

Pro Se

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Second Circuit Holds that 60 Day Ad Seg Reviews Must be “Meaningful”

After Patrick Proctor escaped from Shawangunk C.F. in 1994, he was placed in disciplinary SHU for nine years, following which he was placed administrative segregation (Ad Seg) where he remains. Since his admission to Ad Seg, every 60 days, prison officials have assessed Mr. Proctor to determine whether his presence in general population would threaten security. After each review, prison officials concluded that Mr. Proctor should remain in solitary confinement. In 2009, having spent 22 years in isolated confinement, Mr. Proctor sued a number of DOCCS officials and members of the security staff in federal district court, alleging that they had violated his rights to substantive and procedural due process. The complaint asserts that the defendants' meaningless reviews of the need for continued confinement to Ad Seg violates Mr. Proctor's right to procedural due process. There is also a claim that confining Mr. Proctor to SHU for 22 years violated his right to substantive due process in that the physical and psychological injuries caused by this confinement were a result of the defendants' failure to meaningfully review whether he needs to be in isolated confinement.

After discovery, the defendants moved for summary judgment on Mr. Proctor's procedural due process claims. The court granted the motion, and on its own motion, granted summary judgment to the defendants with respect to the substantive due

process claim. Mr. Proctor appealed from the district court's decision.

In Proctor v. LeClaire, 846 F.3d 597 (2d Cir. 2017), the Second Circuit reversed the district court's decision. In doing so, the Court emphasized that it was not ruling on the merits of the defendants' conclusion that having Mr. Proctor in general population would threaten prison security. Rather, the court stated, it was reviewing whether the proof submitted in support of Mr. Proctor's claim that the reviews did not meet

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VISITATION UPDATE: NEW ASSEMBLY CORRECTION COMMITTEE CHAIR WEIGHS IN

A Message from the Executive Director, Karen L. Murtagh, Esq.

Some of you may have heard of the proposal in the 2017-2018 Executive Budget to reduce the number of visitation days at New York's 17 maximum security facilities from the current seven days a week to three – allowing visitation only on Friday's and weekends. The change would result in the elimination of 39 positions and bring maximum facility prisons more in-line with medium prisons where visitation is currently only allowed on weekends and holidays. Presumably, the proposed change would also come with an expansion of the current use of video conferencing.

The reason the proposal was made, as reported by Department of Corrections and Community Supervision Commissioner Annucci, was because visiting rooms at maximum security facilities do not get much use during the week and the reduction will save DOCCS money – approximately \$2.6 million out of an annual budget of \$3.276 billion, a .08% savings.

Some of you may also have heard that there is a new Chairperson for the Assembly Committee on Correction, Assemblyman David Weprin. At a budget hearing in January, Chairman Weprin questioned the wisdom of the proposed policy change calling it “inhumane.” Chairman Weprin also held press conferences in New York and Albany on the issue and was joined by a broad coalition of prison reform advocates who spoke out against the proposal. At City Hall in NYC, the chairman said that his opposition is two-fold: the high demand for visits and the extensive research showing that visiting helps to decrease recidivism and to reduce violence at correctional facilities.

Along those lines, in October 2012, the Vera Institute of Justice reported that “prison inmates who had more contact with their families and who reported positive relationships overall are less likely to be re-incarcerated.” Prison reform advocates and reentry experts have seen first-hand the significant positive impact on prison and public safety that results from regular visitation between incarcerated individuals and their loved ones. They maintain that a robust visitation program helps boost the morale of incarcerated individuals who focus on preparing for release knowing that, not only will they be reunited with their loved ones, but they will have a support system on the outside upon release. The importance of maintaining strong family ties, advocates note, cannot be overstated.

Among the other reactions to the current proposal is that visitation programs provide children an opportunity to interact and maintain contact with their incarcerated parents, which is a critical element in ensuring a child's healthy development.

Advocates also point out that tele-visiting opportunities, while an important adjunct to visitation programs, are no substitute for in-person visits. In fact, they argue, it is advisable, both from the stand point of cost effectiveness and of strengthening family ties, to expand visiting hours (including adding evening hours), to place incarcerated individuals in facilities as close to their home communities as possible, and to restore the bus program that was defunded many years ago to help family members travel to visit their incarcerated loved ones when they are placed hundreds of miles away from home.

