# Pro Se

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## *NEW LAW MANDATES ADDITIONAL OVERSIGHT OF PRISON HEALTHCARE*

### Law Follows Critical Report

Governor Patterson signed a new law this past September requiring the State Department of Health (DOH) to oversee DOCS' provision of medical care to prisoners with HIV and Hepatitis C. The legislation took immediate effect.

The law requires the DOH to conduct annual reviews of the HIV and Hepatitis C care in state and local correctional facilities and authorizes DOH to mandate improvements to make correctional healthcare meet community standards of care. It also requires the DOH to publish annual reports on the state of correctional healthcare.

Of New York's 60,000 inmates, almost 4,000 are infected with HIV, representing nearly 20% of all HIV-infected inmates in the country. New York prisons also confine 8,400 inmates infected with Hepatitis C (HCV), a rate eight times greater than in the general public.

Before the passage of the new law, medical facilities in prisons and jails were the only substantial public health institutions in the state exempt from mandatory, independent assessments by DOH.

The law "represents a significant step forward in making our prison system more transparent and accountable and providing needed medical services to a highly vulnerable population," said Jack Beck, Director of the Prison Visiting Project at the Correctional Association of New York.

The law comes on the heels of a new report critical of the quality of health care services provided by DOCS. The report, issued by the Correctional Association, is titled *Health Care in New York Prisons, 2004-2007*. It was based on observations made at 19 prisons and an analysis

*...healthcare article continued on page 4*

## Also Inside…



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*A Message from the Executive Director,*
*Karen Murtagh-Monks*

In this issue of *Pro Se*, we report on the "Anti-Shackling" bill. This legislation, signed into law by Governor Paterson on August 26, 2009, prohibits the shackling of women prisoners during labor and delivery unless the woman poses a major flight risk. In the Summer 2008 issue of *Pro Se*, I urged a prohibition on the horrific practice of shackling women prisoners during childbirth. In furtherance of our commitment to ending this practice, PLS signed an amicus brief that was submitted in Nelson v. Norris, 553 F.3d 958 (8th Cir. 2008), a case raising the issue of whether it was clearly established that the 8th Amendment's ban on cruel and unusual punishment prohibited the shackling of women during childbirth. The Plaintiff in Nelson alleged that forcing her to go through labor with both legs shackled to her hospital bed violated the 8th Amendment. The defendants argued that in 2003, when they shackled the plaintiff to her bed, the law was not clearly established that their conduct violated the 8th Amendment, and thus they should not be held legally responsible for the violation of the plaintiff's rights. On the heels of Governor Paterson's adoption of the anti-shackling law, the Eighth Circuit Court of Appeals issued its decision in the Nelson case, finding that at the time that Plaintiff Nelson was shackled to the bed, it was well established that the shackling during childbirth was cruel and unusual punishment and holding that the defendant was not entitled to qualified immunity. Nelson v. Norris, ___F.3d ___, 2009 WL 3151208 (8th Cir. Oct. 2, 2009).

In the summer of 2008, when *Pro Se* first addressed the issue of shackling women during childbirth, only three states--California, Illinois, and Vermont--had laws banning the practice and the Eighth Circuit Court of Appeals had taken the position that in 2003, it was not clearly established that the practice violated the 8th Amendment. A little more than a year later, three more states have barred the practice of shackling women during childbirth, Texas, New Mexico and New York, and the Eighth Circuit has partially reversed itself. This is progress. This is how we as a society demonstrate that we have become more humane. It demonstrates what the United States Supreme Court calls "evolving standards of decency."

With so far to go on the human rights front, it is easy to lose sight of where we have been. Although progress is often slow, when we do move forward, even when it is by, or because of, 'baby steps,' it is important that we acknowledge that progress. Over the last several years, we have made significant advances. We have adopted legislation prohibiting the placement of mentally ill individuals in solitary confinement. We have established procedural and substantive rights at disciplinary hearings. As a result of putting cameras in prisons, better training of officers, and more rigorous reporting requirements, the number of excessive force incidents has decreased. And most recently, we, as a society, have decided that we will no longer tolerate the shackling of women prisoners during childbirth. Each of these steps has moved us forward on the road to becoming a more civilized society.

*Executive Director's message continues…*

*…Executive Director's message continued*

Our legal system plays a critical role in setting the standards that reflect our progress toward becoming a truly civilized society. In the context of prisoners' rights, the foundation for these standards is the 8th Amendment's prohibition on the use of cruel and unusual punishment. Over a hundred years ago, the Supreme Court wisely noted that the scope of the cruel and unusual punishment clause is defined by public opinion and, "as the public becomes more enlightened by a humane justice," the scope broadens. Ex Parte Wilson, 114 U.S. 417, 429 (1885). Thus, the slowly evolving societal standards of decency dictate the courts' views on when a prisoner has been subjected to cruel and unusual punishment.

My hope is that one day in the near future, our standards of decency will evolve to the point that the law will prohibit placing any prisoner in solitary confinement, mandate the provision of education to all prisoners, implement policies and practices that lead to rehabilitation and successful re-entry, acknowledge the necessity of maintaining family ties, abolish the felony disenfranchisement laws, prohibit the use of "restricted diets," and broaden the use of medical parole. When these reforms are firmly in place, we will know that we are well on the way to becoming a truly enlightened society.

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*...healthcare article continued from page 1*

of system-wide data, inmate grievances, specialty care services, and DOCS's quality improvement program. It concludes that although DOCS has made progress in improving prison healthcare over the past decade, significant problems exist at many prisons. Among the problems identified were:

(1) wide variations in the quality of care from prison to prison;
(2) staff shortages;
(3) inadequate routine healthcare;
(4) gaps in chronic diseases care;
(5) inconsistencies with specialty care services;
(6) inadequate access to medications; and
(7) absence of outside monitoring of the healthcare.

The Correctional Association report highlighted the following problems:

Variability in Care From Prison to Prison

The report found wide variations in quality of care from prison to prison. At some prisons found to provide low-quality care, the problem was rooted in a lack of resources. At others, the poor quality of medical staff were the heart of the problem. According to the report, certain medical care providers were either unable, due to inadequate training or expertise, or unwilling to respond fully to inmates' medical needs or to promptly follow up on medical problems.

"At these institutions, the poor quality of the medical personnel compromises the delivery of healthcare," said Robert Gangi, Executive Director of the Correctional Association, in a press release. "Overall, our report describes breakdowns in services that can seriously endanger the lives of inmates housed in these facilities. Better scrutiny of care and an effective system of accountability will help identify where changes in policies, practices or staff are needed at a system-wide or facility level. These steps will save the state money and save lives."

