Jason Ramos in this Article 78 proceeding.

Accepting a Clearly Untrue Reason for a Witness's Refusal to Testify Leads to Reversal

In Matter of Peterson v. Annucci, 36 N.Y.S.3d 319 (3d Dep't 2016), the petitioner was found guilty of assaulting an inmate and possessing a weapon. The charges against him arose when an officer found the petitioner and the victim in a room where one other inmate was present. The victim had injuries and a weapon that had been used was found in a wastebasket in the room. According to the unusual incident report, the third inmate told the officer that the petitioner had assaulted the victim. The third inmate signed a witness refusal form, adding that his reason for refusing to testify was that he knew nothing about the incident.

In his Article 78 challenge to the hearing, the petitioner argued that accepting the witness's reason for refusing to testify – that he knew nothing about the incident – when the witness had previously stated that he saw the petitioner assault the victim, violated the petitioner's right to call witnesses.

The court agreed, finding that where a witness gives a **specious** (baseless) reason for refusing to testify and the hearing officer fails to make further inquiry, the hearing officer has violated the accused's right to call witnesses. With respect to the appropriate remedy for the violation, the court noted that the hearing officer had provided a good faith reason and that therefore the appropriate remedy was remittal for a new hearing.

David Peterson represented himself in this Article 78 proceeding.

Miscellaneous

The Element of Introduction in the Offense "Promoting Prison Contraband"

In People v. Respress, 34 N.Y.S.3d 652 (3d Dep't 2016), a DOCCS investigator questioned a visitor in the lobby of Elmira C.F. about whether she had anything illegal on her person. When she revealed that she had buprenorphine pills, the prisoner whom she planned to visit was arrested and charged with being an accomplice to promoting prison contraband in the first degree. The defendant was found guilty of having knowingly and unlawfully introduced a dangerous contraband into a detention facility. On appeal, the defendant argued that in the absence of evidence that the drugs were presented or conveyed to a particular person or persons in the prison, the jury could not conclude that the visitor had "introduced" contraband into the facility.

The court rejected the defendant's argument. It held that in the absence of a statutory definition, words must be given their ordinary meaning. The commonly understood meaning of "introduce," the court wrote, is "to lead or bring in especially for the first time;" there is nothing to indicate that the legislature intended the meaning of "introduce" to vary from the commonly accepted definition. As additional support for this definition, the court cited to its decision in People v. Machuca, 845 N.Y.S.2d 201 (3d Dep't 2007), lv. denied 857 N.Y.S.2d 46 (2008), where it used this definition and the fact that if the legislature had intended to require something more than the act of transporting the contraband into the prison, such as delivery to a prisoner, it could have done so. Based on this analysis, the court found that the visitor's act of bringing drugs into the prison was sufficient to establish the element of introduction.

FEDERAL COURT DECISIONS

Total Ban on Motorized Wheelchairs Violates Americans with Disabilities and Rehabilitation Acts

As a result of cerebral palsy and scoliosis, Nathaniel Wright has severely deformed legs. To accommodate his disability, he asked the Department of Corrections and Community Supervision's (DOCCS or the Department) to allow him to use his motorized wheelchair. The Department acknowledged that Mr. Wright is mobility impaired, but denied his request to use the motorized wheel chair, stating that its mobility assistance program gives Mr. Wright meaningful access to prison programs, benefits and services.

Following the denial of his appeals, Mr. Wright filed a complaint in federal court seeking a determination that DOCCS' refusal to allow him to use a motorized wheelchair violated the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). The ADA and the RA prohibit the Department from excluding a qualified individual with a disability, by reason of such disability, from participating in or being denied the benefits of the Department's services, programs or activities and from discriminating against an individual with a disability.

