Pro Se

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Court Strikes Rule Prohibiting DOCCS Staff from Associating with Prisoners and Parolees

In Corso v. Fischer, 2013 WL 5807470 (S.D.N.Y. Oct. 22, 2013), the plaintiff challenged the DOCCS rule which **prohibits** (bars) DOCCS employees from **associating** (having contact) with, among others, current and former prisoners, current and former parolees, and potentially, family members and friends who have contact with such individuals. See Employee Manual, Rule 2.15. The plaintiff has been a DOCCS correction officer since 1998. At various times, her husband (later former husband) and the father of one of her children, was a prisoner, parolee and former prisoner/parolee. In addition, one of the plaintiff's adult children was, for a time, an inmate in a county jail and another of the plaintiff's adult children had a child with a parolee. Over the years, the plaintiff sought to have in-person contact with these individuals and with family members who were in contact with these individuals. Some of her requests were granted and some were partially granted; that is, the plaintiff was allowed to write to her family members who had had significant contacts with the criminal justice system. Several of her requests that she be allowed to have in-person contact were denied.In 2011, the plaintiff brought this lawsuit, claiming that the rule wrongfully **infringes on** (interferes with) her First Amendment Right to freedom of **association** (relationship).

A motion for summary judgment was before the court. The court first noted that the right to freedom of association protects an individual from undue intrusion by the State in his or her choices to have relationships with others. To determine whether a law or regulation unconstitutionally infringes on an individual's right to freedom of association, the court must first balance the strength of the associational interest in resisting government interference against the State's justification for the interference. Where the government interference substantially interferes with close family relationships, the court gives the rule the highest level of review – strict scrutiny. In this case, the court looked at whether the rule was so broadly written as to sweep in constitutionally protected conduct, thereby chilling such activity by those not before the court.

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JUSTICE REINVESTMENT

A Message from the Executive Director – Karen L. Murtagh

For years there has been talk of America's exploding prison population and the need for policy change to reduce incarceration and recidivism and increase the chances of successful reintegration. We have been bombarded with articles, including in *Pro Se*, lamenting the fact that the United States has the highest incarceration rate in the world. We have been admonished for our criminal justice "get tough" policies and we have been told such policies would not only not work, but that they would lead to a prison population explosion that could possibly bankrupt our states. We have been told that states would have to address this issue sooner or later.

That time has come. While I would like to report that criminal justice policies are being reviewed because we have realized that these policies are neither fair nor just, or that we have become more civilized, or that we now recognize that sentencing policies which include incarceration of low-level drug offenders and sentences of life without parole simply don't work, unfortunately, that is not the case. Our failed criminal justice policies are being reviewed, and in many states revamped, for primarily one reason - money.

In an April 2013 article published by The Council of State Governments' Justice Center entitled, "*Lessons for the States: Reducing Recidivism and Curing Corrections Costs Through Justice Reinvestment*," (hereinafter *Lessons*), the authors explore the need to address the issue of declining state revenues in light of the skyrocketing costs of state spending on corrections. These expenses increased over $40 billion between 1988 and 2011. But what is justice reinvestment? According to the article, "[J]ustice reinvestment is a data–driven approach that ensures that policy making is based on a comprehensive analysis of criminal justice data and the latest research about what works to reduce crime, and is tailored to the distinct public safety needs of the jurisdiction."

There are two phases to justice reinvestment. The first phase involves expert analysis of state criminal justice data "to develop practical consensus-based policies that reduce spending on corrections and generate savings that can be reinvested in strategies to improve public safety." The second phase involves the implementation and the monitoring of the new policies to ensure that the projected outcomes are met.

The *Lessons* article notes that the 17 states that have engaged in this process have learned six (6) lessons from doing so. First, it is imperative that a comprehensive data analysis be conducted in order to determine what factors drive crime "reoffense rates, and the growth of correctional populations." When Kansas engaged in the justice reinvestment process, it reviewed 1.2 million data records. Second, states must create a bi-partisan team of elected and appointed officials to work closely with researchers and criminal justice policy experts. This team must then reach out to stakeholders across the state to help accurately diagnose systemic issues and develop an effective response to them. The stakeholders should include "prosecutors, public defenders, judges, corrections and law enforcement officials, service providers, community leaders, victims and their advocates, and people who have been incarcerated."

Third, the focus of services should be on those individuals who are at a high risk of reoffending, and scientifically validated risk-assessment tools should be used to make these determinations. Fourth, states should reinvest their savings in high-performing programs that apply "strategies that reduce recidivism and improve public safety." To do this, states should redirect funding for programs with formula-based contracts to programs that operate on performance-driven contracts, and funded programs should be required to show that they "apply evidence-based practices, better serve the intended target populations, and reduce recidivism."

Fifth, states should strengthen community supervision. Statistics show that rate of growth for those on parole and probation has been greater than that of prisons – 1 in 50 adults are on probation or parole in the U.S – but most community supervision budgets have either decreased or remained stagnant. In addition to providing adequate funding, community supervision models should be structured in a way that addresses risk, need and responsivity; prioritizies supervision based on risk; addresses core criminogenic needs; and designing supervision programs that are responsive to an individual's specific learning style so as to reduce barriers to learning.

Finally, states should incentivize performance. Typically this translates into states rewarding programs that divert offenders from prison. Such programs often replace what would otherwise be prison time with community-based sanctions. States can then reinvest the savings generated from such programs into those programs with the goal of continuing to reduce crime and recidivism.

Of course, as with the implementation of any new policy, it costs money upfront to engage in the analysis that will hopefully result in saving money in the long run. That is where organizations such as the U.S. Department of Justice's Bureau of Justice Assistance and The Pew Charitable Trusts come into play. Both have provided significant funding to a number of states to engage in an analysis of their state's criminal justice systems and to begin implementation of new policies with the hope that such policies will result in long-term savings.

