PLS NOTES

Spring 2010

Published by Prisoners' Legal Services, Eight Winter Street, 11th Floor, Boston MA 02108.
Director: Leslie Walker
Editor: Peter Costanza

Phone: (617) 482-2773
WATS: (800) 882-1413
County prisoner collect: (617) 482-4124
Massachusetts state prisoner calls: *9004#

DOC: SUPERIOR COURT RULES THAT SEVERE ADMINISTRATIVE SEGREGATION REQUIRES DUE PROCESS REVUE

Roughly ten years ago, litigation handled by Prisoners' Legal Services generated the decision in Haverty v. Commissioner of Correction, 437 Mass. 737 (2002), which held that prisoners placed in isolated confinement factually similar to the confinement imposed in the former Departmental Segregation Unit (DSU) at Cedar Junction were entitled to the Due Process protections afforded by the DSU regulations, 103 CMR 421, (a plan for release from segregation and periodic review for compliance with that plan). This is the case regardless of the label placed by the DOC on their confinement. The DOC defendants in Haverty took the position that the DSU had been abolished and that the DSU regulations therefore did not apply to anyone in their custody, but the Supreme Judicial Court said that "the defendants' suggestion that the procedural protections contained in [the DSU regulations] are applicable only to those housing placements that the commissioner may choose to label as 'departmental segregation units' has been rejected, more than once."

In 1995, the DOC tried to repeal the DSU regulations, but was enjoined from doing so by a single justice of the SJC in response to a motion by the plaintiffs in the Hoffer case.

The latest round in this longstanding conflict began when prisoner Edmund LaChance was tossed into the SMU at SBCC for two weeks at the end of 2005 for tossing pudding at another convict. As is too often the case, the expiration of his disciplinary sanction was not accompanied by any noticeable change in his conditions of confinement: one hour a day out of cell five days a week, recreation in a cage, two one-hour non-contact visits per week, limited canteen and property, cuffs and leg shackles and a two-man escort every time he left his cell. Mr. LaChance endured this routine from January to mid-November of 2006. During those ten months, he received various pieces of paper labeling his administrative segregation, but never a hearing or a release plan. When he finally got out of seg, LaChance sued, and both sides eventually moved for summary judgment.

Relying on Haverty as well as upon Longval v. Commissioner of Correction, in 404 Mass. 325 (1989) and Martino v. Hogan, 37 Mass. App. Ct. 710 (1994), the Superior Court held that LaChance's confinement violated the DSU regulations and hence the Massachusetts Declaration of Rights despite the fact that the unit in which he was isolated was

called an SMU, or Special Management Unit, rather than a DSU. Significantly, the court ruled that the defendants also violated the plaintiff's *federal* constitutional rights because the rigor of his administrative segregation qualified as an "atypical and significant hardship … in relation to the ordinary incidents of prison life" as defined in Sandin v. Conner, 515 U.S. 472 (1995).

The federal process "due" in connection with prolonged administrative segregation is probably no more than what the DSU regulations themselves require, but since Mr. LaChance didn't receive even that, summary judgment was granted on both the state and the federal claims.

Unfortunately, this decision does not establish damages liability against the defendants. That decision will come later, and will turn on plaintiff's ability to prove that the individual defendants directly participated in the deprivation of plaintiff's federal constitutional rights.

A particularly helpful element of the LaChance decision is that it holds that the DOC defendants are not entitled to qualified immunity. Qualified immunity lets officials off the hook for damages in situations where the law at the time of their actions was unclear regarding whether the specific things that they did were unlawful. LaChance is very clear that by the time this plaintiff was buried in segregation for ten months of 2006, there was no question that it was unlawful to do that to him without periodic reviews and a release plan. Nonetheless, the DOC is appealing this decision.

Lead counsel on LaChance v. Clarke, et al. is PLS attorney Bonnie Tenneriello, assisted by PLS Litigation Director Jim Pingeon and Senior Paralegal Al Troisi.