To establish a violation of the ADA/RA, Mr. Wright had to show that he is a qualified person with a disability, that DOCCS is subject to the ADA/RA, and that by reason of his disability, Mr. Wright was denied the opportunity to participate in or benefit from DOCCS services, programs, or activities or that DOCCS otherwise discriminated against him by reason. Here, there was no dispute that Mr. Wright was a qualified person or that DOCCS is subject to the acts. The issue before the Court was whether the Department had denied Mr. Wright the opportunity to participate in or benefit from prison services, programs or activities or whether the Department had discriminated against Mr. Wright by failing to make reasonable accommodation.

The District Court granted summary judgment to the Department finding that it had reasonably

accommodated Mr. Wright by its mobility assistance program. Mr. Wright appealed to the Second Circuit Court of Appeals. It is the Second Circuit's decision in Wright v. NYS DOCCS, 2016 WL 4056036 (2d Cir. July 29, 2016) that is the subject of this article.

Facts Relevant to the Court's Decision

DOCCS recognizes that Mr. Wright has a permanent physical limitation and is therefore permitted to use a wheelchair. While recognizing this need, the Department took away the motorized wheelchair that Mr. Wright had brought with him to prison and provided him with a manual wheelchair, quad cane and kneepads and permitted him to use his personal wheelchair cushion. In response, Mr. Wright filed a grievance asking that he be allowed to use his personal motorized wheelchair. DOCCS denied the grievance, finding that Mr. Wright's needs were met by the non-motorized wheelchair and stating that because there are numerous safety and security issues relating to the possession and use of a motorized wheelchair in a correctional setting, DOCCS refusal to allow the motorized wheelchair was not unreasonable.

In response to Mr. Wright's appeal, the Central Office Review Committee (CORC) agreed with the Department's decision, noting that the strength of the battery and the massive amount of wiring supported the denial based on security concerns and concluding that Mr. Wright's needs were reasonably accommodated by the provision of a manual wheelchair and a mobility aid to push the wheelchair.

DOCCS has a policy that prohibits the use of motorized wheelchairs. Prisoners who need wheelchairs and cannot self-propel must rely on inmate mobility aides to push them through the prison. While at Marcy and Franklin Correctional Facilities, Mr. Wright was required to reserve a mobility aid several days in advance of the date when he needed assistance.

According to Mr. Wright, he can only self-propel a manual wheelchair for short periods of time and short distances. As a result, he is totally dependent on the mobility assistance program which, he asserted in his complaint, is unreliable

and ineffective. For example, sometimes, Mr. Wright had to ask 6 aides for assistance before he found one who was willing. On multiple occasions, due to unavailability of aides, he missed sick call, law library call outs, doctor appointments and meals. Due to his unwillingness to seek assistance at night for going to the bathroom, he wheels himself. As a result, on more than one occasion, he urinated or defecated on himself. Also due to the unreliability of mobility aides, Mr. Wright has not been able to perform a number of jobs that he could have performed if he had a motorized wheelchair, such working on the lawn and grounds crew. In addition, because Mr. Wright fears he could not escape if there is a fight in the yard and because no prisoners are available to push his wheelchair in the yard, he avoids using the yard for recreation.

The Department asserts that motorized wheelchairs can be used as weapons (they can weigh up to 275 pounds); can be used to hide contraband in places that are difficult to inspect; and are powered by dangerous acid batteries. Mr. Wright countered this argument by pointing out that electric typewriters, lamps, audio equipment and hair dryers – all of which are permitted by DOCCS – have wires and/or batteries and can be used to hide contraband. In addition, Mr. Wright's expert countered one of the Department's security concerns with an observation that the battery and wiring on Mr. Wright's wheelchair are secured so that they cannot be accessed without tools. Further the expert noted, as Mr. Wright had an insignificant disciplinary history, it was unlikely that he would use the motorized wheelchair to engage in behavior in which he has not engaged for the last 3 years.

Thirty state prison systems and the Federal Bureau of Prisons allow mobility impaired prisoners to use motorized wheelchairs. Only 11 states have a categorical ban like the Department's ban.