Staff Shortages The report states that although DOCS has reduced system-wide vacancies for nurses and doctors during the last few years, high vacancy rates still exist for physician assistants (14%) and pharmacists (13%), primarily due to the low salary rates for these positions. Some prisons, the report found, have significant vacancies for all staff positions. For example, in 2007, Great Meadow Correctional Facility was missing 40% of its doctors, half of its physician assistants and 30% of its nurses. Moreover, some medical vacancies have gone unfilled for many months or years due to salary limitations.

Even at full staffing, the report found, some prisons do not have enough medical personnel. For example, some facilities have only one clinical provider–either a doctor, physician assistant, or nurse practitioner–for every 600 to 800 inmates, whereas the system-wide average is one provider for 400 inmates. According to the report, staff shortages have had and continue to have a significant adverse impact on patients' access to services and the quality of care they receive.

Inadequate Routine Healthcare

At some prisons, the report states, there was inadequate access to routine healthcare such as examinations by nurses for assessments and appointments with clinic providers. Inmates, the report states, often wait weeks or months for a routine appointment with a physician at some prisons. At Attica there was an 11-page waiting list for the doctors. Inmates at many prisons reported cursory, inadequate, and sometimes disrespectful care once they were seen by the medical staff. At several prisons—such as Auburn, Upstate, and Wyoming—a majority of inmates reported that the care provided by their doctors was poor.

Gaps in Chronic Diseases Care

The report found that the care provided to inmates with chronic diseases (*e.g.*, HIV, Hepatitis C, asthma, diabetes, hypertension, etc.) varied greatly within DOCS. Although DOCS has attempted to standardize policies and practices through the promulgation of practice guidelines for many of these illnesses, some prisons fail to fully conform to the clinical standards. For instance, while AIDS deaths have declined and many HIV-infected inmates are

doing well on medications provided by DOCS, not all HIV-infected inmates receive appropriate care: many go without treatment simply because DOCS has identified less than half of its HIV-infected population. For HIV-infected inmates known to DOCS, care throughout the Department varies greatly, with significantly different rates of treatment for HIV-infected inmates and with some prisons rarely referring HIV-infected inmates to infectious disease specialists. For example, in northern New York prisons, the report found, HIV-infected inmates see an infectious disease specialist at one-tenth the rate of prisons in the southern region of the state.

Hepatitis C (HCV) is also a serious problem in the prisons, according to the report. An estimated 13% of the men and 22% of the women inmates are infected. Although DOCS has improved the identification of its HCV-infected population, approximately 30% or more of HCV-infected inmates are unidentified. More importantly, the report states, the care provided to HCV-infected inmates in different prisons varies significantly, with inadequate documentation of chronic HCV-infections, great variability in access to diagnostic specialists and procedures, and significant differences in rates of HCV treatment. Although DOCS has increased the number of inmates receiving effective HCV treatment, it is providing therapy to only 6% of its HCV-infected inmates.

Inconsistencies with Specialty Care Services

Although DOCS sends thousands of inmates to specialists throughout the state for consultations, the utilization of these services varies greatly among the prisons, the report found, and a consistent inmate criticism of prison health care was that DOCS does not adequately follow up on specialists' recommendations.

Inadequate Access to Medications

Inmates reported several problems with the medication delivery system at certain prisons, including: running out of essential medications for chronic conditions; failure to provide inmates with sufficient information about medications they are taking and their potential side effects; and failure to provide medications in a confidential manner.

Absence of Outside Monitoring for Healthcare Within DOCS Inadequate Access to Medications

According to the report, monitoring of healthcare by an outside agency is an essential component of good medical practice. Although DOCS has implemented a Continuous Quality Improvement Program to monitor medical care in the prisons that attempts to assess compliance with its practice guidelines, the report found that more needs to be done to improve prison practices. The report specifically recommends that the Department of Health step in to monitor the quality care within DOCS–a recommendation which has now been partially met by the DOH oversight law.

***Practice pointer**: The 137-page Correctional Association report contains numerous additional recommendations for addressing problems with DOCS' Health Care services. A copy can be obtained by writing to the Correctional Association of New York, 2090 Adam Clayton Powell Blvd., Suite 200, New York, NY 10027.*

## News and Briefs

### Governor Signs Anti-Shackling Bill

Governor Paterson signed legislation this Fall outlawing the use of shackles on pregnant inmates during labor and after delivery.

The Anti-Shackling Bill forbids the use of restraints on incarcerated women during labor and post-delivery recovery unless the woman is a flight risk, and restricts the use of restraints during transport to and from the hospital. Sponsored by Assembly member Nick Perry and Senator Velmanette Montgomery, the bill passed unanimously in the Senate and overwhelmingly in the Assembly on May 20.

Throughout the summer, advocates held demonstrations outside the Governor's Manhattan office and pressured Gov. Paterson for a response.

Shackling women in labor is a degrading and unnecessary practice that puts the health and lives of women and babies at risk, said the bill's sponsors. The new law "moves New York one step closer to making sure that women in prison receive a minimum level of dignity, safety and compassionate care," said Tamar Kraft-Stolar, Director of the Correctional Association's Women in Prison Project.

## "Times" Editorializes Against Prison Litigation Reform Act

In its September 24, 2009 edition, The New York Times called on Congress to reform the "Prison Litigation Reform Act" of 1996 (PLRA). We reprint the editorial, below.

Prisoners' Rights

In 1996, Congress passed a law that made it much harder for inmates to challenge abusive treatment. It has contributed significantly to the bad conditions—including the desperate overcrowding—that prevail today. The law must be fixed.

In the name of clamping down on frivolous lawsuits, the Prison Litigation Reform Act barred prisoners from suing prisons and jails unless they could show that they had suffered a physical injury. Prison officials have used this requirement to block lawsuits challenging all sorts of horrific conditions, including sexual abuse.

The law also requires inmates to present their claims to prison officials before filing a suit. The prisons set the rules for those grievance procedures, notes Stephen Bright, the president of the Southern Center for Human Rights, and they have an incentive to make the rules as complicated as possible, so prisoners will not be able to sue. "That has become the main purpose of many grievance systems," Mr. Bright told Congress last year.

In the last Congress, Representative Robert Scott, Democrat of Virginia, sponsored the Prison Abuse Remedies Act. It would have eliminated the physical injury requirement and made it harder for prison officials to get suits dismissed for failure to exhaust grievance procedures. It would have exempted juveniles, who are especially vulnerable to abuse, from the law's restrictions.

