Pro Se

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Appellate Court Holds Police Body Cam Footage is Not a Personnel Record

When the City of New York adopted a policy that permits the New York City Police Department (NYPD) to release certain police department body camera footage without a court order or the consent of the relevant police officers, Patrolmen's Benevolent Association of the City of New York (PBA) filed an Article 78 challenge asserting that the policy was in violation of Civil Rights Law §50-a. Civil Rights Law §50-a requires a law enforcement agency or a department of corrections to keep confidential the personnel records of its employees. The PBA took the position that because the body cam footage could be used in evaluations, it was a personnel record.

As advocates for the transparency of state agencies have pointed out, the broad definition of personnel records urged by the PBA would render the transparency objectives of the Freedom of Information Law (FOIL) **illusory** (not real). That is, virtually any record generated by an officer, regardless of its primary purpose or the information in the record, may be reviewed as part of the officer's employment review, thus converting a routinely generated record into a personnel record.

The First Department, in *In re Patrolmen's Benevolent Association for the City of New York v. Bill De Blasio*, 2019 WL 660696 (1st Dep't Feb. 19, 2019), made short work of the PBA's argument. First, the court noted, citing *Matter of Luongo v. Records Access Officer, Civilian Complaint Review Board*, 150 A.D.3d 13, 19 (1st Dep't 2017), the threshold **criterion** (test) for determining whether documents are personnel records is "whether the documents . . . are of 'significance to a superior in considering continued employment or promotion.' "

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Prisoners' Legal Services' Pro Bono Program

A Message from the Executive Director, Karen L. Murtagh

In this issue of Pro Se, PLS' Pro Bono Partnership Program (PBPP) is printing its annual 'call for submissions' seeking stories, poems and artwork from incarcerated individuals to perform and display at our annual Pro Bono Event, which will be held in October 2019. In light of that, I thought it would be helpful to share with our readers information about PLS' PBPP, its history, goals and accomplishments.

PLS' PBPP began in 2011, with the goals of educating the legal community regarding the need for legal services for indigent incarcerated New Yorkers and increasing the involvement of lawyers in providing legal representation to those in need. To this end, over the past seven years, PLS' PBPP has established a statewide network of law firms and attorneys who provide pro bono representation to individuals incarcerated in New York State on a myriad of issues. Private attorneys have represented individuals via administrative advocacy and litigation on cases including challenges to Tier III disciplinary hearings, excessive use of force claims, jail time, parole jail time, merit time and sentencing cases, cases involving serious medical and/or mental health issues, First Amendment cases and cases involving prisoner re-entry issues.

Under the leadership of our Pro Bono Coordinator John Amodeo, PLS reaches out to individual attorneys and small, mid and large sized law firms, encouraging them to sign-up to take pro bono cases. Once on board, PLS' PBPP assists volunteer attorneys by providing training on substantive areas of law, answering questions as they arise, offering support for research and writing, and providing continuing legal education (CLE) credit for completed work.

The efforts of PLS' PBPP are paying off. PLS pro bono attorneys have been incredibly successful in the cases they have litigated. For example, just over this past year, one of our pro bono attorneys represented a client suffering from mental illness, who had been sentenced to 365 days in solitary confinement and two months recommended loss of good time following a Tier III hearing. The pro bono attorney successfully challenged the hearing via an Article 78 petition on the grounds that the hearing officer failed to consider the client's mental health. The court reversed and ordered a new hearing. In another case, a client who committed his crime when he was 15 years old, was denied parole for a second time after serving over 15 years in prison. A PLS pro bono attorney challenged the parole denial in court arguing that, despite the great strides toward rehabilitation and self-growth the client had made while in prison, the Parole Board denied him release, relying almost exclusively on his instant offense and essentially disregarding his young age at the time of the crime. After the Article 78 petition was filed, Parole agreed to hold a new hearing and, at that hearing, the client was scheduled for release on parole. In yet another case, a PLS pro bono attorney successfully litigated an Article 78 on behalf of a client who was found guilty of drug possession, resulting in the disposition being reversed and expunged.

Our pro bono attorneys have also had a great deal of success in their administrative advocacy efforts. In one case, a client who was found guilty at a Tier III hearing, received 180 days of solitary confinement with a commensurate loss of privileges. A PLS' pro bono attorney filed a supplemental appeal and the hearing was reversed. Another PLS pro bono attorney appealed a Tier III hearing for a client and was able to secure the restoration of three months of recommended loss of good time. This same attorney represented another client on an appeal of a Tier III hearing and, as a result, a SHU penalty of 210 days was reduced to 170 days.