The Lawsuit

The Complaint

Nathaniel Wright's lawsuit seeks declaratory and injunctive relief. That is, he is asking the court to find that the Department's policy of categorically denying motorized wheelchairs to prisoners violates the ADA and the RA and to order that he be

permitted to use his own motorized wheelchair. Note that Mr. Wright is not asking the Department to buy him a motorized wheelchair.

The District Court Decision

After discovery, the parties cross moved for summary judgement. The District Court granted the defendant's motion and denied the plaintiff's. It found that the Department's blanket prohibition on motorized wheelchairs did not violate the plaintiff's rights under the ADA/RA and that the mobility assistance program was a reasonable accommodation of Mr. Wright's disability as this program gave him meaningful access to programs, benefits and services.

The Second Circuit Decision

An appellate court reviews a district court decision on summary judgment as though it were the initial decision maker. It resolves all disputed facts in favor of the non-moving party and draws all permissible factual inferences in favor of the non-moving party. It will affirm the judgment only if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.

The legal question before the appellate court was whether the plaintiff was, as a practical matter, denied meaningful access to services, programs or activities to which he was legally entitled. The hallmark of "meaningful access," the Second Circuit noted, is effectiveness. The defendant is only entitled to summary judgment if the undisputed record reveals that the plaintiff was accorded a plainly reasonable accommodation.

The Reasonableness of the Accommodation

To be reasonable, the accommodation must provide effective access to programs and activities. An accommodation is not reasonable where it is so inadequate that it deters the plaintiff from attempting to access the services otherwise available to him; meaningful access means giving prisoners meaningful participation in prison activities and programs.

Here, the court wrote, based on the evidence in the record, it could not conclude that the accommodations were reasonable because there was evidence that the mobility assistance program failed to allow the plaintiff to move freely and to participate in prison programs. Citing to the plaintiff's deposition, the court noted the following examples that the plaintiff was being denied meaningful access to prison services, programs and activities:

The plaintiff was at times unable to access programs and services that other inmates routinely access. For example, at times he was unable to visit the law library and missed multiple morning sick calls, doctor appointments and meals.

Because the plaintiff was unable to propel himself to the bathroom, on numerous occasions, he defecated and urinated on himself.

Jobs that the plaintiff hoped to perform such as working on the lawn and grounds crew were not available to him.

The plaintiff could not use the rec yard because of fears that he would be unable to escape quickly if a fight broke out.

The Court found particularly troubling the Department's requirement that the person seeking a mobility aide had to make his request "well in advance." This aspect of the program effectively prevented the plaintiff from moving about the prison and discouraged him from participating in prison activities. Also troubling was the requirement that the plaintiff seek out and rely on the cooperation of other inmates.

"Put simply," the Court wrote, "an examination of the record – with all inferences drawn in [the plaintiff's] favor – demonstrates that the mobility assistance program is fundamentally in tension with the ADA's and the RA's 'emphasis on independent living and self-sufficiency [, which] ensures that, for the disabled, the enjoyment of a public benefit is not contingent upon the cooperation of third persons.'" Based on this conclusion, the Court held that there were disputed issues of fact as to whether

the mobility assistance program is a plainly reasonable accommodation to meet the plaintiff's needs; as a matter of law, however, it is not a plainly reasonable accommodation.

The Reasonableness of Allowing the Use of a Motorized Wheelchair

Having concluded that the mobility assistance program did not, as a matter of law, reasonably accommodate the plaintiff, the court then considered whether the plaintiff has shown that an accommodation exists that is facially reasonable. If he has, it is then the defendant's responsibility to rebut the reasonableness of the proposed accommodation. To do so, the defendant, in this case DOCCS, must show that the proposed accommodation would cause it to suffer an undue hardship.