The bill's supporters need to try again this year. Conditions in the nation's overcrowded prisons are becoming increasingly dangerous; recently, there have been major riots in California and Kentucky. Prisoner lawsuits are a way of reining in the worst abuses, which contribute to prison riots and other violence.

The main reason to pass the new law, though, is human decency. The only way to ensure that inmates are not mistreated is to guarantee them a fair opportunity to bring their legitimate complaints to court.

## DOCS Continues Crack-Down on Fraudulent UCC Filings

In the last issue of ***Pro Se***, we reported that DOCS had defined various U.C.C. related materials as contraband. These include U.C.C. filing forms and documents referencing such things as "an inmate's 'strawman' 'House Joint Resolution 192 of 1933,' the 'Redemptive Process,' 'Acceptance for Value,' or document indicating copyright of an inmate's name," without the prior written authorization of a facility superintendent. DOCS also amended its mail regulations to provide that mail to or from the Secretary of State, Department of State, corporation division or Uniform Commercial Code Unit of any state, may be subject to inspection and may be withheld unless the inmate is able to provide the superintendent with specific, legitimate legal reasons why such materials are required.

DOCS also amended its disciplinary rules to permit the disciplining of inmates who possess U.C.C. related materials or engage in fraudulent U.C.C. filing activities. Specifically, DOCS has

added a new disciplinary rule 107.20, which states:

> An inmate shall not file or record any document or instrument of any description which purports to create a lien or record a security interest of any
>
> kind against the person or property of any officer or employee of the Department, the State of New York or the United States absent prior written authorization from the superintendent or a court order authorizing such filing.

It also added a new rule 113.30, stating:

> An inmate shall not possess any Uniform Commercial Code (UCC) Article 9 form, including but not limited to any financing statement (UCC1, UCC1Ad, UCC1AP, UCC3, UCC3Ad, UCC3AP, UCC1CAd), correction statement (UCC5) or information request (UCC11), whether printed, copied, typed or hand written, or any document concerning a scheme involving an inmate's ''strawman,'' "House Joint Resolution 19 of 1933,'' the ''Redemptive Process,'' ''Acceptance for Value'' presentments or documents indicating copyright or attempted copyright of an inmate's name absent prior written authorization from the superintendent.

Justifying the new regulations DOCS wrote, in the State Register:

> This…rule is in response to a scheme whereby inmates have fraudulently utilized provisions of the Uniform Commercial Code (UCC) to file baseless liens with the Secretary of State against Department employees and others. Under this scheme, an inmate asserts a ''copyright'' over his or her name; files a UCC-1 financing statement that asserts a claim over the inmate's ''property'', which in this case is him/herself. The inmate then makes demands to be compensated for the unauthorized use of his or her property (*i.e.*, every time an officer writes down the ''copyrighted'' name) or for the illegal holding of his or her property, which in this case is the inmate him/herself. When the demands are ignored, the inmate claims a right to assert a UCC lien against the staff member to whom the demand was made. This has the potential to have a severe detrimental effect on the individual's credit or to cause them significant financial hardship. Since the adoption of the original emergency rule, the Department has discovered prohibited materials in the possession of at least forty (40) inmates at nineteen (19) of the Department's facilities. In each case the documents were consistent with the bogus filings associated with the "Redemptive Process'' scheme that may lead to the filing of a false lien.

***Practice pointer:*** *Many inmates have written to Prisoners' Legal Services to ask whether these new rules are legal.*

*Restrictions on access to U.C.C. materials come in response to the so-called "redemption theory"--a belief that the State has legal authority only over an individual's "strawman" and lacks authority over "real" persons. The theory holds that the efforts of state officials to incarcerate "real" persons--or even, in some cases, to use their names--may subject them to enormous fines, against which a U.C.C. lien may be filed.*

*Although there is no merit to this bizarre and complex theory, it has spread widely through prison systems over the past several years, prompting numerous inmates to file frivolous or fraudulent liens against state officials. In the last issue of* ***Pro Se****, for example, we reported the case of Matter of Fludd v. DOCS, 879 N.Y.S.2d 606 (3d Dep't*

*2009), which involved a New York inmate who was disciplined for filing numerous fraudulent liens against various state officials.*

*Against this background, we believe most courts would uphold the new regulations.*

*Prison rules imposing restrictions on constitutional rights – in this case, the right of access to the courts – are evaluated under a "reasonableness" test, first set forth in Turner v. Safley, 482 U.S. 78 (1987). Under the Turner test, a court looks at whether there is a "valid, rational connection" between the challenged prison regulation and the State interests put forth to justify it." If so, it considers, "(1) whether inmates retain alternative means of exercising the circumscribed right… (2) the burden on prison resources that would be imposed by accommodating the right and (3) whether there are alternatives to the regulation that fully accommodate the prisoner's rights at de minimis cost to valid penological objectives."*

*In Monroe v. Beard, 536 F.3d 198 (3d Cir. 2008) a federal appeals court analyzed Pennsylvania regulations restricting access to U.C.C. materials which are similar to those recently enacted by New York DOCS. The court found them to be constitutional. It found, first, that they were justified by a rise in criminal cases across the country involving inmates filing fraudulent liens against public officials, as well as several instances in Pennsylvania in which fraudulent liens had been filed against state officials.*

*It then analyzed whether the rules met the three additional "Turner" standards and found that they did. Inmates still have a wide range of alternative means of accessing the courts for legitimate purposes " that do not pertain to the filing of fraudulent [U.C.C.] liens," the court found. Moreover, accommodating an inmate's right to have access to U.C.C. materials "may encourage them to harass, intimidate or threaten prison officials, including guards and administrators, by threatening to file liens." And finally, although there may be "less restrictive means" for the prison administrators to meet their objectives than by an outright ban on such materials, prison administrators are not required, the court wrote, to take the "least-restrictive" approach to meet their goals.*

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## FEDERAL CASES

### Appellate Ruling Grants Some Inmates Additional Time to File Medical Indifference Claims

Shomo v. City of New York, 579 F.3d 176 (2d Cir. 2009)

Inmates asserting deliberate indifference to their medical needs by prison officials can make use of a legal doctrine that extends the time in which to file suit, ruled the federal appeals court with jurisdiction over New York this Fall. Specifically, the court held, for the first time, that the "continuing violation doctrine" can be applied to claims of medical indifference under the Eighth Amendment.