Over this past year, our pro bono attorneys have also obtained positive results in merit release and parole rescission cases. In one case, after a client was unsuccessful in his request for medical parole in 2016 and a sentence commutation in 2017, a PLS pro bono attorney helped this client prepare an application to the NYS Parole Board for merit release. In citing the positive impact of the pro bono attorney's work on its release decision, the Board granted the client merit release. In yet another case, a client was found guilty at a Tier III hearing just 10 days prior to his scheduled open date for release on parole. As a result, his open date was rescinded. One of our pro bono attorneys successfully represented him at his parole rescission hearing,

where the Board rejected the SORC's recommendation of "hold to max" and fixed a much earlier open date that saved the client over 18 months of prison time. And the list goes on.

Back in 2011, to kick-off its new program, PLS hosted a screening of the movie "Crime After Crime: The Battle to Free Debbie Peagler" during National Pro Bono Recognition Week. The movie followed the case of Ms. Peagler, a battered woman who was convicted for her involvement in the murder of Oliver Wilson, a man who was alleged to have abused her, forced her into prostitution, and molested her daughters. She was represented by two pro bono attorneys who worked on her case for 10 years, eventually securing her release. The movie demonstrated the importance and effectiveness of dedicated pro bono counsel and it helped motivate a number of attorneys to sign-up for PLS' PBPP.

Since 2011, we have hosted a Pro Bono event every October. At each event, we present various awards honoring individuals who have demonstrated a life-long commitment to justice, attorneys who have provided outstanding pro bono representation to incarcerated individuals and law students who have spent countless hours volunteering at PLS.

In addition, we work with the Black Theater Troupe of Upstate New York to put on a theatrical production that highlights the struggles of incarcerated people. In years past, we have focused on solitary confinement, the effects of incarceration on children and the elderly, the history of incarceration, restorative justice, medical parole, maintaining family ties during incarceration and, most recently, the transformational power of education within prison. The director of the Black Theater Troupe, Jean Remy-Monay, and all of the actors, volunteer countless hours to make this event a success.

As you will read in this issue, under our 'call for submissions', our focus this year is on Immigration. We are hoping to hear from you about your experience with immigration, from any standpoint whatsoever. Your submissions help educate, shine a light on issues that are often ignored or misunderstood and are incredibly important in PLS' efforts to expand our pro bono panel and thus our ability to provide more services to more clients. We are looking forward to hearing from you!

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Whether a document is a personnel record, the court went on, also depends on its nature and use in evaluating an officer's performance. Perhaps most importantly, the court wrote, in the context of a FOIL disclosure of an officer's personnel records, preventing such disclosure requires more than merely demonstrating that the document **may be** used to evaluate performance.

The court then turned to the PBA's arguments that 1) the body camera footage is intended in part for the purpose of performance evaluations and is clearly "of significance" to superiors in considering employment or promotion, and 2) a finding that body camera footage is not a personnel record would result in an unprecedented invasion of privacy.

While the court found the invasion of privacy issue to be a valid concern, it found that the court's role is to consider the record's general "nature and use," and not solely whether it **may be** considered for use in a performance evaluation. Otherwise, the court wrote, "that could sweep into the **purview** [scope] of §50-a many police records that are an expected or required part of investigations or performance evaluations, such as arrest reports, stop reports, summonses, and accident reports, which clearly are not in the nature of personnel records so as to be covered by §50-a."

The court held that "given its nature and use, the body camera footage at issue is not a personnel record covered by the confidentiality requirements of §50-a" but rather has as its purpose other key objectives of the body camera program,

"such as transparency, accountability and trust building." It based this conclusion on the view that although the body camera program was designed in part for performance evaluation, and supervisors are required at times to review such footage for the purpose of evaluating job performance, the footage being released in the case before the court was not primarily generated for, nor used in connection with any pending disciplinary proceedings or promotional processes. "To hold otherwise," the court wrote, "would defeat the purpose of the body camera program to promote increased transparency and public accountability."

The Corporation Counsel of the City of New York represented Mayor Bill De Blasio in this Article 78 proceeding.

News and Notes

Requests for Legal Assistance

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

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Pro Se On-Line

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

CALL FOR SUBMISSIONS
IMMIGRATION*:* A View from Within

HELP PRISONERS' LEGAL SERVICES CELEBRATE NATIONAL PRO BONO WEEK

National Pro Bono Week is a time to celebrate and recognize the dedicated work of *pro bono* volunteers as well as to educate the community about the many legal and other issues faced by our clients. This year, National Pro Bono Week is October 20th – 26th and, we will host an event highlighting the many ways that people are affected by immigration. We are looking for submissions about how you have been affected by your own immigration and how the immigration stories of other people have affected you. We want to hear from you about how immigration and immigrants have changed your outlook on life, your priorities, your values or your own sense of self.