CORI MODIFICATIONS LIKELY TO PASS THIS LEGISLATIVE SESSION BUT MANDATORY MINIMUM REFORM STALLED IN THE HOUSE

At the conclusion of its 2009 session last year, the Massachusetts Senate passed Senate Bill 2220. This bill included changes in the law governing CORI (Criminal Offender Record Information), mandatory minimum sentences for drug offenses, supervision of homeless sex offenders, mandatory parole, and 'constructive custody', i.e. authorization for prisoners to be administered outside of prisons and jails under house arrest and computer monitoring.

Some of the provisions of the bill were good, others not so good. The CORI portion of S. 2220 made improvements including reducing the time for sealing criminal records from ten years to five years for a misdemeanor and fifteen years to ten years for a felony. It proposed eliminating misdemeanors older than five years and felonies older than ten years from reports sent to employers, landlords or volunteer agencies, and it proposed to delete references to records that ended in dismissal or not guilty. At the same time all employers, landlords and volunteer agencies could have access to CORI from a state operated web site, and could deny employment based on the CORI, and the general public would also have access to recent CORI on line.

The bill also proposed to make prisoners serving state sentences for drug offenses eligible for parole and work release at

two-thirds of their minimum sentence (county prisoners would be eligible at one-half of their sentence). If enacted into law this provision could significantly reduce overcrowding, especially in county houses of ~~correction. The~~correction. The DOC alone has stated that over 1,900 of its 11,300 prisoner would be affected.

Unfortunately at this time, prospects for many of the sentencing reforms included in the Senate bill are dim. After passing the Senate the bill went to the House where CORI reform passed by a wide margin on May 26, 2010. The ~~House version~~House version of the bill, however, did not include any of the Senate's ~~sentencing reforms~~sentencing reforms.

All is not lost, however. Both versions of the bill are now in what is known as the joint legislative conference committee. The conference committee, which will conclude its work by June 11, 2010 could report out a bill that includes mandatory minimum reforms. Please contact your state representative and state senator and Speaker Robert DeLeo's office (legislator's name, State House, Boston, MA 02108) and ask that the entire criminal justice reform package, including mandatory minimum reform, become law this session.

PLS Notes is available in Spanish by request and is posted on the PLS web site in English and Spanish.

SJC HOLDS THAT PROBATION RECORDS RESULTING FROM ERRONEOUS PROSECUTION CAN BE SEALED BUT NOT EXPUNGED

In July of 2006 two cars collided in Roslindale, injuring a passenger in one vehicle. When the driver of the vehicle with the injured passenger tried to exchange insurance information, the male driver (and only occupant) of the other car drove off after threatening to come back with a gun. The police, who were given the plate number, sent a summons for leaving the scene of a personal injury accident to Tina Boe, who was the registered owner of the car driven by the threatening man. A few days later a police officer applied for a criminal complaint against Boe in the West Roxbury Division of the BMC. A magistrate's hearing was scheduled to see if a criminal complaint should issue. Boe came to the courthouse for the hearing but was directed to the wrong room, where she sat for a long time and, after the mistake was discovered, was told that a criminal complaint had issued against her because she had missed the magistrate's hearing!

At the end of September Boe was arraigned and an attorney was appointed for her. In November, the defense attorney and the prosecutor filed a *joint* motion to dismiss the charge and also to expunge "all information regarding this case" from the records of the Probation Department, the Commissioner of Probation, and other appropriate agencies. The motion was granted.

Two months later, the Commissioner of Probation filed a motion to reconsider and vacate the order to expunge Boe's CORI on the grounds that the BMC lacked statutory authority to issue such an order because Boe's only remedy was to seal her record pursuant to G. L. c. 276, § 100C. The judge denied the commissioner's motion, concluding that because the criminal complaint had been

issued erroneously based on misidentification of Boe as the perpetrator of the crime, expungement of her criminal record was "appropriate" and "just" relief.

The commissioner appealed, and the Appeals Court affirmed the BMC. The commissioner appealed again, and the SJC reversed. On March 25 of this year the SJC held in Commonwealth v. Tina Boe, 456 Mass. 337, that the trial court had no authority under existing statutes to order the expungement of the probation records associated with Boe's clearly erroneous prosecution, although those records could be sealed.

