Pro Se

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SUPREME COURT: PRISONERS MUST EXHAUST ADMINISTRATIVE REMEDIES IN ALL CASES BEFORE FILING IN FEDERAL COURT - NEW HURDLE FOR INMATE LITIGANTS

In two recent cases, the Supreme Court reiterated the requirement, contained in a 1995 law, that inmates must exhaust their administrative remedies before they can sue in federal court over the conditions of their confinement. The law, part of the Prison Litigation Reform Act (or "PLRA") states that no inmate may bring an action in federal court concerning "prison conditions" unless he shall first have exhausted the "available" administrative remedies.

In both cases, the Supreme Court rejected the interpretations of the law presented by prisoners.

In Booth v. Churner, 121 S.Ct. 1819 (2001), the Court rejected a prisoner's argument that the exhaustion requirement should not apply if the administrative remedy could not provide him with the same relief – in his case, money damages – that he was seeking in federal court. In Porter v. Nussle, 122 S.Ct. 983 (2002), the Court rejected a prisoner's argument that the exhaustion requirement should not apply to a single, isolated incident of guard brutality.

By rejecting the prisoners' claims in these cases, the court demonstrated that exhaustion of administrative remedies is now a pre-requisite for filing *any* case concerning prison life in federal court.

Significant questions concerning exhaustion remain, however. What administrative remedies must be exhausted? What does it mean to "exhaust" an administrative remedy? What happens if you fail to exhaust? Are there any exceptions to the exhaustion rule?

This issue of ***Pro Se*** takes an in-depth look at the exhaustion requirement. We start with a closer look at the Booth and Porter cases. We then examine some of the most important questions still unanswered by those cases. ***(continued on page 17)***

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PRO SE -- WELCOME BACK

A Letter From the Executive Director

We, at Prisoners' Legal Services, are excited to be publishing *Pro Se* again. For those who have never seen *Pro Se*, this newsletter is designed to provide updates on legal issues affecting the rights and responsibilities of New York State prisoners. Since most prisoners must represent themselves at administrative hearings and in court, understanding the law is of critical importance. It is important to know if you do or if you don't have a claim or grievance. *Pro Se* will help in that educational effort.

On the wall of my office, I have a framed copy of the first issue of *Pro Se*, published in November 1984. The banner headline announced "A New Voice...." We stopped publishing *Pro Se* in 1998 when the funds for Prisoners' Legal Services of New York were cut off and we shut PLS down. With this issue, we once again bring *Pro Se* to life.

Twenty-seven years ago, in the fall of 1976, a group of dedicated lawyers affiliated with the New York State Bar Association and several state legislators responded to one of the prisoners' complaints voiced during the Attica uprising in 1971. Prisoners complained that there was no meaningful way to address serious concerns regarding prison conditions. Prisoners had no meaningful access to the courts. These lawyers and legislators, profoundly shaken by the Attica experience, took that message to heart. Their response was to create Prisoners' Legal Services of New York to serve as a national model for providing legal services to prisoners.

Many aspects of prison life in New York have been improved as a result of advocacy by PLS' attorneys and paralegals, in hard fought legal battles. Some areas affected by PLS' advocacy include improvements in the disciplinary process, access to medical and mental health care, access to the courts, protection for family visitation rights, improved procedures for strip searches, protection and expansion of the right to the practice of many religions and the ability to sue for compensatory damages for a variety of wrongs, including being the victim of excessive force.

At the same time that PLS and other inmate advocacy organizations were winning court battles to improve conditions, federal and state laws were passed and Supreme Court decisions rendered which have made it much more difficult for prisoners today to file and win cases. The door to the courthouse is slowly closing.

In 1998, funding for PLS was vetoed. The program virtually closed, with only two part time attorneys remaining. Thousands of cases had to be closed and over two hundred cases in litigation had to be abandoned. When funding was restored late in 1999, a strong effort was made to rebuild the program. Less than two years later, however, it happened again: no funding was provided in 2001. Staff was reduced by two thirds and word went out that PLS could not take any new cases. In March of 2002, funding was restored – but at a substantially lower level than in previous years.

I relate this tale of woe to let you know why there has been such a disruption in legal services from PLS in the recent past. As of today PLS is stable again – with a much smaller staff and fewer offices. We are accepting new cases but only in a limited number of subject areas. But with a weakened economy and a troubled state budget, uncertainty lies ahead. Funding for legal services for those in need, whether incarcerated or on the street, are in short supply. Next years State budget will almost certainly not contain money to expand our resources. Further reductions in funding

for legal services appear likely.

We at PLS - the attorneys, paralegals, secretaries and other administrative support staff - will continue to do what we can, trying to be efficient in addressing some of the most serious problems facing prisoners in New York State today. For example, one of the reports in this issue of *Pro Se* talks about the filing of a statewide lawsuit being co-counseled by PLS, which seeks to address the critical problem of housing seriously mentally ill inmates in SHU. In addition to that challenge to the policies and practices of the Department of Correctional Services and the Office of Mental Health, the staff at PLS will also continue to represent individuals facing long box hits, especially those who can't adequately represent themselves.

Which brings me back to *Pro Se*. While PLS' resources are directed at a few priority areas, prisoners have to continue to do more on their own. *Pro Se* will hopefully help those interested in learning about the changes in prisoners' rights and responsibilities. We hope it provides a valuable tool for individuals who want to understand the state of the law and, when necessary, to do the best job you can in representing yourself.

Tom Terrizzi,
Executive Director
Prisoners' Legal Services

NEWS AND BRIEFS

Supreme Court : Prison Officials Liable for Chaining an Inmate to a Hitching Post; Qualified Immunity Rejected

Alabama prison officials who handcuffed an inmate to a hitching post for hours in the hot sun violated his eighth amendment right to be free from cruel and unusual punishment, and prison officials could not claim qualified immunity, ruled the Supreme Court in Hope v. Pelzer __U.S.__, 122 S.Ct. 2508 (2002).

In this case, Alabama prison officials had twice handcuffed an inmate to a hitching post for disruptive conduct. On the first occasion he was handcuffed for a two hour period and was offered drinking water and a bathroom break every 15 minutes. The inmate claimed that his hands were handcuffed above shoulder height, so that when he tried to move his arms to improve circulation the handcuffs cut into his wrists, causing pain and discomfort. On the second occasion, after an altercation with a guard, he was stripped of his shirt, placed in leg irons as well as handcuffs, and handcuffed to the post for seven hours while being given water only twice. He was also deprived of bathroom breaks, and taunted by the guards.

The Court concluded that this conduct violated the inmate's Eighth Amendment rights. The "unnecessary and wanton" infliction of pain upon the inmate was totally without penological justification, held the court. Any safety concerns raised by the inmate's allegedly assaultive behavior had long since abated by the time he was handcuffed to the hitching post. The prison officials, nevertheless, knowingly subjected him to a substantial risk of physical harm, to the unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation.

Under these circumstances, the court concluded, the use of the hitching post violated the "basic concept underlying the Eighth Amendment, [which] is nothing less than the dignity of man."

Prison officials argued that even if their conduct had violated the Eighth Amendment, they should not be held liable for damages on the ground that they were entitled to "qualified immunity." Qualified immunity protects government officials from damages when their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). It is based on a principle of fair notice: a government official should not be held liable for damages unless a "reasonable official [under similar circumstances] would understand that what he is doing violates [a constitutional] right." Saucier v. Katz , 121 S.Ct. at 2153 *citing* Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034 (1987). In Hope, the defendants argued that, since there had been no previously reported cases with facts "materially similar" to this one, they could not reasonably have known that handcuffing the inmate to the hitching post under those conditions violated his constitutional rights.

The Court rejected this defense. Even absent a case with facts "materially similar" to those in the present case, the Court held, prison officials were on fair notice that their conduct violated the Constitution. The use of the hitching post under the conditions described by the plaintiff was so obvious a violation of the Eighth Amendment that the Court's prior cases holding that the infliction of pain without legitimate penological justification violates the Constitution should have given the defendants fair warning. Even if that was not the case, the Court pointed out other cases in the defendants' own jurisdiction which squarely held that various forms of corporal punishment, including "handcuffing inmates to the fence and to cells for long periods of time. . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods", run afoul of the Eighth Amendment and "offend contemporary concepts of decency, human dignity, and precepts of civilization which we profess to possess."

For all of those reasons, the Court concluded, the defendants in Hope were not entitled to qualified immunity.