The court found that the record showed that the plaintiff's proposed accommodation – being allowed to use his motorized wheelchair – was facially reasonable. Relying on the motorized wheelchair, for fifteen years before he was incarcerated, the plaintiff "lived a self-sufficient life." And, because the effects of cerebral palsy, he cannot turn his wrists and therefore cannot operate a manual wheelchair. These two findings, in addition to his successful use of the motorized wheelchair when he first came into DOCCS' custody, support the conclusion that a motorized wheelchair would allow the plaintiff meaningful access to services, programs and activities. This conclusion is bolstered by the acceptance of motorized wheelchairs by 30 state prison systems and the federal Bureau of Prisons.

The court then looked at the evidence supporting the Department's position that allowing the plaintiff to use his motorized wheelchair would be "unduly burdensome." DOCCS' primary support for its argument that allowing the plaintiff to use his motorized wheelchair would be unduly burdensome is that it would violate the Department's policy prohibiting the use of motorized wheelchairs. The court found that the Department's blanket ban on motorized wheelchairs violated the ADA because it frees DOCCS from having to make individualized decisions pertaining to a disabled inmate's particular needs. An individualized determination of what a person who has a qualifying disability needs

to be reasonably accommodated is at the core of the ADA, the court found. Thus, once a disabled prisoner requests a non-frivolous accommodation, in the absence of an individualized inquiry into its reasonableness, the accommodation should not be denied.

Here, the court found, the record is clear that the defendant did not make an individualized assessment of whether the plaintiff's proposed accommodation was reasonable; rather, it relied on general safety and administrative concerns that had no connection to the plaintiff's situation. DOCCS did not assess whether the plaintiff's wheelchair presented a security threat nor did DOCCS consider whether the plaintiff was likely to use the wheelchair in ways that might create a threat to security (by considering his disciplinary history and past crimes). Because DOCCS did not engage in an individualized assessment of the reasonableness of the proposed accommodation, its denial violated the ADA and the RA.

Further, the court found, there were disputed issues of fact as to whether his use of his motorized wheelchair would be unduly burdensome. The plaintiff's evidence suggested that the risks and cost of using the wheelchair were low. The plaintiff would assume all costs associated with using the chair and DOCCS already allows several devices that have extensive wiring and rely on batteries. This, the court wrote, suggests that DOCCS' security concerns – the introduction of potentially dangerous materials – may be overstated. As for the concern that the plaintiff might use the wheelchair to ram other people, the court found that the absence of a history of behavioral problems while in prison provided a basis for concluding that the risk of ramming was particularly low in this case.

The court acknowledged that DOCCS had raised some facts that legitimately could be a basis for concluding that the plaintiff's use of his wheelchair could be unduly burdensome, e.g., he could hurt people by accidentally bumping into them; an employee would have to be assigned from other duties to regularly inspect the wheelchair and to transport it for repairs; etc. A reasonable fact-finder, the court concluded, might find in favor of either party. For this reason, the court vacated the district court's grant of summary judgment in favor

of DOCCS and remanded the case for further proceedings.

Because there was a disputed issue of fact as to whether the Department would suffer an undue hardship if it allowed the plaintiff to use his motorized wheelchair in its prison, the court remanded the case to the district court to consider this issue.

Joshua Cotter of Legal Services of Central New York represented Nathaniel Wright in this Section 1983 litigation.

Court Recommends that DOCCS Rewrite Two Provisions of Its Grievance Procedures

In 2014, Mark Williams filed a Section 1983 action alleging that three officers had assaulted him at Downstate C.F. The defendants moved to dismiss the action due to Mr. Williams' failure to exhaust his administrative remedies. The district court agreed that Mr. Williams had not fully and properly followed the procedures of the Inmate Grievance Program (IGP) and dismissed the case. Mr. Williams appealed. In *Williams v. Priatno, et al.*, 2016 WL 3729383 (2d Cir. July 12, 2016), the Second Circuit reversed that decision.

The Exhaustion Provisions

The IGP requires that a prisoner file a grievance within 21 days of the incident, or the issuance of the decision, about which the prisoner is complaining. For prisoners in general population, grievances are filed with the grievance clerk. Prisoners in special housing must give the grievance to an officer whose responsibility it is to pass it on to the grievance clerk. Upon receipt, the grievance clerk logs in the grievance and assigns it a number.