The plaintiff in the case, Mr. Shomo was in the custody of the New York City Department of Corrections when, on September 20, 1999, he was diagnosed with right arm paralysis. In his suit, he claimed that, despite the fact that doctors ordered he be given assistance with basic activities of daily living, be placed in specialized infirmary housing and get treatment, the medical and security staff did none of these things from September 20, 1999, to January 4, 2001. The district court judge dismissed some of his claims on the grounds that they had not been timely filed and he appealed.

In deciding the appeal, the appellate court explained that the statute of limitations for constitutional claims brought under 42 U.S.C. §1983 is governed by state law — in this case

New York's three-year statute of limitations for personal injury actions. Mr. Shomo's complaint was filed on September 26, 2003, but he did not allege any acts of deliberate indifference occurring after September 26, 2000. Under a strict reading of the Statute of Limitations, therefore, his claim would have to be dismissed.

But, the court wrote, there is an exception to the three year rule, called the "continuing violation doctrine." The continuing violation doctrine applies where the plaintiff has alleged an ongoing policy of medical indifference, as well as some act taken in furtherance of the policy that occurred within the statute of limitations. Under the doctrine, "the commencement of the statute of limitations period may be delayed until the last discriminatory act in furtherance of it."

Here, the court found, the alleged failure of various jail supervisors, as well as a city hospital, to respond to Shomo's complaints after September 26, 2000, could make a continuing violation of the medical indifference.

## STATE CASES

### Discipline

**Drug Testing: Testimony Constitutes Adequate Proof of Chain of Custody**

Matter of Harris v. Fischer, 883 N.Y.S.2d 737 (3d Dep't 2009)

Petitioner was being processed into a special housing unit when a search of his property revealed a small plastic package hidden in a bottle of saline solution. After the contents of the package were tested they were determined to be amphetamines, and petitioner was charged with possessing narcotics and smuggling. Following a Tier III disciplinary hearing, he was found guilty of both charges and the determination was affirmed on administrative appeal. He then filed an Article 78 proceeding, alleging that the drug test results were not supported by an adequate "chain of custody"--meaning that DOCS could not show where the alleged drugs had been from the time they were confiscated to the time they were tested.

The court rejected petitioner's claim. The author of the misbehavior report testified that, upon discovering the contraband, he informed his supervisor and was directed to have the material analyzed. He immediately brought the contraband to a certified drug analysis tester and remained in the room while the tests were performed. The certified drug analysis tester, meanwhile, stated that he adhered to proper procedure while conducting the drug tests to confirm that the recovered substances were amphetamines. Upon receiving the confirmation, the author of the misbehavior report placed the contraband into an evidence locker.

Such testimony, the court found, in conjunction with the test request form and the contraband test procedure form, sufficiently established that there was an unbroken chain of custody and that proper drug testing procedures were employed.

**Inmate Disciplined for Providing Parole With False Proof of Residence**

Matter of Wright v. Bezio, 882 N.Y.S.2d 668 (3d Dep't 2009)

Petitioner provided his parole officer with a letter purportedly written by his mother approving of him residing with her on her property. It was later determined that the letter was not written by petitioner's mother and, as a result, petitioner was charged in a misbehavior report with making a false statement and forgery. He was found guilty of these charges following a Tier III disciplinary hearing and the determination was affirmed on administrative appeal. Petitioner then filed an Article 78 proceeding.

The court found that petitioner's admissions, at the hearing, that the letter was composed and signed by his sister-in-law, rather than his mother, that he was aware that the signature was not his mother's and that he nevertheless sent the letter to his parole officer, were sufficient to

sustain the hearing officer's conclusion that he was guilty as an accomplice to the forgery.

The court also found that he was not denied his constitutional and regulatory rights to call his sister-in-law as a witness at the hearing, since "the record reveals that the hearing officer made reasonable and substantial efforts to obtain the testimony [of the sister-in-law] by making numerous, unsuccessful attempts to contact the [her] by telephone." Therefore, the court held, the determination must be confirmed.

**Charges Against Inmate Supported by Substantial Evidence**

Matter of Terrence v. Fischer, 884 N.Y.S.2d 277 (3d Dep't 2009)

Petitioner, while being pat frisked for weapons, allegedly attempted to strike the correction officer who had ordered him to stand so that mechanical restraints could be applied. An altercation ensued and petitioner sustained injuries while he was being subdued. As a result of the incident, petitioner was charged in a misbehavior report with refusing a direct order, failing to comply with search and frisk procedures and attempting to assault staff. He was found guilty of the charges following a Tier III disciplinary hearing. The determination was later upheld on administrative appeal with a modified penalty and petitioner filed an Article 78 proceeding.

The court affirmed the hearing result. It found that the petitioner's testimony that it was the correction officers who were the aggressors and assaulted him, not vice-versa, merely presented a credibility issue which was for the Hearing Officer, not the court, to resolve. It also rejected petitioner's claim that the Hearing Officer had failed to independently assess the credibility of the confidential source that had caused the officers to frisk him. Since that information did not provide the basis for determination of guilt of the charges at issue, there was no requirement that the Hearing Officer assess the credibility and reliability of the information.

**Inmate's Letter Provided Evidence of Gang Activity**

Matter of Umoja v. Bezio, 881 N.Y.S.2d 924 (3d Dep't 2009)

A letter to the petitioner from another inmate highlighting "the importance of a chain of command and the use of caution when recruiting other prisoners into a particular gang," was confiscated from petitioner's cell, resulting in a misbehavior report charging him with violating the prison disciplinary rule that prohibits possession of gang-related materials. He was found guilty of the charge following a Tier III disciplinary hearing and, after his administrative appeal was denied, filed an Article 78 proceeding.

The court affirmed the Hearing Officer. "The confiscated letter, misbehavior report and testimony from the authoring correction officers, both of whom were trained in the identification of gang-related materials, provide[d] substantial evidence of petitioner's guilt." Contrary to petitioner's assertions, he was not entitled to hear confidential testimony regarding the ongoing investigation that led to the search of his cell, and the misbehavior report "provided identifying information and the factual basis for the charge with sufficient particularity to allow [him] to prepare a defense."

**Misbehavior Report Provided Adequate Notice of Charges**

Matter of Fareedullah v. Fischer, 882 N.Y.S.2d 756 (3d Dep't 2009)

An investigation suggested that petitioner had conspired with other inmates at Arthur Kill Correctional Facility in Richmond County to gain a leadership role over the facility's Muslim community. He was found guilty after a Tier III disciplinary hearing of, among other things, violating the prison disciplinary rules that prohibit making threats, attempting to create an unauthorized organization and urging other inmates to participate in a demonstration. After that determination was administratively

affirmed, he filed an Article 78 proceeding claiming that the misbehavior report did not provide him with sufficient notice and that the hearing result was not supported by substantial evidence.