We also want to hear about how this country's immigration laws may have impacted you or your family, either for better or for worse, and about whether you believe our immigration laws need to be changed, and, if so, how. Finally, we want to hear your views on how well, or how poorly, immigrants are treated in this country and what could be done to improve the situation. Submissions can include stories, letters, poems, artwork, or even scenes with characters and dialogue, about your own immigration story, the immigration stories of family members, friends or neighborhood or public figures, or simply about your own personal views on the topic.

We welcome submissions from people who themselves or whose immediate family members immigrated to this country, whose ancestors immigrated here in the distant past or whose ancestors were here before the first immigrants even arrived -- in short, from EVERYONE!

If you speak/write in a language other than English, please feel free to send us a submission in your native language.

We will compile selected submissions, and the finished product will be presented by professional actors during a live performance at our October 2019 *pro bono* celebration. At the same event we will display artwork selected from the submissions.

Submissions should be no more than ten (10) pages in length and mailed, with the below release, to: **Pro Bono Coordinator, Prisoners' Legal Services, 41 State Street, Suite M112, Albany, New York 12207, no later than June 30, 2019.**

By sharing your first-hand stories, we hope to educate the public about the issues you face, and recruit attorneys to take cases *pro bono*, thus increasing access to justice for indigent incarcerated persons across the State. While we cannot guarantee that each piece will be read or displayed, we encourage all submissions and will do our best to integrate each one into the event. PLS reserves the right to make editorial changes to submissions.

Please note that contributing your story for the Pro Bono Event described above is not the same as seeking legal assistance/representation from PLS.

If you are seeking legal assistance, you must write separately to the appropriate PLS office.

Please complete and return submission form on reverse side of this page and include with your submission.

PLEASE INITIAL ON THE APPROPRIATE LINE(S) AND SIGN BELOW:

_____ PLS may use my real name.

_____ I authorize PLS to use my submission at their event.

_____ I authorize PLS to use my submission on their website, in *Pro Se*, and/or for other informational purposes

I consent to PLS including this submission as part of its National Pro Bono Week event. I understand that my contribution will be retained and may be used again by PLS after the event.

_____ _____

Signature Date

Mail to: **Pro Bono Coordinator**
Prisoners' Legal Services
41 State Street, Suite M112
Albany, NY 12207

PRO SE VICTORIES!

***Matter of Michael Czora v. James Thompson*, Index No. 1-2015-00046 (Sup. Ct. Erie Co. June 9, 2015). After reviewing the sentencing minutes relating to the petitioner's 2007 conviction, the court granted his petition, over respondents' objections, ordering that DOCCS expunge all references to petitioner's status as a second felony offender.**

***Charlie Scott v. The State of New York*, Clm. Number 123959 (Ct. of Clms. April 25, 2018). After a trial, the court found that in 2013, DOCCS had wrongfully confined Charlie Scott for what appears to be roughly 100 days.** A court conducts a trial when there are disputed issues of facts. That Mr. Scott was successful after trial means that with respect to the disputed issues of fact, the court gave greater weight to Mr. Scott's evidence than it did to DOCCS' evidence.

***Luis Ramos v. Paul Chappius, Jr.*, Index No. 15 CV 06600 (W.D.N.Y.). After defeating a motion to dismiss, Luis Ramos settled his §1983 case against corrections staff at Southport C.F., whom, Mr. Ramos claimed, had wrongfully confined him to SHU for 215 days based on a determination of guilt made at a Tier III hearing at which the hearing officer had violated his right to call witnesses.**

***Jessie Barnes v. Paul Chappius*, 2018 WL 4660390 (N.D.N.Y. Sept. 28, 2019). Responding to cross motions for summary judgment, Judge Sharpe accepted in its entirety the Magistrate Judge's report and recommendation denying the plaintiff's motion for summary judgement and recommending that the defendants' cross-motion for summary judgment be granted in part and denied in part.** To that end, the court adopted the magistrate's recommendation that eight of the plaintiff's claims be dismissed in their entirety; that the failure to protect claim be dismissed as to two defendants, but proceed to trial as to Defendants Rock and Uhler; that the plaintiff's Eighth Amendment use of force claims as to three incidents be dismissed, but that the use of force claims relating to 4 other incidents proceed to trial; that the plaintiff's First Amendment retaliation claims against two defendants be dismissed but that the remaining First Amendment claims against 10 other defendants proceed to trial; that the plaintiff's Due Process claims with respect to one disciplinary hearing proceed to trial but that the remaining due process claims be dismissed.

***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 Hearings

Charges of Fighting and Possession of a Weapon Were Not Supported by Substantial Evidence

After an investigation led to confidential information that Thomas Sumter had assaulted another individual and struck him in the face with a padlock inside of a sock, security staff charged Mr. Sumter with fighting, assault, possession of a weapon and engaging in violent conduct. Mr. Sumter was found guilty at the Tier III hearing and the determination of guilt was affirmed by the Commissioner.