Supreme Court : No Right Against Self Incrimination in Sexual Abuse Treatment Program

In McKune v. Lile, —U.S.— , 122 S.Ct. 2017 (2002), the Supreme Court held that an inmate may be compelled to admit prior uncharged crimes in a sexual abuse treatment program, and that such compulsion is not a violation of the Fifth Amendment.

Mr. Lile, a state inmate, was ordered to participate in a Kansas sexual abuse treatment program. As part of that program he was required to complete an "Admission of Responsibility" form and a sexual history form detailing all prior sexual activities, regardless of whether the activities constituted uncharged criminal offenses. Failure to complete the forms would mean he could not participate in the program. Not participating in the program would result in the loss of various privileges, including his transfer to a maximum-security unit.

The inmate sued. He argued that being forced to reveal prior sexual misdeeds under threat of losing his prison privileges constituted a violation of his Fifth Amendment right against self-incrimination.

The Court, in a 5-4 opinion, disagreed. The Court held that the adverse consequences faced by Lile for refusing to make the admissions required for participation in the sexual abuse treatment program were not so severe as to amount to unconstitutional

compulsion. The Court noted that the transfer to a maximum security unit for failing to participate was not intended to punish Lile for exercising his Fifth Amendment rights but was instead incidental to a legitimate penological purpose: freeing up space for inmates who did want to participate in the program. The Court stated that what constitutes unconstitutional compulsion is a question of judgment: Courts must decide whether the consequences of an inmate's choice to remain silent are closer to the physical torture against which the Constitution clearly protects or the *de minimis* harms against which it does not. In this case, the Court found that the consequences for non-participation in the Sexual Abuse Treatment Program were not so severe as to constitute the kind of compulsion forbidden by the Fifth Amendment.

Second Circuit: No Right to Privacy in Prison

In Willis v. Artuz, 301 F.3d 65 (2002) the Second Circuit Court of Appeals re-affirmed what many inmates probably already suspected: There is no right to privacy in prison.

The facts were these: The police were investigating an unsolved murder. Detectives asked prison officials to search an inmate's cell for anything that might connect him to the crime. Prison officials searched the cell but found nothing to incriminate the inmate. The inmate sued the corrections officials. He claimed that, in conducting the search, they had violated his Fourth Amendment rights.

The Fourth Amendment to the Constitution protects against "unreasonable" searches and seizures. Under the Fourth Amendment the police must obtain a warrant to conduct a search of an area where a person has a "legitimate expectation of privacy." In 1984, the Supreme Court held that inmates have no legitimate expectation of privacy in their prison cells and that prison officials may search them at any time, without a warrant. Hudson v. Palmer, 468 U.S. 517. (1984)

Plaintiff in Willis, however, relied on a case decided after Hudson – United States v. Cohen, 796 F.2d 20 (2d. Cir. 1986). In Cohen, the Second Circuit Court of Appeals held that evidence of a crime produced in the warrant-less search of a city jail cell was inadmissible in court. The Cohen Court found that Hudson was limited: It meant only that prison officials could conduct a warrant-less search of an inmate's cell only if the search was in support of the "legitimate needs of institutional security." But, the Court held, if the search was intended solely to produce evidence in support of a criminal prosecution and had nothing to do with institutional security, a warrant was not necessary to conduct the search.

The question before the Second Circuit in Willis, therefore, was whether the Supreme Court decision in Hudson or its own precedent in Cohen applied. The Court decided that Hudson applied. The Court distinguished Cohen on the ground that the defendant in that case was a *pre-trial detainee*, not a convicted prisoner. "Unlike the pre-trial detainee in Cohen," the Court wrote, "a convicted prisoner's loss of privacy rights can be justified on grounds other than institutional security." Loss of privacy for a convicted prisoner, the court held, "serves the legitimate purpose of *retribution* as well as the institutional needs of the prison system. . . . Society is not prepared to recognize as legitimate any subjective expectation of privacy that [a convict] might have in his prison cell." (Emphasis supplied.)

Thus, under Willis, correction officers do not need a warrant to conduct a cell search, even if the search is unrelated to institutional security.

State Court: Court Cannot Set Conditions of Confinement for Ill Inmate

A state Supreme Court justice does not have the authority to set conditions for the incarceration of an inmate with AIDS, a New York State appellate court ruled.

The Appellate Division, First Department,

unanimously reversed an order issued by Justice Marcy Kahn in December 2000, after she sentenced a defendant to a 3-to-6-year prison term for attempted criminal sale of a controlled substance in the third degree. People v. Purley, 747 N.Y.S.2d 10 (1st. Dep't 2002).

Before his sentencing the defendant said he had suffered from AIDS for many years. After soliciting comments from the prosecution, defense, DOCS, the New York City Department of Health and New York City Health and Hospitals Corp., the judge issued a supplemental order directing DOCS to take certain measures concerning the defendant's medical care. Among other things, the judge directed DOCS to assign the defendant to a facility with a doctor and nurse on call 24 hours a day as well as an HIV clinic on site, and to assign him a single primary care physician who would have access to an HIV specialist. She also ordered the department to advise her if the defendant was transferred to another facility and to report periodically on his health.

The five-judge panel unanimously vacated the order, pointing out that after a court commits a defendant to the custody of the DOCS, "prison services, including health care are the responsibility of DOCS . . . . It is also the responsibility of DOCS to choose into which correctional facility an inmate will be placed, or to provide for the transfer of an inmate from one facility to another." The appeal court's unsigned memorandum opinion found that the judge's decision to "micromanage the terms of defendant's incarceration, and concomitant health care, was improper." Judge Kahn had praised the corrections department's AIDS-related services in her rulings, the appellate court noted. It also pointed out that terminally ill inmates may apply for release on medical parole under the Compassionate Release Program.

State Court: Court Upholds 15 Year to Life Sentence for Throwing Urine

Many would agree that throwing urine or feces is offensive. But does it merit fifteen years to life in prison? That was the issue in People v. Stokes, 736 NYS2d 781 (3d. Dep't 2002).

In 1996, the Legislature passed Penal Law §240.32, which makes it a class E felony for a prison inmate to throw urine, feces, semen or blood at a DOCS employee with the intent to "harass, annoy, threaten or alarm" such person. The maximum sentence for a class E Felony is an indeterminate term of 1 and 1/3 to 4 years of incarceration. However, because virtually anyone convicted of this offense will have at least one prior felony conviction, most such persons will be sentenced as either second or "persistent" felony offenders.

The defendant in Stokes was a persistent felony offender – he had been convicted of two or more previous felonies. Under the Penal Law, when a sentencing court is "of the opinion that the history and character" of a persistent felony offender, as well as the "nature and circumstances of his criminal conduct," indicate that extended incarceration and life-time supervision will best serve the public interest, it may impose the same sentence of imprisonment authorized for an A-1 felony. Penal Law §70.10(2). The *minimum* sentence that may be imposed for the conviction of a A-1 felony is 15 years to life. That was the sentence imposed in Stokes.

On appeal, the defendant argued a sentence of fifteen years to life for squirting urine at an officer was harsh and excessive. He argued that the crime, an E felony, was not the moral equivalent of the type of the crimes to which an A-1 felony sentence is usually applied,

such as murder, and that, in his case, it was an act of desperation of an inmate confined to special housing for several years.

The appeals court, in considering the defendant's appeal, recognized "the gravity of imposing an A-1 felony sentence" on conduct which, prior to 1996, had been addressed solely through the prison disciplinary system. The court nevertheless upheld the sentence. The court found that the defendant's numerous prior felony convictions, his lengthy prison disciplinary record, and the apparently planned nature of the current offense – which the lower court had described as "reprehensible and degrading" – combined with the need to "condemn and deter" such conduct within prisons, led to the conclusion that, under the circumstances of this case, a sentence of 15 years to life was neither harsh nor excessive.

State Court: Defendant Must be Told When Post-Release Supervision Is Part of Sentence

A defendant who enters into a plea agreement for a determinate sentence must be advised that a mandatory period of post-release supervision will follow completion of the sentence. Failure to so advise the defendant may result in the revocation of the plea. People v. Goss, 733 N.Y.S.2d 310 (3d Dep't 2001)

A "determinate" sentence is one in which the defendant is ineligible for parole and must serve the full term of the sentence. He may earn good time, but the good time available is limited to one day for every seven days served. *See*, Correction Law §803(b)(c); Penal Law §70.40(b). In 1998, the Legislature passed "Jenna's Law" which required that all persons convicted of violent felonies receive determinate sentences. It also required that a period of "post-release supervision" be served after completion of any determinate term. *See*, Penal Law §70.45(1).