The court rejected both of these assertions. Regarding the notice claim, the court held that, "[I]nasmuch as the charges resulted from an ongoing investigation, it was sufficient for the misbehavior report to set forth the rules determined to have been violated, the particulars of the incident giving rise to the violations and a time period during which said incidents occurred, all of which served to provide petitioner with enough particulars to make an effective response."

With respect to the substantial evidence claim, the court noted that the evidence consisted of "information from confidential informants;" "the misbehavior report, [which alleged] that documents containing threatening statements against the civilian chaplain were discovered in petitioner's personal property;" and "corroborating testimony from the civilian chaplain, the correction officers involved in the investigation and petitioner himself." The court reviewed the confidential information "in-camera" [in chambers] and found that there was sufficient proof and corroborating evidence for the Hearing Officer to independently assess the credibility of the confidential informants. That information, it held, along with the other evidence presented at the hearing, was sufficient to support the Hearing Officer's conclusions.

## Parole

### Court Reverses Parole Denial Where Board Relied Solely on Seriousness of the Crime

***Matter of Johnson v. NYS Division of Parole***, 884 N.Y.S.2d 545 (4th Dep't 2009)

Petitioner, who was serving a sentence of 15 years to life for murder, was denied parole for a second time in December 2007. The only reason given by the Board was "[t]he violence associated with this terrible crime." He appealed, and the court reversed.

The court began its analysis by noting that it is "well settled that parole release determinations are discretionary and entitled to deference." Nevertheless, it held, "[t]he Parole Board is required...to give fair consideration to each of the applicable statutory factors as to every person who comes before it, and where the record convincingly demonstrates that the Board did in fact fail to consider the proper standards, the courts must intervene." Although the Board "need not expressly refer to the relevant statutory factors in its determination" here, the court concluded, the Board's determination "fail[ed] to comply with the requirement of Executive Law § 259-i(2)(a) that the reasons for denial of parole be 'given in detail and not in conclusory terms.'"

"[T]he only reason for the Parole Board's denial of parole…discernable from [its] perfunctory reference to '[t]he violence associated with this terrible crime', is that the determination was based solely upon the seriousness of the crime," wrote the court. "But," it continued, "in order to preclude the granting of parole exclusively on this ground there must [also] have been some significantly aggravating or egregious circumstances surrounding the commission of the particular crime." "[T]he mere reference to the violence of the crime, without elaboration, does not constitute the requisite 'aggravating circumstances' beyond the inherent seriousness of the crime itself."

The court also found that the record was "devoid of any indication that the Parole Board…considered the statutory factors that weighed *in favor* of petitioner's release," such as his exemplary institutional record and the favorable remarks of the County Court at the time of sentencing. "In fact," wrote the court, "during the notably truncated hearing, the Parole Board focused on matters unrelated to any statutory factor." Therefore, the court concluded, there is "a strong indication that the denial of petitioner's application was a foregone conclusion."

***Practice pointer****: It remains difficult to find consistent principles in the courts' parole decisions. Here, the court criticizes the Board*

*for relying exclusively on the seriousness of the crime and for failing to consider factors that weighed in favor of release. In other cases, however, courts have appeared to permit precisely that. For example, in Cruz v. NYS Division of Parole, 833 N.Y.S.2d 311 (3d Dep't 2007) the Board denied parole on the grounds that the facts of the petitioner's crime gave rise to a "reasonable probability" that he would not "live and remain at liberty without violating the law." The court, in reviewing the Board's decision, noted that the petitioner's academic and institutional accomplishments had been "exemplary" and that it would seem that he would be "a prime candidate for parole release." Nevertheless, the court held, because the Board had considered the appropriate statutory factors set forth in Executive Law § 259-I, "spanning from the seriousness of petitioner's crime to his lack of criminal history, nearly spotless prison disciplinary record, positive program accomplishments and postrelease plans" and because "the Board [is] not required to give equal weight to those factors" and is allowed to place "more emphasis on the serious nature of [the] crime," it felt "constrained" to affirm the Board's decision.*

*The distinction may be that, in this case, the court found that the Board had failed to even consider the positive factors, while in Cruz, the court found that the Board had considered the positive factors, even though it failed to weigh them equally against the seriousness of the crime.*

## Sentence Computation

### Inmate Not Entitled to Parole Jail Time for Time Spent in Drug Rehabilitation Program

Matter of Brooks v. Alexander, 883 N.Y.S.2d 381 (3d Dep't 2009)

In 1995, petitioner pled guilty to criminal possession of a controlled substance in the second degree and was sentenced to a prison term of three years to life. He successfully completed a six-month shock incarceration program, however, and was released to parole supervision in April 1996. Although he was declared delinquent on eight occasions between then and 2005, each time that the Board of Parole recommended revocation of his parole it contemporaneously recommended that parole be restored if he successfully completed a drug rehabilitation program. During the time periods between the dates on which he was declared delinquent and the dates on which he entered a drug treatment program, he was held in custody in either a county jail or state prison while he awaited transfer to the treatment program. On each occasion, he completed the recommended treatment and the corresponding declarations of delinquency were canceled.

In June 2007, petitioner violated his parole for the ninth time. Following a final revocation hearing, an Administrative Law Judge declared petitioner delinquent and directed that he be re-incarcerated for three years pursuant to a Parole regulation which requires that any period of re-incarceration for a shock releasee "be for at least a period of time equal to the minimum period of imprisonment imposed by the court." See 9 NYCRR 8010.3(a). Petitioner's three-year time assessment was subsequently reduced by 190 days, reflecting jail time credit for the 140 days he was in custody prior to his transfer to the shock incarceration program in 1995 and 50 days for the time period between the declaration of delinquency for the 2007 violation leading to his present incarceration and the date on which he was returned to the custody of the Department of Correctional Services. He was not, however, granted any credit for the time during which he was held in custody while awaiting transfer to a drug treatment facility as a result of his eight earlier parole violations. After exhausting his administrative remedies, he commenced an Article 78 proceeding asserting that he was entitled to parole jail time credit for those occasions. Supreme Court dismissed the petition, concluding that petitioner was properly credited with all of the time to which he was entitled. Petitioner appealed.