The proposal is not final. New York State's budget process requires the State Legislature to sign-off on such a proposal. By the time this issue of *Pro Se* goes to print, that may have happened. It is also possible that the Legislature may decide to reject such a proposal. Regardless, the decision whether or not to reduce visitation at maximum security facilities will have been significantly impacted by the insightful critique of the new Assembly Chair of Correction and countless other advocates speaking out against it.

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the standard set by the Supreme Court in Hewitt v. Helms, 459 U.S. 460 (1983). In Hewitt, the Court held that a prisoner has a liberty interest in remaining in general population. For that reason, after a prisoner has been properly admitted to Ad Seg, prison officials must conduct informal non-adversarial evidentiary reviews of whether on-going confinement to Ad Seg is justified. The purpose of the reviews, the Proctor Court wrote, is to ensure that the state's institutional interest justifying the deprivation of liberty has not grown stale and that prison officials are not using Ad Seg as a "pretext for indefinite confinement."

Noting that "[i]t is well established that whenever process is constitutionally due . . . 'it . . . must be granted at a meaningful time and in a meaningful manner,' " the Court then turned its focus to what Hewitt requires for meaningful periodic review of Ad Seg. In conducting this assessment, the Court first reviewed the interests that are at stake, finding that the State has a substantial interest in maintaining institutional safety and security while Mr. Proctor has a substantial interest in avoiding indefinite confinement in Ad Seg. In light of these counterbalancing interests, the Court concluded that period reviews of Ad Seg must satisfy at least the following criteria:

1. Reviewing prison officials must actually evaluate whether the prisoner's continued Ad Seg confinement is justified. ("[A] review with a pre-ordained outcome is tantamount to no review at all");
2. Reviewing officials must evaluate whether the justification for Ad Seg exists at the time of the review or will exist in the future, and consider new relevant evidence as it becomes available.
3. Reviewing officers must maintain institutional safety and security as their guiding principles throughout an inmate's Ad Seg term; the State may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions.

Applying these principles to the evidence submitted by the parties in applying for and opposing the defendants' motion for summary judgment, the Court concluded that there were factual questions as to whether Mr. Proctor's reviews have been constitutionally meaningful. First, the Court found, DOCCS' officials own statements raise serious doubts about whether the outcomes of the reviews were pre-ordained. According to the depositions of DOCCS employees, the standard practice is that a prisoner who is placed in Ad Seg due to an escape never gets out.

Second, the defendants' statements about Mr. Proctor indicate that the reviews are no more than hollow formalities: Defendant LeClaire stated that Mr. Proctor's criminal history alone supports his continuing Ad Seg confinement; Defendant Bellnier stated that Mr. Proctor might not be released from Ad Seg even if he did everything asked of him and even if his attitude with staff and inmates improved considerably and he exhibited no negative behavior over a considerable period of time and accepted responsibility for past crimes and misconduct.

Third, the paper evidence raises additional questions about whether the reviews have been designed to evaluate or to extend Mr. Proctor's Ad Seg term. There are years of reports that are virtually identical, from which a jury might conclude that the review process was satisfied by boilerplate explanations. The records documenting the reviews also raise red flags: the good behavior that caused the defendants to reduce his disciplinary SHU time was labelled as behavior justifying continued confinement to Ad Seg. For example, Mr. Proctor's daily cooperative behavior with prison officials in Ad Seg was interpreted as "superficial" and "an attempt to mask his resistance to authority," an interpretation that the Court found to be bizarre and unsupported.

Based on this assessment, the Court found that Mr. Proctor had produced sufficient evidence to raise factual questions about whether his Ad Seg reviews involved real evaluations of the justification for his confinement; whether the reviewers considered all of the relevant evidence that bore on whether that justification remains valid; and

whether the reviews ensure that Ad Seg is used as neither a form of punishment nor as a pretext for indefinite confinement.

Finally, the Second Circuit reversed the district court's grant of summary judgment to the defendants on Mr. Proctor's claim that the defendants violated his right to substantive due process. The court found that a district court does not have the authority to grant summary judgment on its own motion unless it first provides the parties with notice and a reasonable opportunity to respond.

The Court remanded the case to the district court for further proceedings.

Elliot Harvey Schatmeier and Timothy Gilman of Kirkland & Ellis LLP, represented Patrick Proctor in this §1983 action.