Defendant in Goss pled guilty to a charge of burglary in the second degree, for which he received a determinate sentence of twelve years. Pursuant to Jenna's Law, a five year period of post-release supervision was included as part of the sentence. The defendant, however, was not told, at the time he accepted his plea, that the period of post-release supervision would be included as part of the sentence. When he found out, he sought to withdraw the plea.

The court held that he should be allowed to withdraw his plea. It is settled law that when a court accepts a plea it must inform the defendant of all of the "direct" consequences of the plea. On the other hand, a court need not inform the defendant of the merely "collateral" consequences of the plea. Examples of collateral consequences of a plea agreement which, courts have held, a defendant need not be advised of, include such things as the loss of the right to vote or travel abroad, loss of civil service employment, loss of a driver's license and deportation. The question before the court in Goss, therefore, was whether the period of post-release supervision was a "direct" consequence of the plea agreement, or merely a "collateral" consequence.

The court concluded that it was a direct consequence of the plea. The court reasoned that the requirement of post-release supervision "has a definite, immediate and largely automatic effect on [the] defendant's punishment." Moreover, the court held, because violation of the terms of post-release supervision can result in re-incarceration, it is also a "significant [and] punitive" aspect of the sentence. Consequently, the court held, the defendant was entitled to be advised that a period of post-release supervision was part of the sentence prior to entering his plea. *Id.* at 314.

Under Goss, if you entered a guilty plea in exchange for a determinate term, but were not informed that a period of post-release supervision would be included as part of the sentence, you may have the right to revoke your plea agreement.

Court of Claims: State Not Liable for Violation of Cell Search Procedure

DOCS Directive #4910(V)(C)(1) states that, when a general population inmate is removed from a cell prior to a cell search, the inmate shall be placed outside the immediate area to be searched but allowed to observe 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. Violations of this rule may cause the reversal of any disciplinary proceeding that results from the search. *See. e.g.*, Matter of Gonzalez v. Wronski, 669 N.Y.S.2d 421 (3d Dep't 1998)

In Matter of Holloway v. State, 728 N.Y.S.2d 567 (3d Dep't 2001), however, the court held that violations of the rule cannot lead to a judgment of money damages against the State. Corrections officers, the court held, enjoy absolute immunity from such suits.

Absolute immunity protects state employees from damages even when their decision violates the law or is irrational. A state official may be entitled to absolute immunity if his job requires that he use *discretion* in applying broad legal rules to individual cases. For example, a hearing officer conducting a prison disciplinary hearing must use discretion to determine whether an inmate has violated a particular disciplinary rule. The hearing officer is therefore entitled to absolute immunity for that decision, even if it is later determined to be in error. *See*, Arteaga v. State of of New York, 72 N.Y.2d 212. (1988). A grant of absolute immunity is based on the public policy judgment that "the public interest in having officials free to exercise their discretion unhampered by the fear of retaliatory lawsuits outweighs the benefits to be had from imposing liability" whenever they make a bad decision. *See*, Rottkamp v. Young, 249 N.Y.S.2d 330, *aff'd* 15 N.Y.2d 831 (1965). In addition to prison hearing officers, the courts have granted absolute immunity to the State Parole Board in the determination of whether to grant or deny parole (Tarter v. State of New York, 68 N.Y.2d 511 (1986)) and members of the Temporary Release Committee in deciding whether to grant good time (Santangelo v. State of New York, 474 N.Y.S.2d 995 (1984)).

In Holloway, the court concluded that correction officers should have absolute immunity from lawsuits arising from a decision about whether an inmate is allowed to be present during a cell search. The court held that in conducting a cell search, the correction officer was obliged to make a "discretionary decision" about whether the inmate presents a danger to security. Under those circumstances, the court concluded, "it is particularly important that correction officers not be dissuaded by the possibility of litigation from making the difficult decision which their duties demand." Accordingly, while the correction officers who frisked claimant's cell may have abused their discretion by not allowing him to observe the frisk, thereby providing the basis for annulling the disciplinary determination, "[they] were nevertheless exercising a discretionary authority for which the State has absolute immunity" against money damages. *Id.* at 568-569.

Disciplinary Hearings: Threats and Harassment

Two recent cases considered DOCS' rules against threatening or harassing staff.

In Matter of Jones v. Department of Correctional Services, 283 N.Y.S.2d 793 (3d Dep't 2001) the petitioner was alleged to have mailed several letters to judges containing "insolent and abusive" language. Following a Tier II hearing, he was found guilty of violating prison disciplinary rule 107.11. Rule 107.11 states that "inmates shall not harass employees or any other persons verbally or in writing. This includes, but is not limited to, using insolent, abusive, or obscene language. . . ." In Jones, the petitioner argued that Rule 107.11 was unconstitutionally vague and failed to provide him with sufficient notice of the conduct it was intended to prohibit. The court disagreed. "In our view," held the court, the language of the regulation "provides a person of ordinary intelligence with sufficient notice that sending threatening letters to judges will constitute conduct proscribed by the rule."

In Matter of Henriquez v. Goord, 741 N.Y.S. 2d 584 (3d Dep't 2002) the petitioner was found guilty of violating Rule 102.10 after he mailed 10 letters to various State and Federal agencies in which he explained that he was in love with a certain female correction officer. He requested that a meeting be scheduled with the officer so that he could express his feelings to her and convince her that she harbored similar feelings for him. He volunteered to be "handcuffed and shackled" during the meeting to allay any concern that the officer would be placed in physical jeopardy.

Rule 102.10 provides: "Inmates shall not, under any circumstances, make any threat, spoken, in writing or by gesture."

The court reversed the disciplinary hearing, finding that petitioner's conduct did not violate the rule: "Petitioner did not communicate with the officer in question nor with anyone else at the facility. In addition, he made no threats in his letter and endeavored to render himself less threatening by offering to be manacled during the proposed meeting."

Disciplinary Hearings: DNA Database

New York State Executive Law §995-c(3) requires certain felony offenders to "provide a sample appropriate for DNA testing to determine identification characteristics specific to such person and to be included in a state DNA identification index."

In Thompson v. Selsky, 734 N.Y.S2d 348 (3d Dep't 2001), an inmate refused to provide a sample and was thereafter found guilty in a Tier III hearing of refusing a director order. The inmate commenced an Article 78 proceeding to review the hearing. In his petition, he argued that Executive Law section 995-c(3) was invalid and that, therefore, he could not be disciplined for his failure to comply.

The Appellate Division, Third Department, disagreed. In affirming the disciplinary sanction, the court noted that, contrary to the inmate's assertion, he was not disciplined based upon a violation of the Executive Law, but rather upon his refusal to comply with a direct order. An inmate is not free to disobey an order, regardless of whether it appears to be unauthorized or if it infringes upon constitutional rights. *See*, Matter of Ali v. Senkowski, 704 N.Y.S.2d 682 (3d. Dep't. 2000). The proper procedure for contesting an order that an inmate believes to be illegal is to obey the order and file a grievance later. "Any holding to the contrary would simply encourage inmates to break rules as a means of addressing

their grievances and invite chaos," held the court.

In Lunney v. Goord, 736 N.Y.S2d 718 (3d Dep't 2002) the petitioner, an inmate, did file a grievance about the DNA data base statute. In his grievance, he did not challenge the legality of the entire statute, but rather argued only that DOCS lacked the authority to require a blood sample if an inmate was willing to provide a different sample, such as saliva, for testing. Again, the court disagreed. "Although Executive Law section 995-c(3) [does not] specify that a blood sample must be used, the statute requires 'a sample appropriate for DNA testing' and it is undisputed that a blood sample is appropriate for DNA testing. The statute clearly does not give petitioner the option to dictate the type of sample to be taken."

PLS will publish "Questions and Answers abut DNA testing" in a forthcoming issue of Pro Se.

Discipline : Res Judicata Prohibits Second Misbehavior Report for Same Conduct

In Matter of Burgess v. Goord, 729 N.Y.S.2d 203 (3d Dep't 2001) petitioner, an inmate, was found guilty of various disciplinary charges following a fight in a prison yard. On the same day his disciplinary hearing was concluded, prison officials served him with a second misbehavior report based upon the same incident but charging him with different rule violations. The officials argued that this was appropriate because, they claimed, the second misbehavior report was based on newly found evidence – a videotape of the incident. A second hearing was held, and petitioner was found guilty of the additional charges as well.