The state of Ohio is on that hope train. In 2011, after engaging in an in-depth risk assessment analysis which demonstrated that 71% of those in the high-risk group were rearrested while only 17% of those in the low-risk group were rearrested, and that low-risk individuals were more likely to recidivate when they were over-supervised, Ohio passed comprehensive legislation that requires the state's community supervision agencies to "prioritize placement for people who would benefit most from intensive supervision and treatment." The legislation also mandates that individuals who are first time property or drug offenders be given probation as opposed to prison sentences and be required to attend various treatment programs.

We have all heard the old adage that the punishment should fit the crime – but somehow we lost sight of that over the years. As a result we have ended up with statistics like those cited by David Cole and Marc Mauer in a November 14, 2013 op-ed in the Washington Times: "One in nine prisoners in the United Sates is now serving a life sentence, including 10,000 serving life for a non-violent offense (often the third strike under a three-strikes law). Nearly a third of the life sentences are imposed with no possibility of parole." Sadly those statistics meant nothing until states started to run out of money.

It seems intuitive that the person who needs more supervision should get it. It seems logical that restitution and/or treatment should be the punishment for a person who is guilty of a non-violent crime. And yet, it was not until states were faced with declining revenues that they came to the realization that they needed to change their approach to criminal justice. I am glad we are finally here; I am just troubled by the lengthy and convoluted path we took to get here.

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While the court discussed several aspects of the rule, it found most problematic the portion of the rule that permitted an employee like the plaintiff to associate with the father of her child, and the child herself, where the father was an inmate or parolee or a former inmate or former parolee, but would not permit her to associate with her child if he or she were an inmate or parolee or a former inmate or former parolee. Also troubling to the court was a provision of the rule which permits the Inspector General (IG) to grant applications for greater contact than the rule permits, but which provides no guidance as to how the IG is to exercise that authority.

The court found that the rule must be upheld if the defendants could provide a "sufficiently persuasive" **justification** (reason) for its restrictions. Under strict scrutiny, the state must show that the rule "furthers a compelling state interest that cannot be achieved through a less restrictive means." In other words, the rule will be upheld if what the rule is intended to protect is very important and there is no way to protect this interest and also allow the plaintiff more freedom to be with her relatives who are in prison, paroled or formerly in either status.

The defendants argued that the rule promotes the following interests:

> 1) the rule discourages the introduction of contraband because employees who associate with the individuals with whom the rule prohibits association (Prohibited Individuals), are more likely to bring in contraband;
>
> 2) the rule informs the public that DOCCS employees are discouraged from forming relationships that could lead to the introduction of contraband;
>
> 3) the rule encourages non-association because, where both parties know the relationship is prohibited, they are discouraged from forming such relationships while the prisoner is still in prison; and
>
> 4) the rule discourages the instability that could affect work performance should an employee and a former prisoner be allowed to associate or live together.

The court found that while the rule promotes an important state interest, it did not do so in a way that is narrowly tailored. The defendants failed to persuade the court that such a broad rule – which prohibits a seemingly endless number of constitutionally protected family relationships – is necessary for orderly prison administration:

> "The rule prohibits any form of association between DOCCS employees and inmates, former inmates, parolees, and former parolees without regard to how remote the threat of conflict of interest might be. It provides no temporal [time] or geographical limitation with respect to the former inmate's incarceration nor does its prohibition account for variations in the seriousness of the person's offense or his or her disciplinary history. The association is forbidden even if the employee works in Buffalo and the family member did time in New York City; whether the family member's offense was murder or cloning a phone; whether the inmate was a model prisoner or a routine violator of prison rules; and even if the family member has had a clean disciplinary history for decades. The blanket prohibition on contact of any kind amounts to a blunt axe when a scalpel is called for."

Finding that the risk of the rule chilling protected relationships is substantial, the court held that so much of the rule as applies to constitutionally protected family relationships does not withstand strict scrutiny.

The court also found that the rule was overbroad; it prevents a DOCCS employee from visiting or even corresponding with his or her incarcerated spouse if either 1) the couple has no children or 2) their children do not maintain a relationship with the incarcerated parent. The rule prevents an employee from re-establishing contact with his or her spouse when the spouse is released

and is a former inmate, and the same portion of the rule also applies to formerly incarcerated children, parents or siblings. In fact, the court found, an employee would be in violation of the rule if he had any contact with a parent who had spent thirty days in jail in the 1960s for dodging the draft relating to the Vietnam War. Thus, the court found that there is a realistic danger that the rule will significantly compromise recognized First Amendment protections of persons not before the court.

Finally, the court found that the IG's authority to grant exceptions to the rule did not make the rule constitutional. The rule still prohibits employees from associating with their spouses, children and other close relatives if those persons were once prisoners. Further, the rule does not include any factors that the IG is required to consider or otherwise guide the exercise of the IG's discretion. Exceptions which are in the unbounded discretion of the IG, the court concluded, place applicants at the mercy of the government. It would not, the court wrote, uphold an unconstitutional rule because the government promises to use it responsibly.

Based on this analysis, the court granted the plaintiff's motion for summary judgment and enjoined the defendants from investigating, enforcing or reviewing any matter premised on the relevant subsections of Section 2.15 of the DOCCS Employee Manual.

News and Notes

PLS 2013 Pro Bono Event

On October 21st, Prisoners' Legal Services' Pro Bono Partnership Project hosted its third annual National Pro Bono Week event, titled "Bookends: The Effect of Incarceration on Children and the Elderly." The event included a performance and awards ceremony.