LETTERS TO THE EDITOR

Dear Editor,

The purpose of this letter is to thank you for your service and to inform you that I have recently been granted parole effective May 30, 2017. As such, I will no longer require a subscription to the informative **Pro Se**.

In addition, I would like for you to know that during my incarceration of sixteen years, I really enjoyed and appreciated the information that your organization printed in **Pro Se**. Although I am being released, I will continue to follow your reports on line. Once again, thank you and continue to print such an informative newsletter because it is greatly needed.

Yours Truly,

David Holmes

Dear Pro Se Staff,

Thank for your invaluable information and guiding hands. The enclosed victory is for your *Pro Se Victories* column. [Editor's Note: see report on Vernon A. Jones v. State of New York, below]. I urge all **Pro Se** subscribers and readers to never stop litigating! The only way to win is with a resilient and tenacious pen. I wish you all well in your endeavors.

Respectfully,

Vernon Jones

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PRO SE VICTORIES!

Vernon Jones v. State of New York, Claim No. 122260, Motion No. M-89142 (Ct. of Clms. Dec. 6, 2016). Over the assistant attorney general's objection, the court granted the claimant's request that the court order the defendant to produce certain witnesses and documents at trial.

Matter of Malcolm Jackson v. Cheryl Morris, Index No. 4534-16 (Sup. Ct. Albany Co. Dec. 28, 2016). Malcolm Jackson successfully challenged the Department's position that where the denial of an application for participation in the Family Reunion Program (FRP) has been affirmed by the Central Office, the applicant is barred from ever applying for the program during the remainder of his incarceration. In reaching this result, the court reviewed Directive 4500(IV)(B) which lists nine disqualifying conditions. According to the Directive, a prisoner to

whom one of the nine conditions applies is ineligible for the FRP and the facility is directed not to process his application. A Central Office affirmation of a facility denial of an application is not among the 9 disqualifying conditions. For this reason, the court held that the facility's decision not to accept any further application from Mr. Jackson was affected by error of law, was in violation of the Department's own rules and regulations and was made in violation of lawful procedure. The court ruled that the determination that Mr. Jackson was barred from ever again applying for the FRP must be annulled.

Anthony N. Ott v. State of New York, Claim No. 122938 (Ct. of Clms. Jan. 25, 2017). Court awards damages for lost personal and legal property. Anthony N. Ott filed a claim for lost property in 2013. In January 2017, the court held a trial in which the claimant participated via teleconferencing. At the close of the trial, the court found the state liable for the negligence that led to the loss of 3 photo albums, 4 boxes of rice, 1 sweatshirt, a pair of sweatpants and 744 pages of legal transcripts and awarded damages in an amount that allowed Mr. Ott to purchase another copy of the transcripts and to replace his personal property.

Joseph Soto v. State of New York, Claim No. 123161 (Ct. of Clms. Dec. 20, 2016). Joseph Soto successfully sued the state for damages for time wrongfully spent in SHU. In 2013, after serving 40 days in SHU – the sanction that resulted from two Tier II hearings – Joseph Soto was confined for nineteen additional days until a hearing commenced on a Misbehavior Report that was issued on the same day as the reports that led to the Tier II hearings. Following the hearing on the third misbehavior report, it appears that an additional year of SHU confinement was imposed. That hearing was reversed six months later, following which Mr. Soto was held in SHU for an additional ten days. When Mr. Soto sued in the court of claims, the court found that he had been unlawfully confined to SHU for a total of 29 days.

Matter of Javon Gonzalez v. Michael Kirkpatrick, Index No. 2016-1006 (Sup. Ct. Clinton Co. Jan. 30, 2017). After Javon Gonzalez filed his Article 78 challenge to a Tier III hearing, the Attorney General advised the court that the Department had reversed and expunged the hearing and that therefore the action was moot and should be dismissed. When Mr. Gonzalez disagreed, noting that the respondent had not reimbursed him for the court filing fee, the court ordered that the respondent reimburse the \$15.00 that Mr. Gonzalez had paid to file the case. The court also held that Mr. Gonzalez was not entitled to lost wages or the other costs associated with filing the petition, namely, the costs of making copies and the postage costs.