The Appellate Division reversed the second hearing, holding that it was barred by the doctrine of *res judicata*. Res judicata bars the litigation of something that was already raised and adjudicated, or which could have been raised and adjudicated, in a prior proceeding. Prison officials argued that the doctrine did not apply in this case because the second misbehavior report charged different rule violations and was based on new evidence. The court, however, was unpersuaded that the new evidence – the videotape – had been unavailable at the time of the first hearing – particularly since the second report was served on the very day that the first hearing concluded. Any additional rule violations visible in the videotape could have been adjudicated in the first proceeding. Consequently, the court found, *res judicata* applied, and the hearing had to be reversed.

Discipline : Inmate Who Doesn't Attend Hearing May Call Witnesses on His Behalf

Generally, when an inmate refuses to attend a disciplinary hearing, he forfeits all of the procedural rights he would otherwise be entitled to at the hearing, including the right to call witnesses on his behalf. *See, e.g.*, Matter of Kalwasinski v. Senkowski, 664 N.Y.S.2d 841 (3d Dep't 1997)

In Dawes v. Selsky, 730 N.Y.S.2d 563 (3d Dep't 2001) the petitioner, an inmate, refused to attend his disciplinary hearing but he submitted a list of witnesses that he wanted called, as well as the questions that he wanted asked of the witnesses. The hearing officer considered the request but concluded that the witnesses were not relevant. In court, the State argued that the petitioner had forfeited his right to call the witnesses by not attending the hearing.

The court disagreed. Under the circumstances of this case, the court held, the petitioner had not forfeited his right to call witnesses. Further, because the hearing officer had not adequately assessed the witnesses' relevance, the hearing would have to be

reversed.

Parole : Board Decision Contrary to the Evidence is Arbitrary and Capricious

In Delgado v. Travis Index No. 01-02608 (Sup. Ct. , Oneida Co. 2002) petitioner, a parole violator, challenged the Parole Board's decision to deny him re-release after he had served his time assessment for a parole violation. The Supreme Court, Oneida County, granted the petition, holding that the Parole Board's action was arbitrary and capricious and contrary to the evidence before it.

Petitioner' parole was revoked after an incident in which he was arrested for a misdemeanor involving allegations of domestic violence. Petitioner denied the allegations and the charges were later dropped. At his subsequent parole revocation hearing, the Board withdrew the charges related to the misdemeanor "with prejudice." Petitioner then pled guilty to a single parole violation of failing to report a police contact and was sentenced to time served plus three months, after which he would be considered for re-release.

Upon consideration for re-release, the Board conducted an interview with the petitioner during which it questioned him about the facts relating to the misdemeanor arrest. Petitioner again denied the allegations. The Board then issued a decision holding him for an additional twelve months. In its decision the Board stated that petitioner's replies to their questions had led them to conclude that he lacked insight into his criminal activity. It ordered him to participate in the domestic violence/anti-aggression program.

The court found this decision to be arbitrary and capricious and contrary to the evidence. It was obvious from the Board's decision that it had concluded that petitioner was guilty of the misdemeanor charges. The only *evidence* before the Board, however, indicated that he was not guilty: The charges themselves had been withdrawn, as had the revocation charges related to them. Petitioner and his witnesses had all maintained his innocence. There was no evidence in the record to support the Board's decision. Consequently, the decision was arbitrary and capricious and had to be reversed.

A copy of this unreported decision should be available in your facility law library.

Y2K: THE LEGAL FALLOUT

The coming of the new millennium brought with it, among other things, rumors of a planned work stoppage and other demonstrations among New York State inmates. The work stoppage, which was apparently meant to protest the ever-tougher release criterion of the Division of Parole, became known as the "Y2K strike." DOCS' response was tough: Hundreds of inmates were transferred, removed from their programs and disciplined based upon allegations, often from anonymous, confidential sources, that they were involved in some way in planning for the strike.

In the aftermath, Prisoners' Legal Services reviewed over eighty Tier III hearings resulting from charges associated with the Y2K strike. PLS filed administrative appeals in many cases, challenging the hearings on the grounds that they lacked substantial evidence and that the misbehavior reports were so vague as to fail to provide adequate notice of the charges. DOCS' reversed over thirty cases after PLS intervened, and modified the penalties in more than twenty more. PLS also filed numerous Article 78 proceedings challenging the Y2K disciplinary hearings. In many of these cases, DOCS agreed to reverse the hearings once the papers were filed. See: Matter of Rosario v. Goord, 293 A.D.2d 922, 740 N.Y.S.2d 657 (3d Dep't. 2002); Matter of Betancourt v. Ricks, 288

A.D.2d 644, 732 N.Y.S.2d 599 (3d Dep't. 2001); Matter of Harris & Gonzales v. Goord, (Sup. Ct. Orleans, Co.) (Punch, J. 2001); and Matter of Ryan v. Goord, 289 A.D.2d 787, 735 N.Y.S.2d 431 (3d Dep't. 2001).

In two cases, Matter of Callens v. Goord, 286 A.D.2d 811, 730 N.Y.S.2d 263 (3d Dep't. 2001) and Matter of Irving v. Goord, 288 A.D.2d 787, 733 N.Y.S2d 525 (3d Dep't. 2001), DOCS refused to reverse the hearings and the cases were argued before the Appellate Division. In both cases the petitioners were found guilty of urging others to participate in a work stoppage based on allegations from anonymous confidential informants. Although a prison disciplinary determination may be based on confidential information, it is well settled that the information must be "sufficiently detailed for the Hearing Officer to make an independent assessment of the informant's reliability." In both Callens and Irving the court reviewed the confidential information *in camera* and concluded that the evidence from the anonymous informants "was not sufficiently detailed or specific as to the charge to enable the Hearing Officer to independently assess their credibility." On this basis, the court ordered both hearings reversed.

Other cases, both *pro se* and those brought by PLS, were not so successful. See: Moore v. Goord, 279 A.D.2d 682, 719 N.Y.S. 2d 309 (3d Dep't. 2001); Shannon v. Goord, 282 A.D.2d 909, 726 N.Y.S.2d 151 (3d Dep't. 2001); Harris v. Goord, 284 A.D.2d 841, 726 N.Y.S.2d 603 (3d Dep't. 2001); Bosshart v. Goord, 285 A.D.2d 781, 727 N.Y.S.2d 208 (3d Dep't. 2001); Mays v. Goord, 285 A.D.2d 847, 727 N.Y.S.2d 357 (3d Dep't. 2001); Golden v. Ricks, 288 A.D.2d 565, 732 N.Y.S.2d 655 (3d Dep't. 2001); Quinones v. Ricks, 288 A.D.2d 568, 732 N.Y.S.2d 275 (3d Dep't. 2001); Gibson v. Ricks, 288 A.D.2d 569, 732 N.Y.S.2d 452 (3d Dep't. 2001); Innis v. Ricks, 289 A.D.2d 811, 734 N.Y.S.2d 512 (3d Dep't. 2001); Encarnacion v. Ricks, 289 A.D.2d 625, 733 N.Y.S.2d 547 (3d Dep't. 2001); Shepard v. Goord, 292 A.D.2d 694, 741 N.Y.S.2d 128 (3d Dep't. 2002). In these cases the court held that "the confidential information provided substantial evidence to support the determination of petitioner's guilt and the information [was] sufficiently detailed and supported by corroborating evidence to permit the Hearing Officer to make an independent assessment of its reliability ." *Shepard*, 741 N.Y.S.2d at 129. The court, in many of these cases, also rejected prisoners' arguments that they were not provided with adequate notice of the charges because the misbehavior reports did not specify the times, dates and places that the alleged misconduct occurred. In Encarnacion, for instance, the court found that "[a]s a practical matter, this information could not be reported without jeopardizing the safety of the confidential informants." *Id.* at 548.