Mr. Sumter then filed an Article 78 challenge to the hearing, asserting that the findings that he possessed a weapon and was fighting were not supported by substantial evidence. In *Matter of Sumter v. Annucci*, 157 A.D.3d 1125 (3d Dep't 2018), the court agreed that neither of these charges was supported by sufficient evidence. Specifically, the court found, and the respondent agreed, there was no evidence that petitioner and the victim engaged in an exchange of blows. Further, the court wrote, there was no evidence that petitioner had a padlock or other dangerous instrument and no eyewitness testimony that the victim's injuries were inflicted by petitioner's use of a dangerous instrument. In addition, no padlock was ever recovered. Based on this analysis, the court reversed the charges of possession of a weapon and fighting.

The court found that there was a sufficient evidentiary basis for the findings that petitioner assaulted another inmate and engaged in violent conduct.

As a remedy, the court remitted the matter for a determination with respect to the recommended loss of good time.

The Ithaca Office of Prisoners' Legal Services represented Thomas Sumter in this Article 78 proceeding.

Court Rejects Claim that HO Violated Petitioner's Right to Call Witnesses

While searching the cube that Darnell Ballard shared with other prisoners, a correction officer found a jar of urine, a bottle of bleach, 12 unidentified pills that were not in packaging, five latex gloves and a box of service gloves. The officer charged Mr. Ballard with possession of an altered item, smuggling, possession of contraband, possession of unauthorized medication, unhygienic act, unauthorized exchange, possessing property in an unauthorized location, and stealing or misusing state property.

Prior to the hearing on the charges, Mr. Ballard informed his employee assistant that he wanted to call a witness. The employee assistant form indicated that the witness had refused to testify but did not document the reason for the refusal. At the hearing, the hearing officer advised Mr. Ballard that the witness had refused to testify, to which Mr. Ballard responded, "okay." There was no witness refusal form in the record.

After the hearing officer found Mr. Ballard guilty of the charges and the determination of guilt was affirmed on administrative appeal, Mr. Ballard filed an Article 78 action, alleging that the hearing officer had violated his right to call witnesses when he failed to investigate the reason that the witness had refused to testify. In *Matter of Ballard v. Annucci*, 2019 WL 385215 (3d Dep't 2019), the court rejected this argument, holding that because the petitioner failed to object or to demand further inquiry into the reason for the prisoner's refusal to testify, the petitioner's claim that the hearing officer unlawfully denied his right to call witnesses was unpreserved for the court's review. In reaching this conclusion, the court cited *Matter of Ayuso v Venettozzi*, 159 A.D.3d 1209, 1209 (3d Dep't 2018) and *Matter of Harris v. Annucci*, 148 A.D.3d 1385, 1385-1386 (3d Dep't 2017).

Darnell Ballard represented himself in this Article 78 proceeding.

Hearings Reversed Where Prisoners Were Not Present When Their Witnesses Testified

In three recent cases, the Supreme Court, Albany County, considered whether the accused prisoners' right to call witnesses was violated when the hearing officers had the prisoners' witnesses testify when the accused were not present.

The Department's regulations provide that an inmate has a conditional right to call witnesses on his or her behalf and to be present during their testimony. 7 NYCRR §254.5. Witnesses will be allowed to testify in the presence of the accused inmate unless the hearing officer determines that doing so would jeopardize institutional safety or correctional goals. 7 NYCRR §254.5(b). In *Matter*

of Garcia v. LeFevre, 64 N.Y.2d 1001 (1985), the Court of Appeals held that if an inmate is excluded from the hearing when his witnesses testify, he or she has a right to know why this was necessary to preserve safety or to advance correctional goals. Further, the Court found, where an inmate is not permitted to be present when his witnesses testify, a waiver of the inmate's right to be advised of the hearing officers reasons for not allowing him or her to be present will only be found upon a showing in the record that the inmate "made a knowing and intelligent waiver of his rights." Unless there is such a waiver in the record, the inmate need not object to the procedure.

Matter of Ronald English v. Anthony Annucci

In *Matter of Ronald English v. Anthony Annucci*, Index No. 5209-18 (Sup. Ct. Albany Co. Dec. 10, 2018), at a re-hearing on charges that the petitioner had assaulted an officer, the hearing officer took the testimony of two of the petitioner's witnesses when the petitioner was not present. In support of his decision to do so, the hearing officer wrote, "security reasons."

One of the witnesses testified via speaker phone; the other testified in the hearing room in the hearing officer's presence. When the hearing officer advised the petitioner that he would not be present for his witness's testimony, the petitioner did not object and provided questions for the hearing officer to ask the witnesses.