Matter of James Richard v. Anthony Annucci, Index No. 3937-16 (Sup. Ct. Albany County Jan. 13, 2017). In this challenge to the denial of a grievance, the court vacated the results of the grievance proceeding and remanded the matter to be re-processed. James Richard filed a grievance asserting that he had been improperly assigned to the sex offender counseling and treatment program (SOCTP). The grievance was denied because although the petitioner had not been convicted of a sex offense, the Superintendent had concluded, and CORC agreed, that the petitioner's crimes "involved behavior of a sexual nature." The Department's internal guidelines permit the enrollment of prisoners in SOCTP where the prisoner engaged in behavior of a sexual nature during the crime. The court noted that petitioner's crime, kidnapping in the second degree, was included among those offenses that can be a basis for referral to the SOCTP, if the offense was sexually motivated. Here, the court held, there is no indication that the Department even considered whether the petitioner's crime was sexually motivated. For this reason, the court granted the petition and remanded the matter to the facility Superintendent for review consistent with the court's opinion.

Matter of Percy D. West v. Eric Gutwein, Index No. 4533-16 (Sup. Ct. Albany Co. Feb. 15, 2017). After Percy West filed an Article 78 challenge to a Tier III disciplinary proceeding, the respondents notified the court that they had reversed the hearing and expunged all references to the charges from Mr. West's prison records and refunded his \$5.00 surcharge.

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

Violation of Right to Pre-Hearing Assistance Leads to Reversal of Hearing

According to the misbehavior report, while officers were responding to a fight, Markel Nance, who had been ordered to place his hands on the wall, shoved an officer to the floor, injuring the officer's ankle. At his hearing, Mr. Nance objected to his employee assistant's refusal 1) to interview the 30 inmates who had been in the area where the incident occurred to find out if they had relevant information; and 2) to produce the officer's medical records regarding his injury. The hearing officer stated that it was not necessary for the employee assistant to interview the inmates and that Mr. Nance was not entitled to the officer's medical

records and denied Mr. Nance's request to call as a witness one of the inmates involved in the fight, stating that by the time of Mr. Nance's misconduct, the inmate was being restrained and could not have seen anything that happened to Mr. Nance. After the hearing officer found Mr. Nance guilty of the charges and the Commissioner's designee denied Mr. Nance's appeal, Mr. Nance filed an Article 78 challenge to the determination of guilt.

With respect to the hearing officer's denial of Mr. Nance's request that the inmate involved in the fight be called as a witness, in Matter of Nance v. Annucci, 46 N.Y.S.3d 717 (3d Dep't 2017), the court, noting that there was nothing in the record to support the conclusion that the inmate was being restrained when the portion of the incident involving Mr. Nance took place, found that the hearing officer's denial was based on speculation as to the witness's testimony and was an error. The court also found that the employee assistant interviewed only six of the thirty inmates at the scene of the incident – five of whom refused to testify. Based on this conduct, the court found that Mr. Nance has shown that the employee assistant's performance prejudiced Mr. Nance and that the hearing officer had failed to remedy the problem. With respect to the failure to produce the reporting officer's medical records, the court found that the error was harmless because the hearing officer had read the injury report into the record.

The court found that the employee assistant's failure to render proper assistance was a violation of Mr. Nance's constitutional right to pre-hearing assistance and ordered the reversal of the hearing and expungement of the charges.

The Albany Office of Prisoners' Legal Services of NY represented Markel Nance in this Article 78 proceeding.

Inaudible Portions of Tape of Calls Undercut Substantiality of Evidence

The petitioner in Matter of McGriff v. Venettozzi, 46 N.Y.S.3d 286 (3d Dep't 2017), was charged with smuggling, conspiring to introduce drugs into the facility and third party calls. As set

forth in the misbehavior report, the facts underlying the charges were that during a three way call, the petitioner, in coded language, arranged to have someone deliver drugs to his wife who would bring them to the petitioner. Petitioner was charged after his wife surrendered heroin to correction officials at the petitioner's prison.

At petitioner's hearing, portions of the tape of the phone call during which it was alleged that he was arranging to have drugs brought to him, were inaudible. In addition, the officer who wrote the report failed to identify the coded language and explain its meaning.

In his Article 78 petition, the petitioner argued that because the tapes of the conversation in which he allegedly arranged to have drugs smuggled into the facility were largely inaudible and because the author of the misbehavior report failed to identify and explain the coded language, the charges of smuggling and conspiring to introduce drugs into the facility were not supported by substantial evidence. The court agreed, noting that the confidential information in the record further called into doubt the accuracy of the conversation read into the record at the hearing. Based on this assessment, the court reversed the charges of smuggling and introducing drugs and ordered all references to those charges expunged from the petitioner's records. The court upheld the determination that petitioner had violated the rule prohibiting three way calls.