PLS asked incarcerated New Yorkers to describe how their imprisonment affects their relationships with their children and/or what it is like to age behind bars. Demonstrating an intense interest − and a desire to have their voices heard − prisoners submitted poems, drawings, and stories that depicted, often in intimate detail, how prison has impacted not only their lives but also the lives of their children and loved ones. The Pro Bono Partnership Project received over 170 submissions − more than 4 times the number of submissions for last year's event!

At the event, local actors from the Soul Rebel Performance Troupe brought these stories to life. Their outstanding performances moved the audience to laughter and tears. Senator John Dunne, a PLS board member who was at Attica Correctional Facility in September of 1971 during the uprising, said the performance made him "feel connected to New York's prisoners in a way he had not experienced since the Attica uprising." PLS also presented awards to several volunteer attorneys and students who had made significant pro bono contributions over the past year.

We sincerely thank everyone who submitted a story, poem or piece of art for Bookends. The submissions that we received were deeply personal and incredibly moving; we thank those of you who contributed for both your honesty and openness. Because of you, members of the community turned out in droves to support PLS − more than three times the number of people who attended last year's event came to this year's event.

Again, we thank those of you who took the time to share your thoughts, stories and poems with us and we encourage you to keep an eye out for announcements about our 2014 National Pro Bono Week Celebration event!

State Litigation Followed by Federal Litigation Leads to Award of Damages

Darren Jordan began his litigation **odyssey** (journey) in February 2011 when he was charged with possession of a weapon. Found guilty of the charge, Mr. Jordan submitted an appeal arguing that his right to call witnesses had been violated when the hearing officer refused to call an inmate as a witness. The hearing was reversed and a re-hearing was ordered. Having been found guilty at the re-hearing, Mr. Jordan challenged the second hearing in an Article 78 proceeding that was transferred to the Appellate Division. Prior to submitting a brief in response to Mr. Jordan's claim that his right to call

witnesses had been violated at the second hearing, DOCCS administratively reversed and expunged the hearing. By that time, Mr. Jordan had served 13 months of a 15 month SHU sanction.

Having spent 13 months wrongfully confined to SHU, Mr. Jordan then filed a section 1983 action seeking damages for time that he had spent in isolated confinement due to the flawed hearings. On October 22, 2013, more than two and a half years after he was originally served with the misbehavior report, the court "so-ordered" a stipulation agreeing to compensate Mr. Jordan in exchange for his agreement to dismiss his lawsuit. Now that's perseverance!

LETTERS TO THE EDITOR

Dear Editors of Pro Se,

You requested our pro se victories. Here is a copy of the unreported decision in my Article 78. [See Pro Se Victories!]. If it was not for ***Pro Se***, I would never have won.

I had other attorneys examine the record of my hearing and they said that they could not assist me in challenging the hearing. I sat back and thought to myself, "I have never done an Article 78." I called over to another prisoner who had a stack of back issues of ***Pro Se***. I started reading them, found a bunch of issues, put them in my first Article 78 and guess what? I won.

I want to thank the editors for your dedication and hard work. I truly appreciate it.

Sincerely,

Luis Ramos

Letters to the Editor should be addressed to: ***Pro Se***, 114 Prospect Street, Ithaca, NY 14850, ATTN: Letters to the Editor.

Please indicate whether, if your letter is chosen for publication, you want your name published. Letters may be edited due to space or other concerns.

Pro Se Victories!

Matter of Theodore Bickley v. Brian Fischer, Index No. 140159, (Supreme Court, St. Lawrence County, Aug. 14, 2013). Theodore Bickley successfully challenged a Tier III re-hearing at which he was found guilty of possessing a weapon. The petitioner testified at the hearing that although he was initially present during the search of his cell, he was removed from the area of the search without good cause prior to the alleged recovery of the weapon. At the second hearing and in his Article 78 petition, he raised the issue that the officers' testimony at the second hearing was substantially different from their testimony at the first hearing. The first hearing had been reversed due to the Department's " failure to maintain a complete electronic recording of the hearing." Nonetheless, a complete transcript of the first hearing was attached to the respondent's answer.

The court's review of the transcript of the first hearing revealed no gaps or other indications that the transcript was not complete. Further, there was nothing in the answering papers, the court wrote, even attempting to shed light on the basis for the administrative reversal of the first hearing in light of the seemingly complete transcript of the hearing.

At the first hearing, the two officers involved in the search and the interview of the petitioner testified that he had been taken away from the area where the search took place to be interviewed. At the second hearing, one of these officers testified that petitioner had never left the search area. The other testified that petitioner had been interviewed before the search of his cell began and he was present for the entire search. When petitioner attempted to introduce his copy of the tape of the first hearing to show the change in testimony, the hearing officer refused to accept it. Because the credibility of the officers was critical to the hearing officer's finding of guilt, the court found that the hearing officer's failure to admit the tape of the first hearing was erroneous. The court reversed the hearing and remanded the case for a third hearing.

Matter of Randy Williams v. Brian Fischer, Index No. 141038, (Supreme Court, St. Lawrence County, September 25, 2013). Randy Williams was found guilty of harassment, lying/false information, impersonation and altering, forging or counterfeiting documents. Midway through the hearing, he observed that the hearing officer had filled in the disposition rendered form. He placed his observation on the record and objected to having been found guilty before his last witness had testified. The hearing officer responded that she filled in portions of the document to save time. Mr. Williams' Article 78 petition raised a claim of biased hearing officer.

The court was troubled by the hearing officer's failure to clarify which portions of the disposition rendered form she had filled in prior to the close of the hearing and which remained blank, noting that certain portions would be filled in the same way whether an inmate was found guilty or not guilty. However, the court also noted the length of the entries that the hearing officer had written for the sections headed "Evidence Relied Upon" and "Reason for Disposition." The court concluded that the hearing officer could not have written those entries between when she adjourned for disposition at 11:29 a.m. and when she re-convened the hearing at 11:30 a.m. Accordingly, the court ordered the hearing reversed and remitted for a re-hearing.