The appellate court affirmed. Nine NYCRR § 8010.3(b) states that the minimum period of re-incarceration for a shock releasee "shall be

reduced by the violator's pre-commitment jail time and any time spent incarcerated at a [s]tate correctional facility other than a shock incarceration facility." The Division of Parole interprets that regulation as applying to the time an inmate spends in jail or prison prior to his commitment to the original shock incarceration program and to the time he spends in jail prior to his commitment to prison on a parole violation (*i.e.*, "pre-commitment jail time").

In this case, in each of the occasions when the petitioner was declared delinquent, except for his 2007 delinquency, he was never "committed" to a correctional facility. He was, instead, permitted to attend a drug rehabilitation program. Therefore, according to Parole, he was not entitled to credit those periods to his re-incarceration time.

The court found this interpretation of the Parole regulation "reasonable" and, therefore, upheld the lower court.

**Petitioner Can't Credit Prior Sentence With Jail Time Served on New Sentence**

Matter of Oriole v. Saunders, 884 N.Y.S.2d 719 (1st Dep't 2009)

Petitioner, serving an indeterminate term of 3 to 6 years, was released to parole supervision in August 2004. In November 2004, a parole warrant was issued, charging that he had committed various violations of the terms of parole. Petitioner, in the meantime, had absconded from parole.

In July of 2006, petitioner was arrested on new charges. Two days after his arrest, Parole served the November 2004 warrant and violation report. A preliminary parole revocation was held in August 2006, but the final hearing was adjourned pending resolution of the new charges. In January 2007, petitioner pleaded guilty to the new charges and was sentenced to an indeterminate term of 1½ to 3 years. In February 2007, Parole served him with a Final Declaration of Delinquency based on the new conviction. The Declaration of Delinquency established his delinquency date as July 22, 2006, the date of his arrest on the new charge.

Parole then scheduled another hearing to resolve the still outstanding 2004 violation report. Before that hearing could be held, however, petitioner commenced an Article 78 proceeding seeking to prohibit a new hearing. He argued that Parole should be barred from holding a hearing on the 2004 charges after already establishing a delinquency date based on the 2007 charges. After the State Supreme Court granted his petition, Parole appealed.

The appellate court reversed. It found nothing in the law to prohibit a second hearing concerning the earlier incident, despite the fact that petitioner's parole had already been revoked based on the later incident. "Petitioner's January 2007 conviction does not change the fact that a final revocation hearing with respect to the violations charged in November 2004 will serve the purpose of determining whether petitioner had become delinquent in observing his parole obligations – thereby interrupting the running of his sentence on the 1998 conviction – as of November 2004, 20 months before the commission of the crime underlying the January 2007 conviction," wrote the court. "After all, the January 2007 conviction established nothing with regard to the November 2004 charges."

***Practice pointer**: At issue in this case was a question of sentence credit. A delinquency date interrupts the running of a sentence. Therefore, the later the delinquency date, the more time is available to be credited to the interrupted sentence. Here, the petitioner absconded from parole in 2004. The 2007 conviction, however, established only a 2006 delinquency date. If Parole had been precluded from addressing the 2004 parole violation, petitioner would have received credit against his sentence for the period from 2004 until 2006, despite the fact that he had absconded from parole in 2004.*

*The court noted as much, stating:*

> *The construction of [the law] urged by petitioner, besides failing in any way to further the legislative intent and lacking any compelling support in the statutory language, would essentially reward petitioner for his commission of a new*

> *felony by requiring the Division of Parole to credit him for the 20 months during which he was absconding. Even if petitioner's reading of the statute were otherwise tenable, we would reject it as running afoul of the rule that a court "will not blindly apply the words of a statute to arrive at an unreasonable or absurd result*."

## Court of Claims

### State Found Liable for Imposing Administrative PRS and Revoking Parole

Burch v. State of New York, Claim No. 115299 (July 24, 2009) (Milano, J.)

A number of claims for damages resulted from DOCS' practice of administratively imposing a period of post-release supervision on a determinate sentence where the sentencing court had failed to do so--a practice declared illegal by the Court of Appeals in Garner v. New York State Dept. of Correctional Services, 10 N.Y.3d 358 (2008). Some have been dismissed on procedural grounds. Others have been dismissed because trial judges concluded that DOCS should be immune from such suits.

In this case, however, a judge found for the plaintiff–and wrote a compelling argument for why DOCS should be held liable in such cases.

The claimant alleged that as a result of the unlawful imposition of PRS on his sentence, he served nearly three years in prison on various alleged PRS violations.

The court, in analyzing the claim, noted that in order to establish that the State was liable for his confinement he would have to prove that (1) the State intended to confine him, (2) he was conscious of the confinement, (3) he did not consent to the confinement, and (4) the confinement was not otherwise privileged.

Here, the State conceded that the claimant had established the first three elements of the claim. It argued, however, that the imposition of PRS was "privileged" because claimant had been sentenced to a determinate term and the law requires that all determinate terms be accompanied by a period of post-release supervision. The sentencing court's failure to impose the term, the State continued, was a mere oversight and that DOCS was entitled to impose it administratively.

The court rejected this argument, writing: "[D]efendant's assertion of privilege remains unpersuasive in view of the absence of express statutory authority to administratively impose PRS, the explicit statutory instruction (CPL §§ 380.20 and 380.40) that only a court may impose a sentence and the fact that Penal Law § 70.00(6) expressly stated at all relevant times that the court, and not DOCS or any other administrative agency, is required to impose any applicable term of PRS."

The State next argued that "prevailing decisional law" before the Court of Appeals' 2008 decision in Garner permitted it to impose a term of PRS on claimant and should thus render it immune from liability. The court rejected this argument, too, stating:

> Defendant's selective reliance on "prevailing decisional law" is particularly specious as defendant had begun the practice of administratively imposing PRS terms on inmates similarly situated to claimant before any "prevailing decisional law" had emerged. In Donald v. State of New York for instance, defendant administratively imposed the PRS term on inmate Donald just prior to Donald's release from incarceration on July 10, 2000. All but one of the cases cited by defendant as "prior decisional law" are dated after 2000. That some lower courts subsequently, and mistakenly, sanctioned defendant's extra-jurisdictional and illegal actions does not, after the fact, confer privilege or immunity upon defendant for wrongfully confining claimant.

Finally, the State argued, claimant would be getting an undeserved "windfall" were he to obtain monetary damages for wrongful confinement because he would have been

required to serve a PRS term but for "the sentencing court's error."