Many inmates who were not charged with disciplinary infractions found themselves caught up in the Y2K net in other ways. For instance, roughly one-hundred inmates were transferred out of Green Haven Correctional Facility. Many of these inmates were "old timers," people who had been in prison since the 70's or 80's. Some were in the theology program, some were instructors, others were presidents of various prison organizations. Some had earned masters degrees in prison, others had started positive programs. Almost all had exceptional prison records. These inmates did not receive even the minimal due process that was given to those who received misbehavior reports. Instead, they were summarily removed from their programs, reclassified, and sent to other prisons based, in many cases, upon unreliable confidential information. When they arrived at their new facilities they were not allowed to participate in various programs because of notations in their files indicating that they were involved in planning the Y2K strike. They had no legal means by which to challenge this information other than to bring it to the attention of the same administration that was responsible for putting this information in their file in the first place. PLS was successful in having erroneous information removed in some cases. However, in many other cases, the damage was already done.

RECENT DEVELOPMENTS IN RELIGIOUS FREEDOM

A prisoner's right to the free exercise of religion is guaranteed by the First Amendment of the United States Constitution. In New York, it is also guaranteed by Section 610 of the New York Correction Law.

In 2000, Congress passed the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc-1(a) (RLUIPA), which provides even greater protection to inmates' exercise of religion. Under this act, prison officials must meet a heightened standard to justify rules or conduct that substantially burdens the free exercise of religion.

Generally, under the First Amendment, a prison official need only show that a restriction on religious freedom is "reasonably related to legitimate penological interests" in order for the restriction to survive constitutional scrutiny. *See*, Turner v. Safley, 482 U.S. 78; 107 S.Ct. 2254 (1987). Under the RLUIPA, by contrast, a rule or regulation which "impose[s] a substantial burden on the religious exercise of a person residing in or confined to an institution" will only be valid if "the government demonstrates that imposition of the burden. . . .(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

In Marria v. Broaddus, 200 F.Supp.2d 280 (S.D.N.Y. 2002), a federal district court recognized that prisoners can bring their religious claims under both the First Amendment and RLUIPA, and that DOCS's burden of proof is much greater under RLUIPA. In Marria, the plaintiff, an inmate, challenged DOCS's rule prohibiting Five Percenters from organizing and from receiving a publication about their beliefs titled "The Five Percenter." In doing so, the Court admitted into evidence the testimony of Plaintiff's expert that the Five Percenters are a legitimate religion and not a prison gang, and that there is little justification for banning them or their literature. At the same time, it refused to admit into evidence DOCS' expert testimony because it was unreliable and biased. The court then analyzed the plaintiff's claim under the lower First Amendment standards set out in Turner, *supra*, and found issues of fact preventing summary judgment even for this lower standard. When the Court analyzed the RLUIPA claim, it found that DOCS policies "substantially burdened" Mr. Marria's free exercise rights, and that issues of fact existed as to whether DOCS had a "compelling interest" in banning the organization and literature of the Five Percenters, and whether an outright ban was the least restrictive alternative.

Another recent case suggests that the state courts, too, will give careful attention to claims from inmates that their right to free exercise of religion is being violated in prison.

In Matter of Cancel v. Goord, 278 A.D.2d 321, 717 N.Y.S.2d 610 (2d Dep't 2000), an inmate alleged that the Sunni Muslim Imans employed by DOCS were antagonistic to members of the minority Shi'a sect. He requested that DOCS permit Shi'a adherents to hold separate services, free from Sunni influences, and permit Shi'a clergy and/or registered volunteers to enter the prison to lead Shi'a services and religious discussion groups. DOCS refused, on the ground that it was "advised by the Department's Iman that all Muslim religious groups fall under Islam, with the exception of [followers of the Nation of Islam]. All practice the same faith and should not be separated." The Supreme Court found this explanation to be insufficient and the Appellate Division agreed. In its decision, the Appellate Division quoted from a case decided under the Religious Freedom Restoration Act, a precursor to RLUIPA. That case had held that while a prison was not required to employ clergy from every sect or creed, it must justify by a compelling state interest a failure to provide or allow reasonably sufficient alternative methods of worship. The Court found that it was "readily apparent that the petitioner's spiritual needs have not been met." It ordered DOCS to conduct administrative proceedings with Shi'a participation in order to

determine how best to accommodate petitioners' needs.

Following the court decision discussed above, Mr. Cancel brought a First Amendment claim in federal court for money damages. Cancel v. Mazzuca, 205 F.Supp.2d 128 (S.D.N.Y. 2002). The plaintiff sued 31 prison officials for violating his First Amendment rights and his rights under Section 610 of the Correction Law. The federal court, however, dismissed the claims based on state law because New York law prohibits suing government employees for money damages other than in the Court of Claims. It also dismissed most of the defendants except the two Imams, on the ground of qualified immunity. The court found that the right of Shi'a Muslims to separate services had not been clearly established in prior decisions, and denied the Motions of the two Imams to dismiss finding that the facts, if proven, would amount to a clearly established free exercise claim. In a later decision only reported on Westlaw, Cancel v. Mazzuca, 2002 W.L. 1891395 (S.D.N.Y. 2002), the Court denied the plaintiff's motion to amend his complaint to add a number of other defendants, but granted the plaintiff's motion to amend his complaint to add a claim under RLUIPA.

Practice Hints

1. If you have a claim that you have been denied your right to exercise your religion, or that DOCS has substantially burdened your right to exercise your religion, include both state and federal claims, including Correction Law §610, the First Amendment and RLUIPA.

2. If the relief you seek is a change in DOCS' policies or practice, bring your case as an Article 78 in state court, or in Federal Court under Section 1983.

3. If the relief you seek is monetary damages, you cannot bring state claims against state employees. You also will confront the problem of qualified immunity, which requires that a Constitutional right must be clearly established before a court will hold state employees liable for damages.

4. In prison litigation, less is more. Do not sue 31 people: choose the defendants who have actually violated your rights.

5. Before you file any lawsuit, for injunctive relief or money damages, you must first exhaust your administrative remedies by filing a grievance, and appealing an adverse decision to the CORC.

PRISONERS' LEGAL SERVICES JOINS LAWSUIT CHARGING UNCONSTITUTIONAL TREATMENT OF MENTALLY ILL IN PRISON

Prisoners' Legal Services has joined the Prisoners' Rights Project of the Legal Aid Society and Disability Advocates, Inc., lawyers for the disabled, in filing a major lawsuit on behalf of prisoners with mental illness in New York. The lawsuit alleges that such prisoners are denied adequate mental health care, harshly punished for the symptoms of their mental illnesses and frequently confined under conditions amounting to cruel and unusual punishment. As a result, the suit charges, the conditions of mentally ill prisoners routinely deteriorates in prison, sometimes to the point of self-mutilation or suicide.

The lawsuit, *Disability Advocates, Inc. v. New York State Office of Mental Health*, was filed in federal court in New York City in May of this year. It charges New York State's Office of Mental Health (OMH) and Department of Correctional Services (DOCS) with violations of the Eighth Amendment to the United States Constitution and of the Americans with Disabilities Act and the Rehabilitation Act, two federal civil rights statutes. It asserts that prison mental health care programs and resources to address the serious mental health needs of prisoners are deficient across the board. One of the issues the lawsuit addresses is the failure by DOCS and OMH to care for or intervene to remove mentally ill prisoners housed in Special Housing Units, even when the isolation associated with SHU is clearly exacerbating their illness or causing serious mental deterioration.

Prisoners in SHU are allowed out of their tiny cells only one hour per day during which they are locked alone in a small cage outside. They eat alone in their cells, cannot see other prisoners and are not permitted to work at prison jobs, attend programs or engage in other rehabilitative activities. The noise level inside these housing units is often deafening. When these conditions are applied to mentally ill inmates, the results are "simply inhumane," argues Sarah Kerr of the Legal Aid Society, a co-counsel for the plaintiffs. "The stringent conditions of isolated confinement....cause mentally ill prisoners to psychiatrically deteriorate and contribute to a significant number of prisoner suicides."

This issue is of particular concern because, in recent years, numerous inmates suffering from mental illness have committed suicide while in restricted confinement. Family members and other advocates have argued that those tragedies could have been avoided if DOCS had been more responsive to the inmates' mental health needs.

The prison population of New York has increased three-fold over the last twenty years. The incidence and severity of serious mental illness among the prison population has also increased. But mental health staff and other resources have not increased in response to growth and magnitude of the mental health problems of the prison population. For instance, the number of inpatient beds at the Central New York Psychiatric Center (CNYPC), which provides all inpatient care to prisoners in DOCS custody, is only 187 for a prison population of almost 70,000, and has not changed in over twenty years. "The lack of inpatient beds has grave consequences," states Nina Loewenstein of Disability Advocates, Inc. "Some prisoners in psychiatric crisis are secluded in observation cells for 24 hours each day for days or weeks at a time, with only mats on the floor and limited clothing, awaiting placement at CNYPC. Others are discharged back into the prison population despite a continuing need for inpatient care."