Matter of Anthony Foster v. D. Venetozzi, Index No. 2011-1592, (Supreme Court, Chemung County, April 5, 2012). Anthony Foster successfully challenged a Tier III hearing based on the hearing officer's refusal to call as witnesses the medical personnel who treated his wounds and a correction officer who was operating the gates and could see down the gallery and on the hearing officer's failure to produce, even as confidential documents, some of the reports generated as a result of the incident.

The court found that, as petitioner argued, the medical personnel, and the records to which they had access, might have been relevant and material to the issue of whether it was possible for petitioner to have received the injuries that he suffered had the officers used only the force that they acknowledged in their reports. The court also found that only by calling the correction officer as a witness could the hearing officer have determined whether she was able to observe the incident from where she was located. Finally, the court found that even if the hearing officer was correct that the documents which the petitioner had requested were confidential, they were relevant and material and thus the hearing officer should have reviewed them for his own benefit before making a decision. The court ruled that the record, taken as a whole, belied the position of the respondent that the petitioner had received a full and fair hearing. The court ordered the hearing reversed, expunged the record and remanded for a new hearing.

Matter of Luis Angel Ramos v. Brian Fischer, Index No. 1122-11 (Supreme Court, Albany County, July 13, 2011). Luis Ramos successfully challenged a Tier III hearing at which he was found guilty of assault, violent conduct, demonstration, unauthorized organization and weapons possession. He argued that his rights to be present at the hearing and to call witnesses were violated by the hearing officer's interview of two witnesses when petitioner was not present.

At the hearing, Mr. Ramos had requested that two prisoners be called as witnesses. The hearing officer asked whether the witnesses had observed the incident, to which Mr. Ramos replied, "I don't know. That's something I have to find out." Without calling the witnesses, the hearing officer closed the evidentiary portion of the hearing, saying he would render a decision. The hearing officer then interviewed the two witnesses on tape. One witness said that he had no information about the incident; the other said that he was locked up for the incident but had no further information. The hearing officer brought Mr. Ramos back into the hearing room and advised him that neither witness had any information about the incident, except that one had been investigated for it. The court, relying on Matter of Ross v. Bezio, 907 N.Y.S.2d 520 (3d Dep't 2010), found that because the hearing officer had not made a determination that the presence of the witnesses at the hearing would jeopardize institutional safety or correctional goals, Mr. Ramos had a right to be present during the interviews of the witnesses, particularly where there were reports in

the record showing that the two witnesses were in the vicinity of the incident. The court ordered the hearing reversed and that the charges be expunged from Mr. Ramos' institutional records.

Matter of Damon Green v. Brian Fischer, Index No. 2031-13 (Supreme Court, Albany County, October 2, 2013). In this action, Damon Green successfully challenged a determination that he was guilty of violating the rules prohibiting contraband, smuggling and having property in an unauthorized area. Mr. Green challenged the hearing based on the officers' failure to permit him to observe the search that had allegedly resulted in the recovery of the contraband.

At the hearing, the petitioner testified that during the search, he was either in a location outside of his cell from which he was unable to observe the search or had been taken to SHU (after the first item of contraband was allegedly found). No testimony contradicted Mr. Green's testimony on this issue. The court found that DOCCS Directive 4910(V)(C)(1) provides that inmates must be allowed to observe cell searches if they are in their cells when the officers arrive to conduct the search unless, in the opinion of a supervisory security staff member, the inmate presents a danger to the safety and security of the facility. Where the inmate's presence during the search presents a danger to the safety and security of the facility, the directive provides that the inmate shall be removed from the area and not allowed to observe the search. Here, the court found, nothing in the record indicated that a determination was made by a supervisory staff member that Mr. Green posed such a danger. In fact, the court found, the record shows that Mr. Green had followed all orders given to him upon being informed of the unscheduled search and thereafter. Thus, the court ordered the determination of guilt annulled and the matter expunged from Mr. Green's disciplinary record.

Matter of Kevin Murphy v. New York State Board of Parole, Index No. 1580-13 (Supreme Court, Albany Co., July 25, 2013). In this Article 78 action, Kevin Murphy challenged his parole denial, arguing that the Board had relied on mis-information and failed to provide a detailed determination when they questioned him about whether he had faced perjury charges and about contraband allegedly found in his apartment on the date of the incident.

The court found that the hearing transcript showed Mr. Murphy had denied facing perjury charges and had denied ownership of any contraband. Further, the record at the hearing did not show that he had faced such charges or that he had faced charges relating to contraband. Nonetheless, the court noted, the Board's determination stated, without **elaboration** (providing detail) that Mr. Murphy had not been completely forthcoming during his interview. Thus, the court could not determine whether this conclusion was based on evidence in the record. The court found the Board's failure to state the factual basis for its conclusion that the petitioner was not forthcoming was a violation of its obligation to consider certain factors. The court held that the Board's decision was therefore arbitrary and capricious and remanded the case for a new hearing.

Mr. Murphy also argued that the Board had not considered the fact that he had been granted outside clearance for participation in work release. With respect to this positive fact, the respondent acknowledged that the information was not in the record but argued the responsibility for putting this in the record was Mr. Murphy's. However, the court noted, in the event that an applicant participates in work release, the Board is required to consider the information. Thus, respondent's failure to clarify whether Mr. Murphy had been on work release or had merely been approved for work release also dictated that the matter be remanded for a new hearing.