Harassment grievances – grievances which involve employee misconduct meant to annoy, intimidate or harm a prisoner – are sent to the superintendent on the same day that they are filed. The superintendent must investigate the grievance, render a decision and inform the prisoner of his decision within 25 days. If the superintendent does

not notify the prisoner of his decision within 25 days, the prisoner can appeal his grievance to the Central Office Review Committee (CORC). When the prison receives a decision from CORC, he has fully exhausted his administrative remedies.

If a prisoner is transferred to another prison while a grievance is pending, the response to the grievance will be sent to him at his new prison. If a prisoner who has been transferred wants to appeal, within 7 days of when he received the decision, he must mail the signed appeal to the IGP supervisor at the prison where the grievance was originally filed. If a prisoner wants to file a grievance about an incident that occurred, or a decision issued by staff, at the prison where he was before the transfer, he must file the grievance at the prison where he is currently housed even though it is about something that happened at another prison.

The Facts Relating to Exhaustion

The facts set forth here are those upon which Mr. Williams relied in opposing the motion to dismiss. The officer misconduct which is the subject of the lawsuit took place at Downstate C.F. on December 31. On January 15, while he was in SHU at Downstate, Mr. Williams gave his grievance to an officer to forward to the grievance office. A week later, when the superintendent was touring the SHU, Mr. Williams asked her about his grievance, saying that he had not received a reply. The superintendent said she knew nothing about his grievance and would look into it. A week later, Mr. Williams was transferred. He never received a response to his grievance and alleged that the officer to whom he gave the grievance had failed to file it. Mr. Williams acknowledged that he did not appeal.

Motion to Dismiss for Failure to Exhaust

Relying on records which showed that Mr. Williams had not appealed, the defendants moved to dismiss the complaint. The District Court granted the motion.

The Second Circuit Analysis: Were Administrative Remedies Available?

After the district court dismissed the complaint and the plaintiff filed his appeal, but before the appellate court had decided the appeal, the U.S. Supreme Court issued its decision in Ross v. Blake, 136 S.Ct. 1850 (June 6, 2016). In this decision, the Supreme Court rejected the argument that special circumstances – such as the plaintiff’s reasonable though mistaken belief that he had exhausted his administrative remedies – might justify a plaintiff’s failure to exhaust. It found that language in the Prison Litigation Reform Act (PLRA) and the statutory history of the exhaustion requirement **foreclosed** (prohibited) a “special circumstances” exception to the exhaustion requirement.

The Court went on to find that while special circumstances could not excuse a prisoner-plaintiff’s failure to exhaust, the exhaustion requirement found in §1997e(a) of the PLRA hinges on the availability of the administrative remedies. The Court listed three circumstances in which an administrative remedy is officially available but is not actually capable of use to obtain relief.

1. Remedies are not available where the grievance procedure operates as a simple dead end – with officers unable or consistently unwilling to provide any relief to aggrieved inmates.
2. Remedies are not available where the grievance procedure is so “**opaque**” (unclear) that it cannot be used. In this situation, the procedures exist, but no ordinary prisoner can figure out how to use them.
3. Remedies are not available where prison administrators prevent inmates from taking advantage of a grievance process through manipulation, misrepresentation or intimidation.

Because appellate courts review decisions on motions to dismiss without deference to the decisions reached by the lower courts, rather than remanding the case to the district court for application of the Ross decision, the Second Circuit, on the basis of the record which was before the district court, applied the analysis set forth in the Ross decision.

For the purposes of its analysis of whether an administrative remedy was officially on the books, the court found that 1) there is a mechanism for prisoners in SHU to file grievances; 2) inmates can appeal grievances to the next step if they do not receive a timely response; 3) even if the grievance had not been filed, and even after his transfer, Mr. Williams could have attempted to appeal the grievance.