Based upon the application of the law set forth above, the court held that the petitioner had not waived his right to be present when his witnesses testified or his right to be informed of why safety and correctional goals required taking their testimony outside of his presence. The court then found that the "conclusory invocation" of "security reasons," with no explanation as to how petitioner's presence while his witnesses testified would have threatened institutional safety or correctional goals failed to satisfy the requirements of the regulations.

Further, the court noted, one of the witnesses testified via speaker phone. Petitioner's presence during phone testimony could not have threatened institutional safety or correctional goals. And, if one witness had testified by phone, the court asked, why could not the second witness also have done so if having petitioner and his witness in the same room was problematic?

The court concluded that there was nothing in the record showing that allowing Petitioner to be present during the testimony of at least the witness who testified by phone would have threatened institutional safety or correctional goals and held the matter must be reversed and the charges expunged from petitioner's records.

Matter of Charles Hubbard v. Anthony Annucci

In *Matter of Charles Hubbard v. Anthony Annucci*, Index No. 2609-28 (Sup.Ct. Albany Co. Jan. 24, 2019), the petitioner was charged with inmate assault, violent conduct and possession of a weapon. At his hearing, he requested four inmate witnesses. The witnesses were no longer at the prison where the incident took place (although the petitioner was still there) and therefore testified by speaker phone. There was a written statement in the record that for security reasons, the testimony of the inmate witnesses was recorded and played back to the accused inmate.

The court noted that there was no evidence in the record showing that the four witnesses posed any actual threat to institutional safety or otherwise would compromise correctional goals. Thus, there was no factual basis supporting the conclusion that having these witnesses testify in the petitioner's presence was a security issue. Similarly, the court noted, these were the first charges involving violence that had been brought against the petitioner. And, the issue of conflict between the witnesses and the accused turning violent was mitigated by the fact that the witnesses testified by telephone. Based on these facts, the court found the hearing officer's conclusory and unsupported contentions regarding the security of having the witnesses testify in the petitioner's presence was insufficient and contrary to the requirements of the regulation. The judge ruled that because the hearing officer failed to adhere to the regulations, the hearing should be annulled.

Matter of Dequana White v. Anthony Annucci

At petitioner's hearing, the hearing officer stated that for security reasons, petitioner could not be in the room when his four inmate witnesses testified. The petitioner did not object and gave questions to the hearing officer to ask the witnesses. Two of the witnesses testified via speaker phone and two testified in person. Petitioner was not in the hearing room when any of the witnesses testified.

In *Matter of Dequana White v. Anthony Annucci*, Index No. 5546-18 (Sup. Ct. Albany Co. Feb. 6, 2019), the court found that the petitioner was wrongfully excluded from the hearing during the testimony of the two witnesses who testified via speaker phone. That is, the hearing officer violated the petitioner's right to be present.

With respect to the two witnesses who testified in the hearing room but out of the presence of the petitioner, the court found that the hearing officer had violated the regulations that require that an accused inmate's witnesses testify in his or her presence unless doing so jeopardizes institutional safety or correctional goals because the hearing officer had failed to inform the prisoner of why he could not be present when the witnesses testified.

The Ithaca Office of Prisoners' Legal Services represented Ronald English and Dequana White.

The Albany Office of Prisoners' Legal Services represented Charles Hubbard.

Court Upholds Determination of Smuggling

In *Matter of Bachiller v. Annucci*, 166 A.D.3d 1186 (3d Dep't 2018), the court considered a challenge to a Tier III determination that the petitioner and his brother were guilty of violating visiting room, telephone and facility correspondence procedures and the rules prohibiting smuggling and conspiring to possess drugs. The charges arose from an investigation conducted by the DOCCS Office of Special Investigations, Narcotics Unit. According to the misbehavior report, the investigation revealed that the petitioner and his brother had conspired to purchase and package synthetic marijuana which the brother would then smuggle into the prison during a visit with the petitioner. The item that the brothers were discussing during their phone conversations was "Cool Ranch Doritos." The officer who wrote the misbehavior report testified that based on his monitoring of the petitioner's phone calls and on his training and experience, "Cool Ranch Doritos" was code for synthetic marijuana.

The petitioner testified that during the phone calls, when he told the brother he had received the Cool Ranch Doritos, he had, in fact, received Cool Ranch Doritos from his brother. The court noted that the evidence in the record of the hearing showed that the petitioner had not received any packages containing Cool Ranch Doritos during the period preceding the phone call acknowledging receipt.

The court also found that with respect to the petitioner's assertion that the respondent had not followed the directives regarding the control and handling of contraband, the petitioner was not charged with *possession* of drugs, and the rule prohibiting smuggling had been violated when he *conspired* with his brother *to introduce drugs into the facility.*

Based on its analysis of the record, the court affirmed the lower court's dismissal of the petition.