Andre Melette v. State of New York, UID: 2013-009-029 (Court of Claims, Sept. 25, 2013). Andre Melette successfully challenged a Tier III hearing based on the hearing officer's denial of his request to call a relevant witness. The hearing was then administratively reversed and expunged. Following the expungement, Mr. Melette filed a claim in the Court of Claims seeking damages for the 39 days that he spent in the Special Housing Unit. The State argued that

he was not entitled to damages because he could not show that had the witness been called, the result would have been different.

The court rejected the State's argument, holding that because the State had destroyed the tape of the hearing (in accordance with its procedures for expunging the record of a reversed Tier III hearing), the burden shifted to the State to show that the result would have been the same had the witness been called. The court found that the State had not satisfied its burden. The State further argued that Mr. Melette was not entitled to damages for the period between the reversal and when he was returned to general population (9 days) because potential logistical difficulties may have delayed his transfer. Having not produced any evidence of the logistical difficulties that prevented Mr. Melette's prompt release from SHU, the court found no basis for excluding the nine days from the period of wrongful confinement for which Mr. Melette was entitled to damages.

Matter of Keith Waters v. A. Prack, Index No. 3499-13 (Supreme Court, Albany County, Oct. 2, 2013). Keith Waters was accused of refusing a direct order and receiving compensation for providing legal services. The substance of the charge was that an officer had found a letter written by another inmate in which the inmate admitted to having paid Mr. Waters in the past for legal services and to being willing to pay him for such services in the future. In his Article 78 action, Mr. Waters argued that the report failed to provide him with adequate notice of the charges.

The court agreed, finding that the incident date on the misbehavior report, January 18, 2013, could not have been the date upon which Mr. Waters had allegedly engaged in the misconduct of providing legal services, noting that the Description of Incident describes only past behavior, not the provision of legal services on the date that the misbehavior report was issued. Further showing that incident did not occur on or around January 18, 2013, was a statement in the misbehavior report that while the legal services were provided at Coxsackie C.F., Mr. Waters' housing location on January 18 was Greene C.F. Based on these facts, the court found that the misbehavior report did not comply with the requirements of 7 NYCRR § 251-3.1(a). This regulation requires that misbehavior reports "set forth the date, time and place of offense, . . . the disciplinary rule alleged to have been violated and . . . the factual basis for the charge with enough particularity to enable the inmate to prepare a defense." For this reason, the court granted the petition and ordered the determination annulled and all references thereto expunged from Mr. Waters' institutional record.

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

Hearing Reversed Because Witness Who Refused to Testify Had Insufficient Information About Charges

In Matter of Texiera v. Fischer, Index No. 2012-1126 (Supreme Court, Clinton County, May 24, 2013), the petitioner was charged with threatening two inmates and using the PIN of a third. He called the three inmates as witnesses at his hearing. Two testified, but the third refused, saying, "I was never at Upstate ever. I came here from Attica!" Petitioner argued that the third inmate was

confused or misinformed about the nature of the requested testimony, pointing out that the incident that led to the misbehavior report occurred at Attica C.F. and not at Upstate C.F., and asking that the hearing officer contact the inmate and provide clarification. The hearing officer failed to do so and found the petitioner guilty of the charges. The petitioner filed an Article 78 challenge, alleging that by failing to clarify that he sought testimony from the witness about events at Attica C.F., the hearing officer had violated his right to call witnesses.

The respondent argued that it was possible that the hearing officer's failure to further investigate was based on a reasonable conclusion that the inmate's testimony was irrelevant and that he had abandoned efforts to investigate for that reason. The court concluded that there was "absolutely no basis in the record" to conclude that the hearing officer had determined that the requested witness's testimony was irrelevant. Further, the court noted, respondent's letter memorandum stated that the hearing officer would have the inmate re-interviewed, but that there was no indication that he had done so. Based on the record before it, the court concluded that the petitioner's right to call witnesses had clearly been violated.

Turning to the question of remedy, the court noted that the outright denial of a witness without a stated good faith basis or without any effort to obtain the testimony is a constitutional violation requiring expungement. In most other cases, the improper denial of a witness is regulatory and warrants remittal. Here, the court found, because a reason for the refusal was provided, it cannot be said that no reason for the requested witness's refusal was provided. Under these circumstances, the court found that remittal for a new hearing was appropriate.

The petitioner was represented by the Plattsburgh Office of Prisoners' Legal Services. Prisoners' Legal Services has filed a notice of appeal with respect to the issue of appropriate remedy.

Failure to Call Witness at First Hearing Leads to Reversal of Second Hearing

In Matter of Pickering v. State of NY Dep't of Corrections and Community Supervision, Index No. 2243-2013 (Supreme Court, Albany County, Sept. 5, 2013), the petitioner argued that where a witness denial cannot be remedied at a re-hearing, ordering a re-hearing is not the appropriate remedy. The facts underlying this petition were that at petitioner's first hearing, in response to his request that an inmate be called as a witness, the hearing officer ruled that the witness could not testify in the same room as the accused. The accused then asked that the witness be permitted to testify by telephone. The hearing officer failed to make these arrangements and the witness did not testify. On administrative appeal, the hearing was reversed and a new hearing was ordered. By the time that the second hearing was convened, the inmate witness had maxed out and could not be located. Nonetheless, the petitioner was found guilty and his administrative appeal was denied.

In his Article 78 action, petitioner Pickering argued that the hearing officer's failure to arrange for the testimony of the witness at his first hearing was a violation of his constitutional right to call witnesses. That is, the hearing officer had not provided a good faith basis for refusing to call the witness. This, the petitioner argued, in combination with the respondent's knowledge that the witness would be released before a second hearing could be held, rendered a re-hearing an improper remedy for the violation.

The respondent argued that the hearing officer's attempts to locate the witness by telephone were adequate.