The failure to provide for the mental health needs of prisoners has serious, long-term societal consequences. "Prisoners with mental illness who have been neglected and mismanaged while incarcerated are likely to be more severely mentally ill upon their release from prison than they would be otherwise; they

are more likely to experience homelessness, less likely to trust mental health care providers and less likely to engage in necessary mental health care upon their release," said Betsy Sterling of Prisoners' Legal Services. "Disregard for the suffering of mentally ill prisoners harms the prisoner and poses both a burden and danger to the public at large."

PRO SE PRACTICE

NEW FILING RULES FOR INMATES IN STATE COURT

Indigent Inmates Must Now Pay a "Reduced" Filing Fee

In 1999, New York enacted a new law, CPLR §1101(f), requiring poor inmates to pay a "reduced filing fee" to commence most lawsuits in state court. (The law exempts lawsuits raising jail time issues.) Prior to the enactment of CPLR §1101(f), an inmate unable to pay the filing fee (currently about $245) could apply for "poor person" status and have the entire fee waived. Under the new law, however, an inmate unable to pay the fee must file what is called an "application for a reduced filing fee" and, if this application is granted, must pay between $15 and $50 in order to commence his lawsuit.

CPLR §1101(f) requires an inmate, at the time he files a lawsuit, to also file an authorization allowing the court to obtain a statement of his inmate account. If the court, after examining the inmate's account, determines that he is unable to pay the full filing fee, it may require payment of the "reduced" fee. While the payment can be deferred it cannot be waived. Inmates who have no money at all cannot be barred from proceeding but the State is allowed to collect the fee from the inmate's account at a later time.

The new law raised several questions. First, and most basically, was it constitutional? Some prisoners argued that it was unconstitutional, because it treats poor inmates differently than other poor persons, thereby violating the Equal Protection Clause of the Constitution. At least one Supreme Court justice agreed with them. In Gomez v. Evangelista, 714 N.Y.S.2d 636 (N.Y. Co. 2000), Judge Emily Goodman held that the statute violated the Equal Protection Clause of both the state and federal and constitutions. Unfortunately, Judge Goodman's decision was later reversed by the Appellate Division. That Court held that the statute was constitutional because it is permissible to treat similarly situated persons differently if the disparate treatment is rationally related to a legitimate government interest. The Court held that the disparate treatment of poor inmates resulting from CPLR §1101(f) was rationally related to the state's legitimate interest of deterring frivolous lawsuits by prisoners. Gomez v. Evangelista, 736 N.Y.S.2d 365 (1st Dep't 2002) The court noted that a similar provision of the federal Prison Litigation Reform Act (PLRA), has been found constitutional by some federal courts.

Another important question involved the new law's affect on the statute of limitations. Most inmate lawsuits are Article 78 proceedings, which have a short, four month statute of limitations. Consequently, inmates filing Article 78 petitions must often rush to get their papers filed before the four month statute of limitations expires. But what constitutes filing? Is it when the appropriate papers are received by the court? Or is it when the court has obtained the inmate's account statement and received payment of the reduced fees – a process that could conceivably take several weeks?

This question was resolved in Grant v. Senkowski, 95 N.Y.2d 605, 721 N.Y.S.2d 597 (2001). In Grant, the Court held that a *pro se* inmate who proceeds under CPLR §1101(f) has commenced his proceeding at the moment the Court Clerk's office receives his papers and is assigned an index number. As long as the

inmate insures that the proper papers reach the court before the statute of limitations expires, delays by the court in obtaining the inmate's account status or signing an order to show cause will not prevent an inmate from filing his action before the statute of limitations expires.

In our experience, however, a number of Supreme Court clerks are unaware of the holding in Grant. For example, some court clerks still withhold the index number until after the judge has actually signed an order to show cause. Others will not assign an index number if there are even minor omissions from the inmate's papers – a missing Request for Judicial Intervention (RJI) form, for example. Still others *try* to have an index number assigned as soon as possible after receipt of the papers. However, because the assignment of the index number is usually handled by the *County* Clerk, not the Court Clerk, the index number might not be obtained until a day or more after the court actually receives the papers.

Thus there is another question: Is a prisoner's Article 78 proceeding commenced on time if his papers are received by the court before the statute of limitations but an index number is not assigned until after? The Appellate Division, Third Department recently answered this question in Matter of Johnson v. Goord, 733 N.Y.S.2d 766 (3d Dep't 2001). Relying on the decision in Grant, the Third Department held that the proceeding in Johnson was commenced when the inmate's papers were actually received by the clerk, not when the index number was later assigned.

Since Grant, there has been one related development in this area of the law. The legislature recently amended CPLR §304 and a related provision, CPLR §203(c), to provide that a special proceeding (of which an Article 78 proceeding is one) is commenced by a the filing of a petition. Before these amendments, a special proceeding was commenced by filing an order to show cause *and* a petition. At first blush, it may appear that a prisoner need file *only* a petition to commence a proceeding. In fact, however, CPLR §304 has always made clear that the proceeding will not be commenced unless the papers being filed are accompanied by the required fee or, if the petitioner is unable to afford the fee, the application for the reduced fee. If the petition is accompanied by neither the fee nor the CPLR §1101(f) application, the papers will probably be deemed insufficient to commence a proceeding. In addition, *pro se* prisoners will still need to obtain an Order to Show Cause from the court to provide for alternative service (service by mail instead of in person) upon the respondents and the attorney general, and to set a "return date" (the date the petition will be placed on the court's calendar for consideration).

EXHAUSTION OF ADMINISTRATIVE REMEDIES (Continued from page 1)

The Prison Litigation Reform Act of 1995 (PLRA)

Prior to 1995, federal courts had the discretion to require inmates to exhaust administrative remedies before proceeding with their federal claims, but were not obligated to do so. If they chose to require exhaustion, they could do so only if the relevant administrative remedy was "plain, speedy and effective." 42 U.S.C. 1997e(a) (1994 ed.)

In 1995, Congress, concerned about the number of prisoner lawsuits and convinced that many of them were frivolous, passed the PLRA, which sought to limit the number of inmate lawsuits in the federal courts. One of the ways it did this was to make the exhaustion requirement mandatory.

The PLRA states,"[n]o action shall be brought [in federal court] with respect to prison conditions under [any] Federal law by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a).

The PLRA also eliminates the requirement that the administrative remedies must be "plain, speedy and effective." Under the PLRA an administrative remedy need only be "available" to require exhaustion.

Since 1995, it has been clear that many inmate lawsuits would be subject to an exhaustion requirement. Only in the last two years, however, in the wake of the Booth and Porter decisions, have the ramifications of such a sweeping requirement become clear.

Booth v. Churner

In Booth, the Supreme Court addressed the PLRA's requirement that an administrative remedy be "available" before it could be exhausted.

Timothy Booth was a Pennsylvania prisoner who brought a §1983 action alleging the use of excessive force by correction officers. Booth filed an administrative grievance about the assault but, after it was denied, did not file an appeal. He subsequently filed a lawsuit in federal court seeking damages from the corrections officers. His case was dismissed by the federal district court because he failed to exhaust his administrative remedies. He appealed, and his case eventually reached the Supreme Court.

In the Supreme Court, Booth argued that because the administrative grievance program in Pennsylvania was not authorized to give him money damages – and because money was the only thing he was seeking in his federal lawsuit – there was no administrative remedy "available" for what he wanted. Therefore, he argued, the PLRA's exhaustion requirement could not apply.

The Court disagreed. The Court held that as long as the grievance committee had the authority to take *some* responsive action, even if it could not provide Booth with the money damages he was seeking, it was still an "available" remedy, and exhaustion was required. 121 S. Ct. at 1822. The Court reasoned that Congress, in passing the PLRA, had intended that inmates exhaust their administrative remedies before going to court, even if the administrative remedy could not provide the same relief that the inmate was seeking in court.

Under Booth, an inmate must exhaust his administrative remedies even if the administrative grievance process cannot give him the relief he seeks, as long as the grievance process allows *some* action to be taken relevant to the grievance.