Nilo Bachiller represented himself in this Article 78 proceeding.

Court Finds Insufficient Evidence That Petitioner Demonstrated and Failed to Comply with Orders

After 146 prisoners failed to comply with orders to exit the yard and return to their cell blocks, Marsean Johnson was charged with participating in a demonstration and failing to promptly obey orders of department personnel. The misbehavior report asserted that the incident occurred but did not allege that Mr. Johnson was among the inmates who formed a group in the yard and refused to leave. At his

hearing, a DOCCS sergeant testified that during the incident, a group of inmates gathered in the yard and refused to return to their cells. Although the door to the yard was closed, the sergeant testified, during the 45 minute standoff the door was open and shut several times to allow inmates ample time to leave the yard. The sergeant further testified that he did not see Mr. Johnson in the yard, but that his name "had come up in conversations with other officers" and was on a list of inmates who were in the yard that evening. Mr. Johnson admitted that he was in the yard that day but testified that he had followed the order to return to his cell block.

In *Matter of Johnson v. Griffin*, 91 N.Y.S.3d 452 (2d Dep't 2019), the court noted that a misbehavior report written by someone with first-hand knowledge of the events – that is, an eye witness – can constitute substantial evidence. Here, the court found, the respondent had failed to establish that the petitioner was one of the inmates who participated in the demonstration or refused to comply with orders to leave the yard. For this reason, the court ordered the hearing reversed and the charges expunged.

Marsean Johnson represented himself in this Article 78 proceeding.

Sentencing and Jail Time Credit

Time Spent in Jail Will Only Be Credited to One Sentence

On November 25, 1998, while Gil Lewis was on parole, he was arrested for the commission of a new felony. Between the arrest date and April 2000, when, after being convicted of Kidnapping in the first degree and sentenced to 15 years to life, Mr. Lewis was in custody solely because of the new felony charge. The Division of Parole did not lodge a parole violation warrant against him and even though he was in prison, technically he continued to be under parole supervision. That is, the previously imposed sentence continued to run until April 7, 1999 when it expired.

When Mr. Lewis was received by DOCCS, although he had been in pre-trial custody for 1 year and 5 months, he was only credited with the time between when the sentence with respect to which he had been on parole expired (April 1999) and when he was received by DOCCS (April 2000). After unsuccessfully trying to persuade DOCCS to credit to his 2000 sentence the period between his arrest (11/25/1998) and the expiration of his original sentence (4/7/1999), Mr. Lewis filed an Article 78 action seeking the additional jail time credit.

In *Matter of Lewis v. Holford*, 168 A.D.3d 1303 (3d Dep't 2019), the court found no error in the amount of jail time that had been credited to petitioner's 2000 sentence. Penal Law §70.30 controls the crediting of jail time (the time that a person spends in jail between his or her arrest and transfer to DOCCS custody). Subsection 3 of Penal Law §70.30 provides that jail time credit is required to "be calculated from the date custody under the charge commenced to the date the sentence commences and shall not include any time that is credited against the term or maximum term of any previously imposed sentence." Here, the court found, because the sentence with respect to which petitioner was on parole at the time of his arrest continued to run between the November 1988 arrest and the April 1999 expiration of the sentence, the time that petitioner spent in jail during that period was credited to a previously imposed sentence. As such, it was not available to be credited to the 2000 sentence.

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

Gil Lewis represented himself in this Article 78 proceeding.

Miscellaneous

Court Restricts the Application of the SARA Housing Limitations

The Sexual Assault Reform Act (SARA), Executive Law §259-c(14), prohibits people who are serving sentences related to certain sex offenses from being paroled to residences that are within 1,000 feet of a school. At issue in *People ex rel. Negron v. Superintendent of Woodbourne C.F.*, 2019 WL 758682 (3rd Dep't Feb. 21, 2019), were the first three and a half lines of Executive Law §259-c(14):

"**Where a person serving a sentence for an offense defined in [Pena Law Articles 130, 135 or 253 or Penal Law § 255.25, §255.26, or §255.27] and the victim of such offense was under the age of [18] at the time of such offense or such person has been designated a level three sex offender pursuant to [Correction Law §168-1(6)]**, is released on parole or conditionally released pursuant to Executive Law §259-c(1) or (2)] the [Board of Parole] shall require, as a mandatory condition of such release, that such sentenced offender shall refrain from knowingly entering into or upon any school grounds as that term is defined in [Penal Law §220.00(14)], . . . while one or more of such persons under the age of [18] are present." That is, in this case, the court was called upon to decide the definition of the group of people who cannot live within 1,000 feet of school property.