The court agreed that neither hearing comported with the petitioner's constitutional, statutory and regulatory rights and that ordering a rehearing knowing that the witness had been released would not cure that deficiency. Further, citing Matter of Williams v. Coughlin, 535 N.Y.S.2d 499 (3d Dep't 1988) and Matter of Maier v Coughlin, 598 N.Y.S.2d 118 (3d Dep't 1993), the court found that the Third Department has repeatedly held that a re-hearing is inappropriate

where a significant amount of time has passed since the incident in question, a key witness has been released and equity warrants expungement. Finally, the court concluded that because the respondent failed to perform a duty enjoined upon it by law, and its decision was made in violation of lawful procedures and was arbitrary and capricious, the determination of guilt must be vacated and the petitioner's record expunged.

The petitioner was represented by the Plattsburgh Office of Prisoners' Legal Services.

Confidential Information: Hearing Officer Must Review for Reliability and Credibility

In Matter of Carrasquillo v. Rabsatt, 971 N.Y.S.2d 365 (3d Dep't 2013), the petitioner was charged with violating prison disciplinary rules after a log book of inmate nicknames was stolen and destroyed. Based on correction officer testimony about information received from confidential informants, the hearing officer found petitioner guilty of damaging property and being out of place. Petitioner then challenged the determination of guilt, claiming that the hearing officer had failed to independently assess the reliability and credibility of the confidential information.

Hearsay evidence may constitute substantial evidence where it is sufficiently detailed to allow the hearing officer to independently assess its reliability and credibility. See, Matter of Abdur-Raheem v. Mann, 623 N.Y.S.2d 758 (1995) and Matter of Torres v. Fischer, 955 N.Y.S.2d 450 (3d Dep't 2012). The information in this case was the written and oral statements from inmates which implicated petitioner as the thief. Here, the court found, there was no evidence that the hearing officer had independently reviewed the statements given by the inmate informants. Rather, the court wrote, the hearing officer had based his determination on the misbehavior report and the lieutenant who wrote the report. The lieutenant, however, stated that he had merely compiled the work of other officers who had contact with the unidentified inmates who consistently identified the petitioner as the individual who had stolen the log book. Neither the lieutenant's report nor his testimony indicated that he was personally familiar with the inmates or provided any additional basis for his belief that their statements were credible. Under these circumstances, the court held, the hearing officer impermissibly relied on the lieutenant's assessment as to the reliability and truthfulness of the information and the determination is not supported by the substantial evidence and must be annulled.

Edwin Carrasquillo represented himself in this Article 78 proceeding.

Court Reverses Hearing, Finding that Exclusion Was Not Justified

Petitioner Watson was charged with possession of a weapon and altered items after a sharpened toothbrush was allegedly found in his cell. At his hearing, petitioner was first warned that he could be removed from the hearing after he attempted to suggest questions for one of his witnesses who claimed to have been threatened and refused to testify. When petitioner was asked to state his defense, namely that the officer had set him up after she and petitioner had sexual contact, petitioner referred to the officer by her first name. After the hearing officer warned him not to call the officer by her first name, petitioner attempted to explain that the officer had told him to do so and it was only by referring to the officer by her first name that he could accurately describe what had occurred. Instead of allowing him to explain further or present his account of the events, the court wrote, the hearing officer **abruptly** (suddenly) cut petitioner off and removed him from the hearing.

Under these circumstances, the court held in Matter of Watson v. Fischer, 971 N.Y.S.2d 362 (3d Dep't 2013), "[e]ven if petitioner's conduct could legitimately be viewed as **indecorous** [not polite] or disrespectful, our review of the record reveals no evidence that it rose to the level of disruption that justified his exclusion from the proceedings." For this reason, the court annulled the determination of

guilt, reversed the judgment of the lower court, and directed the respondent to expunge all references to this matter from petitioner's institutional records.

James Watson represented himself in this Article 78 proceeding.

Court Finds Hearing Officer Justified in Excluding Prisoner from Hearing

Two misbehavior reports were heard at one hearing. The first report charged Petitioner Barnes with using profanity and threatening an officer when the officer was delivering mail to petitioner. The second charged that when a nurse did not take petitioner Barnes on emergency sick call as quickly as he thought she should have, he became loud and disruptive, shouting at her and calling her a vulgar name. At his Tier III hearing, according to the hearing officer, petitioner arrived with clenched fists, made threatening gestures, and accused the hearing officer of instructing officers to assault him. The hearing officer noted that in view of this, as well as the fact that petitioner had seriously assaulted staff on three occasions in the past three months, the petitioner was being excluded from the hearing.

In Matter of Barnes v. Prack, 971 N.Y.S.2d 359 (3d Dep't 2013), the court first noted that a prisoner has a fundamental right to be present at a prison disciplinary hearing unless he refuses to attend or is excluded for reasons of institutional safety or correctional goals. See, 7 N.Y.C.R.R. § 254.6(a)(2) and Matter of West v. Prack, 947 N.Y.S.2d 217 (3d Dep't 2012). And the court noted, when a prisoner is denied the right to be present at the hearing, there must be a factual basis in the record supporting the hearing officer's decision.

Here, the court found, the hearing officer set forth on the record his reasons for excluding the petitioner from the hearing. These reasons included the petitioner's menacing conduct at the hearing, which the hearing officer had witnessed, and the multiple assaults on staff over the last three months. Based on these facts, the court found, the hearing officer reasonably concluded that petitioner's presence at the hearing would **jeopardize** (threaten) institutional safety and correctional goals.

Jessie Barnes represented himself in this Article 78 proceeding.