The court rejected that argument as well. It noted, first, that DOCS had imposed a three year PRS term, whereas the relevant sentencing statute would have permitted the sentencing court to have imposed a term of as little as 1½ years–a fact the court found "particularly troubling." "More importantly," the court wrote, the State's argument "ignores the possibility that if defendant had acted lawfully upon learning of the 'sentencing court's error' and sought judicial re-sentencing…claimant may have chosen to withdraw his plea, be tried on the violation of probation charges and be acquitted." It also ignored that, under a remedial law passed in 2008, should the State seek to re-sentence the claimant now, the sentencing court could decline to impose a PRS term.

The State's argument, the court wrote, could be described as "no harm, no foul." But "harm, in the form of either incarceration or otherwise restricted liberty, accrued until claimant was either lawfully sentenced by a court of law or released from incarceration or parole supervision."

> It is this Court's opinion that the harm, once done, is not excused or said to be without tangible, meaningful redress by suggesting that had lawful procedures been followed, this claimant, or other similarly situated claimants, would have or may have endured, by lawful judicial action, the same limitation of liberty that defendant unlawfully imposed.

The State's argument was also belied by a 1964 case called Montanaro v. State of New York, 42 Misc.2d 851 (Ct. Cl. 1964). In that case, the claimant was confined at a state hospital on August 23, 1960 based upon an order of commitment issued by a local court judge which was later found to have been issued improperly because the police officer who had arrested claimant had not signed the underlying criminal information and because claimant had not yet been arraigned on the charge. Later, a proper order of commitment was issued by a county court. The Montanaro court held that the claimant had been unlawfully confined prior to the issuance of the order. "Under defendant's reasoning," wrote the court, "there could be no recovery because the claimant *could have been* lawfully confined, *if* she had been arraigned and if the officer had signed the information."

Since that theory had been rejected in Montanaro, the similar theory had to be rejected here. "[I]mposition of post-release supervision on claimant…was a legal nullity. [C]laimant was unlawfully confined by its terms and could not be lawfully imprisoned for violating its terms. Any period of claimant's confinement caused by DOCS' unlawful and extra-jurisdictional imposition of the post-release supervision is not privileged and is actionable by claimant."

***Practice pointer:*** *Copies of Court of Claims decisions can be obtained by submitting a FOIL request to the Chief Clerk of the Court at P.O. Box 7344, Capitol Station, Albany, N.Y. 12224.*

**Court Doesn't Buy What C.O. Is Selling**

Varela v. State of New York, Claim No. 112637 (Court of Claims) (Milano, J.)

Claimant Ronnie Varela testified at his Court of Claims trial that, as a part of an inmate work crew at Wallkill Correctional Facility, he had been ordered by Correction Officer Robin Greene to climb up to a flat roof (the package room roof) on a rainy day to collect and bag garbage that had been thrown to the roof from an adjoining building.

According to the claimant he was expected to climb up to the roof by means of stepping on a garbage dumpster and then onto an awning before hauling himself up to the roof. No ladder was provided and claimant had never before been asked to clean the roof.

After collecting the garbage, he testified, he began to descend from the roof. He had one foot on the awning and one foot on the roof when another inmate slipped and grabbed onto him, causing both to fall into the dumpster and causing injuries to his side and arm.

Officer Greene gave starkly different testimony. He testified that no inmates ascended to the package room roof on the day in question. He stated he himself, out of concern for the safety of the inmates on that rainy day, had ascended to the roof to collect the garbage. He stated that, while on the roof, he saw claimant raise his head to the roof level and ordered him to descend. He stated that he was later informed that the claimant had fallen into the dumpster.

The court found that C.O. Greene's testimony lacked credibility.

First, the court found it hard to believe that Greene would choose to "undertake the work assignment otherwise expected to be completed…by inmates." "Even more difficult to believe," continued the court, "his testimony places him, as the sole supervising Correction Officer of the work gang, on a roof seven to eight feet off the ground, for several minutes, unable to immediately police or supervise the work gang. This Court simply does not credit [this] testimony…."

The Court also noted that Greene's testimony was contradicted by his own memorandum regarding the incident, which stated, in part, "On this date…the YGI gang had completed cleaning the package room roof." In other words, Greene's own memorandum indicated that the roof cleaning had been performed by the work gang, not by himself.

Under the circumstances, the court "declin[ed] to credit the testimony of Correction Officer Greene" and found in favor of the claimant.

Other Cases

**Transfer Request Denied**

Matter of Salahuddin v. Goord, 882 N.Y.S.2d 772 (3d Dep't 2009)

Petitioner's request for an area-of-preference transfer was denied based upon his failure to complete recommended programming and his removal from the Alcohol and Substance Abuse Treatment program (ASAT). He filed a grievance seeking, among other things, corrections to his institutional records to indicate completion of ASAT and honoring his transfer request. The grievance was denied and he commenced an Article 78 proceeding. After the State Supreme Court dismissed his claim, he appealed.

The appellate court denied his appeal, noting that an inmate "has no right to choose the correctional facility where he will be incarcerated." It found that, insofar as the petitioner's institutional records reflected that he did not successfully complete recommended programming and that he was removed from ASAT, the denial of his transfer request was neither irrational nor arbitrary and capricious. To the extent that he was also challenging the accuracy of that portion of records with respect to the fact that they indicated that he failed to complete ASAT, the court held that requests for corrections of allegedly erroneous information contained in prison records "are to be pursued in accordance with the procedures set forth in...7 NYCRR §§ 5.50, 5.51, 5.52."

***Practice Pointer:*** *Seven NYCRR (New York Code, Rules and Regulations) §§ 5.50, 5.51, 5.52 provide:*

*Section 5.50. Challenge to accuracy*

*If the completeness or accuracy of any item of information contained in the personal history or correctional supervision history portion of an inmate's record is disputed by the inmate, the inmate shall convey such dispute to the custodian of the record or the designee of the custodian reviewing the record with him. The inmate may obtain a copy of any record that contains information the accuracy or completeness of which the inmate disputes. The fee for copies of records shall be in accordance with section 5.36 of this Part.*

*Section 5.51. Investigation*

*(a) If the completeness or accuracy of any item of information is disputed by an inmate, the custodian of the record shall, within a*

*reasonable period of time, investigate the accuracy and completeness of the information unless he has reasonable grounds to believe that the dispute by the inmate is frivolous. If the record in dispute is one which has been received from another governmental agency, then the custodian shall direct the inmate to make his challenge to such governmental agency.*

*(b) If the custodian, after investigation, shall determine the disputed information is erroneous or incomplete, he shall make such changes as are necessary and shall report to the inmate the results of the investigation and the changes, if any, which have been made no later than 45 days after the custodian or the custodian's designee has been advised of the dispute.*