In 1997, the petitioner in this case finished serving a sentence for an offense which fell within the terms of Executive Law §259-c(14). When he finished serving his sentence, he was found to be a level three sex offender. In 1998 and 2005, the petitioner was convicted of attempted burglary. In 2016, the petitioner was granted release to parole supervision on his 2005 sentence subject to various terms and conditions, including that he find SARA compliant housing. When he was unable to find housing that was not within 1,000 feet of a school, he was not released from custody but remained in prison. He then filed the lawsuit that led to this decision, alleging that he did not fall within the definition of people who are required to live in SARA compliant housing.

What took him out of that group, the petitioner argued, was that at the time that he was eligible to be released to parole supervision, he was not serving a sentence for one of the **enumerated** (listed) offenses that would require, pursuant to Executive Law §259-c(14), that he reside in SARA compliant housing. He pointed to the portion of the first three and a half lines of the subsection: "Where a person *serving a sentence for an offense defined in [Penal Law Articles 130, 135 or 253 or Penal Law §255.25, §255.26, or §255.27] . . .*"

The respondents countered with the argument that the statute also mandated that anyone who was a level three sex offender live in SARA compliant housing. They pointed to the end of the first three and a half lines of the subsection that reads: " . . . *or such person has been designated a level three sex offender . . .*"

The court found that the statute is **unambiguous** (has only one meaning) and that it should be interpreted in the manner **advanced** (argued) by the plaintiff. The court found that the term "*such person*" referred plainly and **unequivocally** (leaving no room for doubt) to "a person serving a sentence for an offense defined in [Penal Law Articles 130, 135 or 253 or Penal Law §255.25, §255.26, or §255.27] . . ." Based on this finding, the court found that the school-grounds restriction applies either to 1) an offender serving one of the enumerated offenses whose victim was under the age of 18 or 2) an offender serving one of the enumerated offenses who was designated a risk level three offender. As petitioner was not serving a sentence for an offense set forth in Executive Law §259-c(14), the court ruled, the statute did not apply to him.

Elon Harpaz of the NYC Legal Aid Society represented Raymond Negron in this Article 78 proceeding.

FEDERAL COURT DECISIONS

Court Issues Preliminary Injunction Ordering Merit Release Re-hearing

Background

In 2014, Dana Beckhorn injured his left shoulder while operating a crane. Because this injury resulted in permanent limitations to his ability to work, Mr. Beckhorn filed a worker's compensation claim. Two years after the injury, Mr. Beckhorn was sentenced to a 4 year determinate term. His merit release date was in July 2018.

DOCCS offers prisoners the opportunity to participate in the Comprehensive Alcohol and Substance Abuse Treatment, a three phase program. The first phase is offered in prison, the second includes a transfer to a work release facility and the third involves parole supervision.

CASAT interfaces with merit release, an early parole program for people serving indeterminate sentences. When prisoners have completed Phases 1 and 2 of CASAT, they are released to parole supervision on their merit release dates to participate in the Third Phase.

Mr. Beckhorn completed Phase 1 of the CASAT (Comprehensive Alcohol and Substance Abuse Treatment). On March 6, 2018, he was transferred to Rochester C.F. to complete Phase 2. While he was willing and able to work, his shoulder injury limited the work that he could do.

Shortly after arriving at Rochester C.F., Mr. Beckhorn met with the Temporary Release Committee (TRC) which, according to Mr. Beckhorn, advised him that due to his disability, it would be best if he worked in the facility kitchen until his merit release. However, after Mr. Beckhorn had been at Rochester C.F. for a month, the Superintendent removed him from the Temporary Release Program because he had not sought taxable work – that is, work outside the prison – as the program requires.

Following the Superintendent's removal, Mr. Beckhorn met with the TRC a second time. The TRC review form states that Mr. Beckhorn was referred to the TRC after the Superintendent denied him community service leave and *he requested to remain unemployed so as not to jeopardize his worker's comp claim.* At the hearing, Mr. Beckhorn emphasized his willingness, desire and ability to work. The TRC Chairperson, however, expressed concern over the possibility that if he did get a job, he might, because of his less than robust condition, again be injured. This, the Chairperson **opined** (gave an opinion), made it too risky to place him in a job. The TRC ruled that Mr. Beckhorn should be removed from Phase 2 due to his wish to remain unemployed and the Superintendent's recommendation to remove him due to his refusal to work.

As a result of the TRC decision, Mr. Beckhorn was removed from the temporary release program and transferred from the work release facility. In April, he was informed that his merit time allowance had been revoked for refusing work. Mr. Beckhorn appealed the decision but the appeal was denied.