Porter v. Nussle

In Porter, the Court addressed the PLRA's use of the phrase "prison conditions".

The Porter case involved a Connecticut inmate who alleged that he was beaten by corrections officers. He sued the officers in federal court without ever having filed an administrative grievance. He argued that he should not have to file a grievance because the beating was a single, isolated incident and therefore did not involve "prison conditions" as that term is used in the PLRA.

The Second Circuit Court of Appeals ruled in Porter's favor. That Court concluded that "particularized acts", such as a single instance of guard brutality, did not constitute "prison conditions" under the PLRA and, therefore, were not subject to the exhaustion requirement. Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000).

The Supreme Court reversed. The Court held that *any* lawsuit about prison life, whether about a single solitary incident (such as an incident of guard brutality), or whether about "general circumstances" (such as overcrowding), concerns "prison conditions" and is therefore subject to the exhaustion requirement.

After Porter, there will be no exception to the exhaustion requirement based on the argument that the subject of the lawsuit does not involve "prison conditions." Exhaustion of

administrative remedies, it is now clear, is required to bring any federal lawsuit that touches on any aspect of prison life.

While Booth and Porter settled major questions about exhaustion, numerous other questions remain.

1. What exactly is an "available" administrative remedy? Are there some circumstances when an administrative remedy is unavailable?
2. What are the available administrative remedies in New York?
3. What does it mean to "exhaust" an administrative remedy? Must you adhere strictly to the procedures set forth in the grievance process, or is it sufficient that corrections administrators have responded to your complaint (or failed to respond)?
4. Finally, what will happen to your federal complaint if you have not exhausted administrative remedies?

After Booth and Porter, these questions are likely to arise in every case brought by a prisoner in federal court. The rest of this article takes a closer look at these questions.

1. What is an "available administrative remedy"?

Most courts agree that the phrase "available administrative remedy" means the *formal administrative grievance procedures* provided by the correctional system. Courts have reasoned that permitting inmates to bypass the codified grievance procedure of a prison system by, for example, sending letters directly to the facility's superintendent, would undermine the effectiveness that the prison grievance program is intended to achieve. Beatty v. Goord, 2000 WL 288358 (S.D.N.Y. 2000). While there may be exceptions to this rule (see below), in general, inmates who wish to file a federal lawsuit about a problem they are experiencing will be well advised to first exhaust the *formal* grievance process provided by DOCS for the particular problem about which they want to sue.

2. What grievance processes are "available" to inmates in New York?

DOCS provides several formal grievance processes. Which process you will need to exhaust before bringing a federal lawsuit will depend upon the nature of the problem about which you are complaining.

Most problems that arise in New York State prisons can be addressed through the Inmate Grievance Program ("IGP"). *See* Title 7 New York Code, Rules, Regulations (hereinafter 7 NYCRR) §701.7; DOCS Directive #4040. This process involves three steps. First, you must submit a grievance complaint to the clerk of the Inmate Grievance Resolution Committee ("IGRC"), within fourteen days of the incident you are complaining about. 7 NYCRR §701.7(a)(1); DOCS Directive #4040(V)(A)(I). Second, if you are dissatisfied with the IGRC decision, you must appeal to your facility superintendent. *Id.* §701.7(b). Third, if you are still dissatisfied, you must appeal to the Central Office Review Committee in Albany (herenafter CORC). *Id.* §701.7(b)(5). The grievance process is then complete and you may bring a complaint in the appropriate court.

Other problems, however, are *non-grievable* under DOCS regulations, that is, they cannot be addressed via the Inmate Grievance Program. These typically include the decisions of any program or procedure which has its own, separate, written appeal mechanism. For example, DOCS provides a separate

administrative appeal process to appeal the results of disciplinary hearings, (7 NYCRR Chapter 5), the termination or suspension of visitation rights, (7 NYCRR §200.5), the denial of temporary release (7 NYCRR §1900.6); and the denial of a publication (7 NYCRR §712.3). Where these *separate* appeal processes are available, it is the separate process, not the Inmate Grievance Program, that must be exhausted.

Finally, DOCS provides an *alternative* grievance process for complaints about *staff harassment*, including brutality. 7 NYCRR §701.11. Under these regulations, any inmate who feels that he or she has been the victim of harassment or brutality from staff "should first report such occurrence to the immediate supervisor" of the employee. 7 NYCRR §701.11(b)(1). The complaint must then be given a grievance number and referred to the Superintendent who must determine if it represents a bona-fide harassment complaint. 7 NYCRR §701.11(b)(3). If so, the superintendent must initiate an investigation. 7 NYCRR §701.11(b)(4). In either event, he is to respond to the inmate with 12 days. 7 NYCRR §701.11(b)(5). If he fails to respond, or if the inmate is dissatisfied with his response, an appeal may be submitted to CORC by filing a notice of appeal with the grievance clerk within four working days of receipt of the Superintendent's reply. 7 NYCRR §701.11(b)(6) & (7).

3. Are there any exceptions to the rule that only a "formal" grievance counts, for exhaustion purposes?

Perhaps. In one recent case, the Second Circuit Court of Appeals noted that DOCS' grievance regulations specifically state that they are intended only to *supplement*, not replace, informal grievances. Marvin v. Goord, 255 F.3d 40 (2d. Cir. 2001), *citing*, 7 NYCRR §701.1 In Marvin, the inmate succeeded in overturning a ban on his correspondence with his attorney by *informally complaining* about it to various correctional officials. The Court held that since the inmate's informal complaint had *succeeded* in getting him the relief he sought – and since DOCS' regulations specifically recognize the validity of informal grievances – the inmate in that case had exhausted his administrative remedies, even though he never filed a grievance.

Several lower courts have applied this reasoning to cases involving allegations of guard brutality. For example, in Perez v. Blot, 195 F.Supp.2d 539 (S.D.N.Y. 2002) a federal district relied on Marvin in holding that an inmate's assertion that he had made complaints of guard brutality to a variety of corrections officials, and that his complaints had succeeded in obtaining an investigation by the Inspector General's office, which had found the officer culpable, would, if accurate, establish that the inmate had exhausted his administrative remedies, even though he never filed a formal grievance. *See also*, Heath v. Saddlemire, 2002 WL 31243304 (N.D.N.Y. 2002). (Plaintiff's letters to the Superintendent and the Inspector General satisfied exhaustion requirement.)

In addition, a number of district courts have noticed that DOCS' alternative grievance process for complaints of staff harassment or brutality is, itself, highly informal – requiring, as it does, little more than that the inmate make his or her concern known to an appropriate supervisory officer in order to obtain an investigation. 7 NYCRR §701.11. Some of these courts have relied on this regulation to conclude that inmates complaining about staff misconduct do not have to file a formal grievance under 7 NYCRR §701.7 in order to exhaust administrative remedies, so long as they have taken steps consistent with the process described in §701.11. For example, in Perez, *supra*, the court held that an inmate who alleged that he had complained to "various" corrections officials about being beaten by corrections officers, had probably exhausted the administrative remedy provided by 7 NYCRR §701.11, even though he had never filed a formal grievance. Similarly, in Morris v. Eversley, 205 F.Supp.2d 234 (S.D.N.Y. 2002)

the court held that an inmate who had complained about an incident of staff brutality to a corrections captain had exhausted her administrative remedies under §701.11, although she, too, had never filed a formal grievance. And, likewise, in Gadson v. Goord, 2002 WL 982393 (N.D.N.Y. 2002) the court held that a prisoner's letter to the Superintendent about alleged assault by corrections officers satisfied the exhaustion requirement under §701.11.

On the other hand, many courts have been unwilling to recognize broad exceptions to the rule that only a *formal* grievance -- typically, one filed pursuant to 7 NYCRR §701.7 -- will satisfy the exhaustion requirement. *See, e.g.*, Hemphill v. State of New York, 198 F.Supp.2d 546 (S.D.N.Y. 2002) (letter sent to prison superintendent about an incident of alleged excessive use of force could not be deemed a "grievance" under the PLRA notwithstanding the availability of the alternative grievance process); Mills v. Garvin, 2001 WL 286784 (S.D.N.Y. 2001) ("letter writing is not the equivalent of an exhaustion of administrative remedies under the PLRA"); Grey v. Sparhawk, 2000 WL 815916 (S.D.N.Y., 2000) (a complaint to the Inspector General did not excuse failure to file a grievance); Laureano v. Pataki, 2000 WL 1458807 (S.D.N.Y. 2000) (plaintiff's letters to various employees did not relieve him of satisfying codified grievance procedure); Adams v. Galleta, 1999 WL 959368 (S.D.N.Y. 1999) (inmate's letter to warden was an insufficient substitute to formal grievance process); Byas v. New York, 2002 WL 1586963 (S.D.N.Y. 2002) (inmate's letter to the Superintendent was not a grievance under the informal process, because the Superintendent was not the "immediate supervisor" of the employee in question).