However, the court went on, even if technically Mr. Williams could have appealed his grievance, “we conclude that the regulatory scheme providing for that appeal is so opaque and so confusing that no reasonable prisoner can use it.” What the court found particularly troubling was that if a prisoner in SHU gives an officer a grievance to submit and the officer fails to file it – a fact alleged by Mr. Williams which, for the purposes of the motion to dismiss is presumed to be true – the procedures and conflicting deadlines fail to provide a meaningful remedy.

For example, the IGP only contemplates appeals from grievances that were actually filed. But if the grievance is not filed, the superintendent will never receive it and the timeline for her to respond – 25 days – will never be triggered. In turn, the prisoner’s regulatory right to file an appeal with CORC would never be available. The regulations are deficient, the court wrote, because they fail to provide any guidance to a prisoner whose grievance is never filed.

The defendants countered this by asserting that if Mr. Williams had attempted to appeal when, after 25 days, the superintendent failed to respond to his grievance, the Inmate Grievance Program supervisor would have advised him that the grievance had not been received and explained his options:

- If fewer than 21 days had passed since the incident, the prisoner could re-file the grievance.
- If more than 21 days but less than 45 days had passed, the prisoner could ask permission to file a late grievance.
- If permission to file a late grievance is denied, the prisoner can file a grievance about the wrongful denial of his request to file a late grievance.

The problem with these options, the court found, is that they do not involve *appeals* of grievances, but rather are instructions on the timelines for *filing* grievances. Looking at the regulations governing the filing of appeals, for prisoners filing harassment grievances, the court wrote, the time limitations and procedural obstacles in most cases would preclude pursuing unfiled and unanswered grievances. In fact, the court held, these regulations are “so confusing that no reasonable prisoner can use them.”

The court identified several insurmountable obstacles to the options which the defendants argued made the grievance process available to the plaintiff. First, because the superintendent has 25 days to answer a harassment grievance, by the time the prisoner whose grievance was not actually filed can file a default appeal, the time for filing a timely grievance (21 days from the date of the incident) will have passed. With respect to the second option – the provision allowing with approval, the filing of a late grievance within 45 days of the incident – that option is only viable if the prisoner filed his original grievance less than 21 days after the incident. If the prisoner took advantage of the time that the regulations gave inmates to file grievances, he would be time barred from seeking permission to file a late grievance.

The court found the third option – filing a grievance to protest the denial of permission to file a late grievance – to be wholly ineffective as a mechanism for appealing an unfiled grievance; the regulations state unequivocally that an exception to

the time limit may not be granted if the request is made more than 45 days after the alleged occurrence. As such, the court concluded, while option 3 suggests that a prisoner could file a separate complaint grieving the denial of an exception to the filing deadline, such a grievance would be futile because the IGP supervisor does not have the authority to grant an extension where more than 45 days have passed.

Based on its analysis of the Inmate Grievance Program regulations, the court found that the regulations do not provide a mechanism for appealing a grievance that was never filed. In addition, the court found, the defendants' options for relief, to the extent that they are even available to a prisoner where an officer failed to file the grievance that the prisoner handed to him for filing, "only increase the confusion regarding the avenues available to pursue an appeal."

For these reasons, the court held that the process to appeal an unfiled and unanswered grievance is so opaque such that no prisoner could actually make use of it. Thus, it concluded, there were no administrative remedies available to Mr. Williams. The court therefore reversed the district court's decision granting the defendants' motion to dismiss for failing to exhaust administrative remedies and remanded the case for further proceedings.

The Court also recommended that DOCCS rewrite its grievance procedures to instruct inmates on how to appeal grievances that were not properly filed by prison staff, and how to appeal a grievance to which the inmate never received a response, after being transferred.

Correction

In *Pro Se*, Vol. 26, No. 4, in the article on page 8, "Third Department Reverses Finding of Civil Contempt," we omitted the case cite. The cite for that case is Matter of Cassidy v. NYS Board of Parole, 35 N.Y.S.3d 132 (2d Dep't 2016).

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