DeWitt McGriff represented himself in this Article 78 proceeding.

Charges of Stolen Property Not Supported by Substantial Evidence

After Luis Cintron pled guilty to possession of contraband and was found guilty of possession of stolen property and filed an unsuccessful administrative appeal, he filed an Article 78 challenge to the Tier III hearing. According to the misbehavior report, a search of Mr. Cintron's cell revealed 19 state garbage bags and five library books. In Matter of Cintron v. Kirkpatrick, 43

N.Y.S.3d 182 (3d Dep't 2016), the court ruled that because Mr. Cintron had pled guilty to possession of contraband, he could not challenge the evidentiary sufficiency of the determination of guilt with respect to that charge. The court reached a different result with respect to whether Mr. Cintron had possessed stolen property. While Mr. Cintron admitted to possessing the bags and the books, the court wrote, neither the misbehavior report nor the testimony established that either were stolen. Based on this assessment of the record, the court reversed the determination of guilt with respect to the charge of possession of stolen property.

Luis Cintron represented himself in this Article 78 proceeding.

Failure to Call Police Investigator and to Determine the Reason that Some Witnesses Refused to Testify Leads to Reversal of Hearing

In Matter of Mosley v. Annucci, 45 N.Y.S.3d 632 (3d Dep't 2017), the petitioner was charged with assaulting another prisoner. Both the petitioner and the other inmate emerged from the incident with lacerations. At his hearing, the petitioner asked that a State Police investigator be called as a witness, because, the petitioner stated, the investigator had obtained statements that materially contradicted the evidence that the correction officials had relied upon. The hearing officer denied the request, stating that the investigator's testimony was irrelevant because he had not witnessed the incident.

The court held that "inasmuch as [the investigator's] testimony would have been potentially helpful to the petitioner's defense, the hearing officer erred in denying it." Because the hearing officer gave a "good-faith" reason for the denial, the court ruled that the proper remedy was a re-hearing.

The petitioner also argued that by failing even to attempt to determine the reason that several inmates had refused to testify, the hearing officer

had violated the petitioner's right to call witnesses. Again, the court concluded, the proper remedy for this violation, which has been characterized by the courts as regulatory (as opposed to constitutional) was a re-hearing.

Barclay Damon, LLP, represented Manuel Mosley in this Article 78 proceeding.

Hearing Officer Remedied Omission of Prisoner's Name from Body of Misbehavior

The petitioner in Matter of McClain v. Venettozzi, 45 N.Y.S.3d 702 (3d Dep't 2017), was charged with participating in a multi-person fight. The body of the misbehavior report, which listed the inmates involved in the fight, did not include the petitioner's name. The petitioner asserted that the omission of his name from those inmates who were listed in the report as being involved in the fight violated his right to notice of the charges. The hearing officer noted that his copy of the misbehavior report included the petitioner's name in the body of the report and read that report into the record. Following the reading, the hearing officer adjourned the hearing for four days, thus giving the petitioner over 24 hours' notice of the charges against him.

The court found that where there was a four day adjournment between when the petitioner got notice of the corrected misbehavior report and when the hearing actually began, and where the petitioner had not been prejudiced (hurt) by not having received the corrected misbehavior report, the petitioner had adequate notice of the charges and was able to prepare a defense.

Jhaffre McClain represented himself in this Article 78 proceeding.

Hearing Officer's Efforts to Procure Resigned Officer's Testimony Were Sufficient

After being found guilty of violating strip frisk procedures and assault on staff (among other charges), the petitioner in Matter of Lopez v. Annucci, 45 N.Y.S.3d 700 (3d Dep't 2017), filed an Article 78 proceeding asserting that the hearing officer had violated his right to call witnesses. One of the witnesses at issue was the correction officer who was conducting the pat frisk when the petitioner allegedly assaulted her. The officer had resigned and when contacted by a "facility disciplinary officer (FDO)," told the FDO, who testified at the hearing, that she refused to testify. The court found that because the witness was "a civilian and no longer under the Department's control," and because the hearing officer had made "reasonable and substantial" efforts to contact her, the petitioner had not been deprived of his right to call witnesses.

Luis Lopez represented himself in this Article 78 proceeding.