The most that can be said at present about a possible exception for staff misconduct complaints based on 7 NYCRR §701.11 is that the law is still unsettled. Inmates who wish to sue in federal court over an incident of staff misconduct would be well advised to exhaust the formal administrative grievance process under & 7 NYCRR §701.7, even if they can plausibly argue that they have already satisfied the requirements of the informal process under 7 NYCRR §701.11.

WHAT'S THIS? Some of the case citations that you see in this article refer to Westlaw, the computerized reporter service that is available over the internet. A Westlaw cite starts with the year of the case (e.g., 2000) then "WL" (for Westlaw) and then the number of the case on Westlaw's service.

Pro Se tries to refer only to cases that are available in the Federal Reporter series, because we know that inmates cannot easily access such services as Westlaw. In some cases, however, developments that we think are important to inmates have not been published in the federal reporter, and are only available on-line. In those few cases we may choose to refer to the cases using the Westlaw cite, so that you are at least aware of their existence.

4. What does it mean to "exhaust" administrative remedies?

"Exhausting" administrative remedies means appealing them to the highest level of the grievance system. To exhaust an administrative grievance you must appeal it to CORC. To exhaust an appeal of a disciplinary hearing or an administrative segregation hearing you must appeal it to the Commissioner. The federal courts in New York will, and do, dismiss prisoner's lawsuits where the prisoner has failed to "exhaust" his grievance by appealing it to the highest level possible, even if he has otherwise filed it correctly.

Exhaustion applies to any decision from the grievance process. For example, a decision stating that it is now too late to file a grievance, because more than fourteen days have passed since the incident about which you are complaining occurred, must be appealed to the CORC. Similarly, the failure of the grievance

committee to respond to a grievance, should be treated as a denial, and appealed to CORC.

Exhaustion also applies to each *issue* you may wish to challenge. For example, if you want to sue over a disciplinary hearing because your witnesses weren't called and because there was insufficient evidence to support the charge, you must be sure to raise both of these issues in the administrative process.

This process can be complicated in some situations. In Giano v. Goord, 250 F.3d 146 (2d. Cir. 2001), a prisoner wanted to challenge his disciplinary conviction based on a urinalysis proceeding but he also wanted to challenge DOCS' procedures for handling urine samples in general. The court held that he must exhaust his complaints about his disciplinary hearing through the disciplinary appeal process (a "Selsky" appeal) and exhaust his broader complaints about DOCS' policies through the Inmate Grievance Program.

5. What if the time limit for filing a grievance has already passed?

If the fourteen days for filing a formal grievance has passed, you should still follow through with the grievance procedure. Seven NYCRR §701.7(a)(1) and DOCS Directive #4040(V)(A)(1) allow for exceptions to the fourteen day time limit based on mitigating circumstances.

The mitigating circumstances acknowledged by DOCS include "e.g., attempts to resolve informally by the inmate, referrals back to the Inmate Grievance Program from the courts, etc." 7 NYCRR §701.7(a)(1). Despite this language, at least one court has attempted to refer a case back to the IGP only to be told the grievance was now time barred. (The plaintiff had been rendered unconscious by deficient medical care during the fourteen days.) The court then held that no administrative remedy was available for that plaintiff, and waived the exhaustion requirement. Cruz v. Jordan, 80 F.Supp.2d 109 (S.D.N.Y. 1999) *overruled on other grounds*, Neal v. Goord 267 F.3d 116 (2d. Cir. 2001).

In your grievance you should state why you are filing the grievance late. For instance, if you were the victim of excessive force and you did not file a timely grievance concerning the matter, reasons for your failure to do so might include the following:

- you contacted the IG regarding your complaint of excessive force and believed that was sufficient.
- until the Supreme Court decided Booth v. Churner, you didn't realize that damage claims had to be exhausted because it didn't seem like the grievance process was "available" for that purpose.
- until the Supreme Court decided Porter v. Nussle, the law in the Second Circuit was that use of force claims, retaliation claims, and other complaints of "particularized" actions against an individual prisoner did not have to be exhausted.
- you attempted to resolve the matter "informally" with a letter to the Superintendent or other persons, pursuant to the provisions of 7 NYCRR §701.11, *et. seq.*
- you were afraid of retaliation by the CO's involved.
- you were transferred out of the prison before you had time to file a grievance.
- you were incapable of filing a grievance because of your injuries, location, etc .
- your federal case has been dismissed without prejudice to allow you an opportunity to exhaust your administrative remedies.

Whatever the reason(s), you should state them clearly. If your grievance is denied as untimely, you should appeal that denial all the way through to the CORC. This way, even if

DOCS concludes that the mitigating circumstances presented for the late grievance are insufficient, you may still be able to argue in court that your case should not be dismissed for failure to exhaust administrative remedies. For example, in Graham v. Perez, 121 F.Supp.2d 317 (S.D.N.Y. 2000) the court, in dismissing the plaintiff's complaint for failure to exhaust, held that he should be allowed to attempt to file a late grievance, and that if DOCS refused to accept the late grievance, he could re-file his claim with the court, stating what the mitigating circumstances were that caused him to fail to file a timely grievance. The court would then use its own judgment to determine whether sufficient mitigating circumstances had been presented to waive the exhaustion requirement.

6. What if I've already filed a pro-se lawsuit without having exhausted my administrative remedies?

If you have already filed a lawsuit without exhausting your administrative remedies it is highly likely that the defendants raised this issue in their answer as an affirmative defense.

If there is a good reason why you didn't exhaust, you should explain it to the court. For example, if an issue is not "grievable," and there is no other administrative remedy (like a disciplinary appeal) for that issue, you should argue that there was no administrative remedy "available" to you, and therefore you didn't have to exhaust.

In general, however, you are probably best advised to try to exhaust as soon as you can. If your suit is a damage suit filed before Booth v. Churner was decided, or a use of force or retaliation case filed before Porter v. Nussle was decided, you should request to have your grievance considered late on the ground that the court decision saying you had to exhaust was not decided at the time of the incident you are suing about. If you are denied permission to file a late grievance, appeal that decision all the way to the CORC.

If you succeed in exhausting before the defendants raise exhaustion in your lawsuit, you should argue that you have now satisfied the exhaustion requirement. Although the decision in Neal v. Goord says that you must exhaust before you file suit or have your case dismissed, you should ask the court to make an exception to the Neal rule because either the Booth or Porter case had not been decided when you filed suit and you did not know your case had to be exhausted. You should make the same argument if the defendants raise exhaustion while you are trying to exhaust, and ask the court to allow you to complete exhaustion without dismissing your case.

7. What happens if my case is dismissed for failing to exhaust administrative remedies?

Courts have agreed that a dismissal for failure to exhaust administrative remedies should be "without prejudice," that is, the plaintiff should be allowed an opportunity to exhaust and, once exhaustion has been completed, to re-file the federal complaint. Morales v. Mackalm, 278 F.3d 126 (2d. Cir. 2002).

In practice, however, this presents complications. For one thing, the fourteen days within which to file a grievance will almost certainly have already passed. You will have to present mitigating circumstances to the IGRC for your failure to have filed a timely grievance. If the IGRC refuses to accept your late grievance, you will have to exhaust that decision to CORC before you can go back to court. Once back in court, you will have to convince the court that there was a good reason that you failed to file a timely grievance and that the IGRC should have accepted your late grievance. *See, e.g.*, Cruz v. Jordan, 80 F.Supp.2d 109; Graham v. Perez, 121 F.Supp.2d 317.

In Conclusion

While many of the details of what constitutes exhaustion of administrative remedies in different circumstances are still being worked out by the courts, it is now plain that if you are planning to bring a federal lawsuit about something that happened in prison, you must be prepared to argue that you have exhausted your administrative remedies.

Pro Se Mailing List

At this time, please **do not** write to PLS requesting to be put on the *Pro Se* mailing list. In a future issue we will tell you when and how to make such a request.