Court Reverses Hearing; Hearing Officer Wrongfully Failed to Call Officers

When petitioner Griffin was transferred from Upstate C.F to Attica C.F., a search of his possessions when he arrived at Attica C.F. resulted in the recovery of a metal rod hidden in a box of rice. Petitioner was charged with possessing a weapon and an altered item and with smuggling. At his hearing, the hearing officer denied the petitioner's request to call as witnesses the officers who searched his property at Upstate C.F. prior to the transfer. He argued that the metal rod did not belong to him. The hearing officer found that the officers had not searched the particular bag in which the box of rice was packed. The respondent agreed that the hearing officer's refusal violated the petitioner's right to call witnesses but argued the proper remedy was a rehearing, not reversal and expungement. The court agreed, finding in Matter of Griffin v. Prack, 973 N.Y.S.2d 476 (3d Dep't 2013), that where a hearing officer states a good faith basis for denying a prisoner's right to call a witness, the appropriate remedy is remittal for a new hearing.

Gerald Griffin represented himself in this Article 78 proceeding.

Court Confirms Tier III Determination, Finding that Returned Mail Can Be Opened

When mail with petitioner's name, DOCCS number and return address on the envelope was returned as undeliverable to the prison where he was housed, prison officials opened the envelope. The contents of the envelope were letters that were signed with petitioner's name and that contained

gang language and a request that the person to whom the letter was addressed forward the information to another prisoner. As a result of the letters, the petitioner was charged with and found guilty of gang activity and violating facility correspondence procedures. Petitioner challenged the hearing, arguing that 1) he did not write the letter; and 2) that DOCCS violated its own procedures by opening the letter.

The court, in Matter of Scott v. Fischer, 971 N.Y.S.2d 594 (3d Dep't 2013), found that the question of whether the petitioner wrote the letter was a credibility issue which the hearing officer has the authority to resolve. The court rejected petitioner's argument that DOCCS staff violated DOCCS policies by opening the returned envelope. It found that mail that has been returned as undeliverable is required to be opened, checked for contraband, and inspected to determine whether it was written by the prisoner to whom it is being returned.

Kwame Scott represented himself in this Article 78 proceeding.

Miscellaneous

Unusual Incident Directive Not Exempt from Production Under FOIL

In Matter of Flores v. Fischer, 973 N.Y.S.2d 485 (3d Dep't. 2013), the petitioner challenged, among other things, the respondent's denial of his FOIL request for a copy of Directive 4004, the DOCCS Directive that sets forth the procedures for generating an unusual incident report. "FOIL" is an acronym for the New York State Freedom of Information Law. The law is found in Article 6 of the Public Officer's Law. It is the basis for the Department's obligation to provide a prisoner with the opportunity to review records in response to a written request.

In Flores, the petitioner had submitted a FOIL request for Directive 4004. The respondent refused to produce the directive, arguing that it was exempt from production because its disclosure might endanger the life or safety of a person. The law provides for several exemptions and the so-called public safety exemption is one. The court however, noted that there is a presumption that government documents are available for inspection and that the law places the burden of showing that a document falls within one of the exemptions on the state agency that has the document. Here, the court wrote, it "failed to see how the disclosure of DOCCS Directive 4004, which pertains to the specifications of creating unusual incident reports, poses a danger to lives or to anyone's safety." Accordingly, the court held, the directive must be produced.

Antonio Flores represented himself in this Article 78 proceeding.

Court Denies Waiver of Mandatory Surcharge

Having been convicted of a felony, and the court having imposed a mandatory surcharge of $300, a DNA databank fee of $50 and a crime victims assistance fee of $25, Rufus Law requested an order **deferring** (putting off) the payment of the fees and the surcharge. In support of the motion, Mr. Law stated that he was unable to pay the surcharge because he is indigent and has no income other than prison wages. The People argued that Mr. Law was not entitled to the waiver because all of his needs were met in prison and his claim was **uncorroborated** (was not supported by evidence other than his affidavit). Further, the People argued, even if Mr. Law were entitled to the waiver, the maximum period that payment of the surcharge can be waived is 60 days.

Penal Law, Article 60, authorizes sentences which include, in addition to any other terms, a mandatory surcharge and a crime victim assistance fee. See, Penal Law §60.35(1)(a)(i); Criminal Procedure Law (CPL) §§420.10(1), 420.34 and 420.40. CPL §420.40 and PL §60.35(3) allow deferrals in payment for defendants who are serving sentences of fewer than 60 days. Reviewing these provisions, the court in People v. Law, 2013 WL 5809428 (Sup. Ct., Bronx County, Oct. 28, 2013), noted that some **lower courts** (here, meaning below

the Appellate Division of the Supreme Court) have interpreted these provisions to apply only to sentences of fewer than 60 days but that others, including the Bronx Supreme Court, have held to the contrary. Further the court noted, the Fourth Department, in People v. Kistner, 736 N.Y.S.2d 924 (4th Dep't 2002), held that courts have the authority to defer the mandatory surcharge of defendants incarcerated for more than 60 days. And in People v. Abdus-Samad, 712 N.Y.S.2d 63 (3d Dep't. 2000), where the court in **dicta** (language in a decision on an issue which the court does not decide) cited a number of reasons that the defendant would not have been entitled to a deferral, the court did not mention the fact that the defendant's sentence was over 60 days, thus creating an inference that the Appellate Division, Third Department, would not give these provisions as narrow an interpretation as some of the lower courts have done.

Looking at the merits of defendant Law's motion, the court held that Mr. Law was not entitled to the relief that he was seeking. To qualify for a deferral of the surcharge and fees, the court found, CPL §420.40(2) requires that a defendant "provide **credible and verifiable evidence** showing that because of his indigence, payment of the surcharge would work an unreasonable hardship upon him or his immediate family." Credible and verifiable evidence is believable proof that can be confirmed in some way. Here, the court found, Mr. Law had not given the court with any creditable and verifiable evidence showing that the surcharge would work an unreasonable hardship on him over and above the ordinary hardship suffered by other indigent prisoners. The court also found that the defendant had failed to show, or even to allege, that he was responsible for supporting an immediate family member who was adversely affected by surcharge deductions from Mr. Law's inmate account. For these reasons, the court denied the motion.