Court Finds Prisoner Failed to Preserve His Objection to the Admission of Test Results

Based on evidence in the form drug testing results, the petitioner in Matter of Frantz v. Venettozzi, 44 N.Y.S.3d 818 (3d Dep't 2017), was found guilty of drug use. In his Article 78 proceeding, he argued that the drug test results should not have been relied upon because the foundation for the admission of the results was flawed. In Tier III hearings where the evidence against the prisoner is drug test results, for those results to be relied upon, there must be evidence that the testing process in general is reliable and that in this instance, the test was properly done. Here, the petitioner noted, the sample identification numbers entered on the two test result forms were different and that difference was not explained at the hearing, raising the possible inference that two unrelated samples had been tested and that the

petitioner’s sample had not been tested twice, as is required by the test procedures.

The court rejected the petitioner’s argument without reaching its merits. The court ruled that because the petitioner did not raise this argument at his hearing, where presumably the hearing officer could have called witnesses to see if the difference in sample numbers could be clarified, the petitioner had failed to preserve his argument that the Department had failed to lay a proper foundation for reliance on the test results.

Jean Frantz represented himself in this Article 78 proceeding.

Court Finds that 6½ Year SHU Sanction is Not Excessive

The petitioner in Matter of Ashley v. Annucci, 43 NYS3d 572 (3d Dep’t 2016), was found guilty of assault on staff, violent conduct, and weapon possession after he allegedly attacked officers with an ice pick type weapon, stabbing one of the officers seven times. The hearing officer imposed a penalty of 78 months and 16 days in SHU. After the hearing was affirmed, the petitioner filed an Article 78 proceeding, raising the argument, among others, that the penalty was harsh and excessive.

The court rejected the petitioner’s argument. In reaching the conclusion that the penalty was not so shocking to one’s sense of fairness as to be excessive, the court noted the serious nature of the incident, evidence that the assault was premeditated, and petitioner’s disciplinary history.

Darius Ashley represented himself in this Article 78 proceeding.

Court Upholds the Department’s Interpretation of Rule 1.00 Penal Law Violation

In 1991, the petitioner in Matter of Sierra v. Annucci, 44 N.Y.S.3d 827 (4th Dep’t 2016,) began serving a state sentence. In 2014, he was convicted

of federal racketeering charges for conduct in which he engaged while he was in state prison. After his conviction, the Department charged him with violating Rule 1.00 of the Rules of Inmate Conduct. This rule states that, “[a]ny Penal Law offense may be referred to law enforcement agencies for prosecution through the courts. In addition, departmental sanctions may be imposed based upon a criminal conviction.” One of the arguments that the petitioner raised in his Article 78 proceeding was that the rule only authorized the imposition of departmental sanctions when an inmate had committed a Penal Law offense, i.e., a violation of state law. The petitioner argued that he had not been convicted of violating the Penal Law, but had been convicted of violating the United States Code, i.e., federal law.

The Appellate Division rejected this argument, noting that the respondent interpreted the regulation at issue to permit imposition of sanctions based upon a conviction of any crime, and that it is a recognized principle of administrative law that great weight is to be given to an administrative agency’s interpretation of its own regulations. Thus, the court wrote, “where the construction adopted by the agency is not irrational, it should be sustained.” Here, the court agreed with the respondent that the agency’s interpretation of the regulation as authorizing the petitioner’s confinement is not irrational.

Leonides Sierra represented himself in this Article 78 proceeding.



Court Finds Failure to Consider Sentencing Minutes is Harmless Error

In Matter of Almonte v. NYS Board of Parole, 42 N.Y.S.3d 691 (3d Dep’t 2016), the petitioner was serving a sentence of 25 years to life. He entered prison in 1992. When petitioner appeared before the parole board in 2015, the Board denied

parole and imposed a 24 month hold. On appeal, the court found that the board had denied parole release based on the seriousness of the offense, the petitioner's poor prison record, drug use, numerous disciplinary charges, and removal from prison programs. Given the discretionary nature of parole release decisions, the court found that the denial was supported by substantial evidence.

The court rejected petitioner's argument that the board's failure to consider his sentencing minutes must result in a reversal of the denial and a new hearing. Although it was true that the minutes were not before the board, the court wrote, they were attached to the respondent's answer to the Article 78 petition. After reviewing the minutes, the court concluded that the failure to review them was harmless error. The conclusion was based on the fact that the sentencing court had not made any parole recommendations. Thus, although the board was required to consider the minutes, its failure to do so was of no consequence.