*Section 5.52. Appeal from determination*

*If the inmate still disputes the accuracy or completeness of the information after investigation and determination, the inmate may appeal the determination of the custodian to the Inspector General, Department of Correctional Services, State Campus, Building 2, Albany, NY 12226. The appeal shall be in writing. The Inspector General shall affirm, modify or reverse the determination of the custodian and shall notify the inmate of his decision within 30 days of receipt of the appeal.*

**Court Affirms TAC Decision to Withhold Good Time**

Torres v. Durbray, 882 N.Y.S.2d 761 (3d Dep't 2009)

Petitioner in this case was serving a prison term of 11 to 22 years for manslaughter, among other offenses. He had been disciplined for fighting in November 2007 and directed to appear at a hearing before the Time Allowance Committee (TAC) one month later to time behavior determine whether any portion of his good time behavior allowance should be withheld. The TAC recommended that all 88 months of his good time be withheld based upon his disciplinary history and failure to participate in a mandatory educational program. After that recommendation was affirmed, petitioner commenced an Article 78 proceeding challenging the decision.

The court affirmed DOCS' decision. "Whether to withhold a good time behavior allowance is a discretionary determination," the court wrote, "and, as long as it is made in accordance with law and is based upon a review of an inmate's entire record, it is not subject to judicial review." Here, the court noted, the TAC considered the complete institutional record prior to making its recommendation, and that review revealed 23 disciplinary infractions, including the violent episode just one month before the TAC hearing. It also reflected his refusal to participate in the education program despite knowing that such refusal would have repercussions with respect to his good time.

Correction Law § 803(1)(a) states that a good time allowance may be withheld "for bad behavior, violation of institutional rules or failure to perform properly in the duties or program assigned." Given the statutory language, the court held, DOCS' decision to withhold petitioner's good time "was entirely rational."

**Referral to Sex Offender Program Upheld, Even Though Inmate Not Convicted of Sex Offense**

Matter of Harris v. Granger, 882 N.Y.S.2d 545 (3d Dep't 2009)

Petitioner in this case is serving an aggregate prison term of 20 years to life following his 1975 plea of guilty to the crimes of murder and attempted murder. Approximately 30 years after his conviction DOCS referred him, for the first time, to the Sex Offender Counseling Program (SOCP). The referral was based upon information contained in his pre-sentence report suggesting that there was a sexual element to the underlying offense. Petitioner then filed a

grievance contending that he had been improperly "classified" as a sex offender and challenging the referral to SOCP. After the grievance was denied, he filed an Article 78 proceeding.

The court affirmed DOCS' decision. Although the petitioner was not convicted of a sex offense, the court found, "the pre-sentence investigation report contains information which suggests that petitioner attempted to engage in sexual conduct with his victim prior to her death…." Under the circumstances, the court continued, it was rational for DOCS to refer him to SOCP. Moreover, the court held, the referral "does not operate as a 'classification' of the petitioner for purposes of the Sex Offender Registration Act."

**Decision Denying Temporary Release Reversed Where TRC Relied on Incorrect Information and Failed to Review Administrative Appeal**

Matter of Parker v. Joy, (Sup Ct. Albany Cty. May 12, 2009) (Devine, J.)

Petitioner, an inmate at Bare Hill Correctional Facility, submitted an application for Temporary Release. The application was denied by his facility Temporary Release Committee (TRC). In denying the application, the Committee cited the petitioner's instant offense which, it wrote, "involved the inmate taking the victim's money while armed with a gun" and "us[ing] the gun to strike the victim on the head."

On July 1, 2008, petitioner submitted a notice of appeal, stating that he was in the process of perfecting his appeal and that the respondent would receive it within twenty days.

On July 8, 2008, he received a notice of appeal decision from the respondent, stating that his appeal had been reviewed and rejected.

Petitioner then sent a letter, dated July 14, 2008, asking how the respondent had been able to review his appeal when he had not yet submitted it and raising various objections to the original disapproval, arguing that the TRC had relied on erroneous information. In particular, he stated, he did not personally take money from the victim and did not strike anyone with a gun.

Respondent then issued a second notice of appeal decision. The second decision was identical to the first, but for a "PS" which stated: PSR [Presentence Report] reviewed. Instant offense is an in concert act. You provided the weapon used in the attempt to rob a victim and the infliction of injury to the victim.

Participation in temporary release, the court noted, is a privilege, not a right. Nevertheless, it continued, a decision to deny temporary release "must be rational and must have a sound basis in fact."

Here, the court found, the respondent's decision was irrational. According to the court, the Presentence Report did not show that the inmate had either taken the victim's money or struck her with a gun. On the contrary, it showed that he was not actually present at the scene of the robbery and had never struck the victim. "[W]here, as here, the details of the instant offense considered…are clearly inconsistent with the information provided in the Presentence Investigation Report, such determination constitutes an abuse of discretion."

Moreover, the court found, "the premature denial" of petitioner's initial appeal, sent before he had actually submitted his appeal, constituted further evidence of respondent's "arbitrary treatment" of petitioner. "Respondent contended that she had 'reviewed' the appeal while she clearly had not," wrote the court. Given the foregoing, the court concluded, the denial of temporary "was done in an arbitrary and capricious manner." The court ordered that theapplication be returned to DOCS for "proper review."

**Petitioner Entitled to Disclosure of Parole Records Under FOIL**

Matter of Hector v. NYS Division of Parole, (Sup. Ct. Albany Cty., February 10, 2009) (Connolly, J.)

Petitioner submitted a Freedom of Information Law (FOIL) request to the Division of Parole seeking disclosure of "the name of all inmates convicted of A-1 violent felony who appeared or reappeared before the Parole Board on March, April, May and June 2008; and how many were granted release and how many were denied release." Parole denied the request,stating that it "cannot release the information you have requested." Petitioner appealed administratively. In response to his administrative appeal, Parole advised him that the records could not be released because their disclosure would constitute an unwarranted invasion of privacy. Petitioner then filed an Article 78 proceeding.

The court found in petitioner's favor. Agency records are presumptively available under FOIL, the court noted, unless they fall within one of several exemptions enumerated in Public Officer's Law § 87. The exemptions include one which exempts from disclosure records which, if disclosed, would "constitute an unwarranted invasion of privacy."

Here, however, the information petitioner sought was readily available on Parole's website. "While the Court is cognizant of the confidentiality of parole case record information," it wrote, "where such information is readily available to the public it cannot be held exempt on privacy grounds." Since Parole raised no other basis for denial, the court granted the petition.

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