Rufus Law represented himself in this Article 78 proceeding.

Practice Point: *A prisoner is most likely to win a motion to defer payment of the mandatory surcharge and other fees if he or she has proof that payment of these fees interferes with his or her ability to support an immediate family member. The kind of proof that the court looks for is, for example, a child support order and inmate account records showing that payments made to pay surcharges, etc. are needed to pay child support.*

FEDERAL COURT DECISIONS

Court Finds Alleged Interference with Exercise of Religion Was Trivial

In Perrilla v. Fischer, 2013 WL 5798557 (W.D.N.Y. Oct. 28, 2013), the court considered whether the defendants had violated the prisoner-plaintiff's rights to free exercise of religion. This decision arose in the context of the plaintiff's motion to proceed as a poor person. In deciding such a motion, the court must accept as true all of the factual allegations and must draw all inferences in the plaintiff's favor. Based on its evaluation of the plaintiff's complaint, the court dismissed several of the claims as they did not state grounds upon which relief may be granted.

The plaintiff alleged that while at Southport C.F., he was not allowed to attend congregate services during Ramadan, his right to break his fast with Halal food during Ramadan was denied when he was not provided with "double portions" and oatmeal in the Sahoor bags, and that the evening meal was ill-prepared, sometimes served by non-believers, and when prepared by believers, was unclean, filthy and raw. In response to plaintiff's grievances, the defendants said DOCCS regulations prohibit congregate religious services in SHU and that the meals were prepared and delivered as required.

With respect to the allegations that by their failure to provide sufficient food and food of a sufficiently high quality prepared and delivered by observers the defendants had violated the plaintiff's free exercise right to practice his religion, the defendants argued that the claim regarding congregate religious services must be **dismissed with prejudice** (cannot bring again), and that the claims against the Southport C.F. staff must be dismissed for failure to state a claim.

Congregate Religious Services in SHU

Finding that "it is well established" that the policies restricting congregate religious services in SHU are rationally related to a legitimate penological goal and that this policy is the least restrictive means of serving that interest, the court dismissed the plaintiff's claim that the policy violated his First Amendment to free exercise of religion. In reaching this result, the court relied on the decisions in Washington v. Afify, 2013 WL 4718693 (W.D.N.Y. Sept. 3, 2013), Leon v. Zon, 920 F.3d 379 (W.D.N.Y. 2013), Smith v. Artus, 2010 WL 3910086 (N.D.N.Y. 2010).

Problems with Halal Meals:

In considering the claims that the defendants had denied plaintiff Halal meals and had served ill-prepared Halal meals, the court first noted that "[i]nmates clearly retain protections afforded by the First Amendment including its directive that no law shall prohibit the free exercise of religion." O'Lone v. Estates of Shabazz, 482 U.S. 342, 348 (1987). These protections, the court observed, are not as extensive as the rights enjoyed by an ordinary citizen. Rather, "a prison inmate . . . retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." Thus, whether a restriction on a prisoner's religious practices violates the First Amendment is determined by a reasonableness standard.

To show a violation of the First Amendment, a prisoner must show that the challenged conduct or policy substantially burdens his sincerely held religious beliefs. Restrictions on an inmate's free exercise rights are only permissible where they are reasonably related to legitimate penological interests.

The Second Circuit Court of Appeals, in McEachin v. McGuinnis, 357 F.3d 197, 203 (2d Cir. 2004), stated that it had clearly established that a prisoner has a right to a diet consistent with his or her religious beliefs and that the failure to provide prisoners with food that satisfies the dictates of their faith unconstitutionally burdens the free exercise of religion. In a footnote, the McEachin Court observed that there are some burdens so minor that they do not amount to a First Amendment violation. In the following situations, district courts within the Second Circuit found that the "inconveniences" regarding denials of religiously required food were so trivial that they did not rise to the level of constitutional violations:

Evans v. Albany County Correctional Facility, 2009 WL 1401645, at *8 (N.D.N.Y. May 14, 2009) (receipt of "wrong meals" approximately 18 out of 354 times is de minimis and not actionable under First Amendment);

Ward v. Goord, 2009 WL 102928, at *9 (N.D.N.Y. Jan. 13, 2009) ("The failure to provide a single meal is insufficient to allege a constitutional violation.");

Odom v. Dixion, 2008 WL 466255, at *11 (W.D.N.Y. Feb. 15, 2008) (failure to provide inmate kosher meals on 7 out of 33 occasions is not sufficient under First Amendment or RLUIPA);

Thomas v. Picio, 2008 WL 820740, at *6 & n. 8 (S.D.N.Y. Mar. 26, 2008) (assuming that inmate plaintiff was denied three or four Kosher meals for one or two consecutive days, "such a denial is not a substantial burden" on her free exercise of religion).

But see, Ford v. McGinnis, 352 F.3d 582, 594, n. 12 (2d Cir.2003) (whether an inmate's religious beliefs were burdened by a prison's refusal to serve a meal for the Eid ul Fitr feast was a question of fact, but noting that the "feast is sufficiently unique in its importance within Islam to distinguish the present case from those in which the mere inability to provide a small number of meals commensurate with a prisoner's religious dietary restrictions was found to be a de minimus burden").

Applying this law to the facts before it, the Perrilla court held that the plaintiff's complaint and the attached grievances did not allege a plausible claim for relief and that the denial of double portions to break fast and having been provided some ill-prepared meals of chicken and fish and some meals prepared by non-believers during Ramadan in 2011 were no more than a de minimus burden on the plaintiff's free exercise rights.

Sergio Perrillo represented himself in this Section 1983 action.

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