Jose Almonte represented himself in this Article 78 proceeding.

Failure to Find Out Reason that a Witness Changed His Mind about Testifying Leads to Reversal of Hearing

In response to charges that he possessed marijuana and a weapon, the petitioner in Matter of Banks v. Annucci, 45 N.Y.S.3d 706 (3d Dep't 2017), said that he had been framed. To support this defense, he called an inmate who originally said that he would testify but later signed a refusal form, indicating that he did not want to get involved. The petitioner asked the hearing officer to find out what had caused the witness to change his mind. The hearing officer said that he would but, the court wrote, he "apparently never did."

Based on the hearing officer's failure to determine the reason that the witness had changed his mind, the petitioner argued that his right to call witnesses had been violated. The court agreed, writing that where an inmate initially agrees to

testify and later refuses, it is incumbent upon the hearing officer to conduct a personal interview unless a genuine reason for the refusal appears in the record and the hearing officer makes sufficient inquiry into the facts surrounding the refusal to determine its authenticity. "An inmate's refusal that is based upon a desire not be involved is not adequate to excuse a personal inquiry by the hearing officer." Here, the court found, "notwithstanding his offer to do so," the hearing officer failed to personally inquire as to the reason that the inmate had changed his mind. This, combined with the fact that the inmate's testimony was potentially relevant to the charges, led to the court's conclusion that the petitioner's regulatory right to call witnesses had been violated. The court ordered that the respondent conduct a re-hearing.

Javon Banks represented himself in this Article 78 action.

Brief Interruption of Observation of Cell Search Did Not Violate DOCCS Regulations

DOCCS Directive 4910(V)(c)(1) provides that a prisoner who is in his cell when officers come to search it is entitled to observe the search unless a determination is made that his presence during the search is a risk to safety and security. The petitioner in Matter of Kirby v. Annucci, 46 N.Y.S.3d 292 (3d Dep't 2017), was in his cell when officers arrived to search it. Initially, based on confidential information that his presence during the search was a risk to safety and security, he was removed from the area. Prison officials then determined that his presence during the search would not threaten safety or security and he was returned to the area outside of his cell and was present when officers recovered contraband.

Following a hearing at which he was found guilty of possession marijuana, the petitioner filed an Article 78 challenge to the determination of guilt. He argued that by removing him from the area while the search was being conducted, the Department had violated its own procedures. The court held that where there were grounds to remove him from the area of the search and he was returned

as soon as security determined that there was in fact no risk and where he returned to view the portion of the search that resulted in the recovery of the drugs, the petitioner was not denied his right to observe the search of his cell.

Andre Kirby represented himself in this Article 78 action.

Miscellaneous

Respondent’s Production of Document Moots Article 78

After the petitioner in Matter of Johnson v. Annucci, 45 N.Y.S.3d 697 (3d Dep’t 2017), was denied a religious meal while he was in special housing status, he requested the unit log book showing which officers were on duty on the day that the religious meal was not delivered so that he could determine the name of the officer responsible for failing to serve the meal. When his request was denied, he filed the Article 78 challenge to the denial. Subsequently, he won his administrative appeal and was given the logbook page that showed the names of the officers at the time that the meal was denied. The respondent then moved to dismiss the action as moot. The court held that the petition was moot as disclosure of the log book provided the petitioner with the names of the officers on duty during the relevant time period and thus the petitioner had received all of the relief that the court could have given him.

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114 Prospect Street
Ithaca, NY 14850**

PLS Offices and the Facilities Served

Requests for legal representation and all other problems should be sent to the local office that covers the prison in which you are incarcerated. Below is a list identifying the prisons each PLS office serves:

ALBANY, 41 State Street, Suite M112, Albany, NY 12207

Prisons served: Bedford Hills, CNYPC, Coxsackie, Downstate, Eastern, Edgecombe, Fishkill, Great Meadow, Greene, Green Haven, Hale Creek, Hudson, Lincoln, Marcy, Mid-State, Mohawk, Otisville, Queensboro, Shawangunk, Sing Sing, Sullivan, Taconic, Ulster, Wallkill, Walsh, Washington, Woodbourne.

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

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

ITHACA, 114 Prospect Street, Ithaca, NY 14850

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

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

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

Pro Se Staff

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