Filing of Complaint

In December 2018, Mr. Beckhorn filed a claim in federal district court under the Americans With Disabilities Act (ADA) and the Rehabilitation Act (RA), asking that court find that the defendants violated the ADA and RA by denying him access to the Temporary Release Program because of his disability, which led to the revocation of his merit time allowance and his continued incarceration. He asked the court for a preliminary injunction

reinstating his merit time allowance and ordering the defendants to hold a parole hearing. The court's analysis of his claim is set forth in *Dana Beckhorn v. NYS DOCCS, et al.*, 2019 WL 234774 (W.D.N.Y. Jan. 16, 2019) and is summarized below.

Requirements for Issuance of a Mandatory Preliminary Injunction

A preliminary injunction is a court order issued before the court makes a final decision in the case. A mandatory preliminary injunction is an order that changes the status quo (the way things are when the injunction is requested). To obtain a mandatory preliminary injunction, the plaintiff must make a clear showing that:

1. There is a clear and substantial likelihood of success on the underlying claim. (In this case, that the court will find that the defendants violated Mr. Beckhorn's rights under the ADA and RA);

2. There is a likelihood of **irreparable harm** (permanent harm) if the injunction is not granted;

3. The balance of hardships tips in the moving party's favor. (Mr. Beckhorn will be hurt more if the injunction is not issued than the defendants will be hurt if it is); and

4. The public interest in not harmed by issuance of the injunction

The single most important requirement that must be shown before a preliminary injunction may be issued is that if the injunction is not granted, the applicant is likely to suffer irreparable harm before the court reaches a final decision on the merits of the claim.

Likelihood of Success on the Merits: Establishing a Claim Under the ADA

To establish that he was substantially likely to succeed on his claim of disability discrimination under the ADA, Mr. Beckhorn had to show that he has a disability, that he was qualified for the merit time program and that he was denied the benefits of the program solely because of his disability.

Mr. Beckhorn has permanently limited range of motion in his left shoulder resulting from his shoulder injury. This, the court found, is a disability. The court also found that Mr. Beckhorn was otherwise qualified for the merit release program. He had been granted a merit time allowance and had he not been removed from the temporary release program, he would have continued to qualify for the program.

With respect to whether Mr. Beckhorn was removed from the program because of his disability, the court found that the transcript of the second TRC hearing was "direct evidence that the TRC acted with discriminatory animus." Discriminatory animus refers to conduct by the agency which *demonstrates* discriminatory intent. Courts look for conduct that demonstrates discriminatory intent because agencies rarely admit that they took adverse action against a disabled person for discriminatory reasons. Discriminatory animus can be inferred, for example, from the absence of a legitimate reason for the agency's conduct.

Here, the DOCCS defendants argued that Mr. Beckhorn refused to work and it was his refusal that caused him to be ineligible for the work release program. The court dismissed this argument, finding that the TRC had acted upon a discriminatory motive when it recommended against Mr. Beckhorn's involvement in the work release program.

The court found evidence of this motive in the TRC Chairperson's statement that if the TRC sent Mr. Beckhorn to work, he might be injured again and that New York State could not take that risk with Mr. Beckhorn. In effect, the court found, the Chairperson was saying that because Mr. Beckhorn was injured and disabled once, the State could not risk a second job related injury. The court concluded that because the TRC recommendations play a meaningful role in determining whether a prisoner will be allowed to participate in work release, and the TRC hearing statements demonstrate impermissible bias that might well influence the ultimate decision maker, Mr. Beckhorn had made the necessary showing of disability discrimination.

Finally, the court found, as Mr. Beckhorn had demonstrated that his disability was a substantial cause of the defendants' denial of access to the temporary release program, and but for his disability, he would have been given access to the program, Mr. Beckhorn had shown a substantial likelihood of success on the merits.

Irreparable Harm

"Irreparable harm is an injury that is neither remote nor speculative," the *Beckhorn* court wrote. As a result of the defendants having deprived Mr. Beckhorn of his merit time allowance, he was at the time of the hearing incarcerated without a parole board hearing. A wrongful deprivation of liberty, the court wrote cannot be remedied after trial. For these reasons, the court found that Mr. Beckhorn had established that he will suffer irreparable harm if the preliminary injunction were not issued.

Balance of Equities and Public Interest

The court found that the balance of the equities also favored the plaintiff. Mr. Beckhorn had earned the right to go before the parole board as though he had never lost his merit allowance, and this was simple for the defendants to provide. Compared to the effects of remaining incarcerated, the balance of the equities tipped in favor of requiring the defendants to hold a parole hearing. In addition, the public interest was not disserved by granting Mr. Beckhorn's request for a preliminary injunction. Rather, doing so furthered the public interest in the fair administration of public programs.

Conclusion

Based on this analysis, the court issued a preliminary injunction requiring the defendants to arrange for Mr. Beckhorn to appear before the New York State Board of Parole for consideration of merit release to parole.

The Buffalo Office of Prisoners' Legal Services represented Dana Beckhorn in this Section 1983 action.

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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.

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