The decision is not quite as bad as it appears at first glance to be, because it is focused on the Probation Department records (which are not public records), not the records of the Criminal History Systems Board (CHSB), which is the main repository for the distribution of CORI to employers and landlords. This was because only the Commissioner of Probation appealed the BMC order. The SJC said that for this reason it was not addressing the part of the BMC order that required expungement of the CHSB records, and noted that the CHSB CORI is normally much more widely available than are probation records.

Even if sealing is theoretically available to the unlucky Ms. Boe, however, it will by no means be easy to obtain. She will still have to negotiate the extremely steep grade and curves of the procedure required by Commonwealth v. Doe, 420 Mass. 142, 149-151 (1995), a road more twisted than any in Roslindale.

En la oficina de PLS (Servicios Legales para Prisioneros) se habla español, y este periódico está disponible en español.

NEW ENGLAND INNOCENCE PROJECT COMBATS WRONGFUL CONVICTIONS

If you are factually innocent of the crime for which you are incarcerated, The New England Innocence Project (NEIP) may be able to assist you. The NEIP provides *pro bono* (free) legal help to people who have claims of actual innocence and who are wrongly convicted, in Maine, Massachusetts, Connecticut, New Hampshire, Rhode Island and Vermont. The NEIP considers cases in which a conviction is final and in which scientific testing *or other new investigative leads* could establish a strong likelihood that the individual is factually innocent. Address correspondence as follows:

Intake Coordinator
New England Innocence Project
c/o Goodwin Procter
53 State Street
Boston, MA 02109

PLS is aware of problems with some Parole Board calculations of parole eligibility and discharge dates. If you believe that there is an error in the calculation of your parole discharge or eligibility date, write to PLS, 8 Winter Street, 11th floor, Boston, MA 02108, attention "Parole Calculations."

Families and friends of prisoners can also call PLS for free on 1-800-882-1413 toll free from anywhere in the state. Prisoners who cannot reach us by phone should write to: PLS / Prisoners' Legal Services, Eight Winter St., Boston, MA 02108.

Formatted: Spanish (International Sort)

Formatted: Spanish (International Sort)

Regular call-in hours are 1:00 to 4:00 on Monday afternoons unless it is an emergency, in which case you can call whenever you can get a phone during business hours (9:00 A.M. to 4:00 P.M., Monday to Friday). On weeks when Monday is a holiday, PLS accepts calls on Tuesday from 1:00 to 4:00.

En la oficina de PLS (Servicios Legales para Prisioneros) se habla español. El número directo de PLS para los presos del DOC es *9004#. Los presos de los condados deben llamar el número (617) 482-4124 (a carga reversada).

NOTICE TO BRISTOL COUNTY PRISONERS

On January 5, 2010, the Supreme Judicial Court affirmed the trial court's ruling that Bristol County Sheriff Thomas Hodgson had acted unlawfully by charging prisoners a "cost of care" fee, as well as other fees for medical care, haircuts, and GED services. If you paid any of these fees, you will be entitled to a refund. To participate in the case~~, write,~~ write to **PLS.** When you write, please include your name, your birth date, social security number, and an address where you can be contacted. IF YOU MOVE AT ANY POINT, PLEASE LET US KNOW YOUR NEW ADDRESS.

Prisoners' Legal Services
8 Winter Street
Boston, MA 02108-4705

Non-Profit Organization

U.S. Postage Paid
Boston, MA

Permit No. 58866

Speed Dial phone number for PLS for state prisoners: *9004#

PLS formerly MCLS has arranged with the DOC for a **toll free speed dial number** that is accessible to all **state** prisoners on the PIN system. **County prisoners must call collect on (617) 482-4124.**

Families and friends of prisoners can also call PLS for free on 1-800-882-1413 toll free from anywhere in the state. Prisoners who cannot reach us by phone should write to: Prisoners' Legal Services, Eight Winter St., Boston, MA 02108.

Regular call-in hours are 1:00 to 4:00 on Monday afternoons unless it is an emergency, in which case you can call whenever you can get a phone during business hours (9:00 A.M. to 4:00 P.M., Monday to Friday). On weeks when Monday is a holiday, PLS accepts calls on Tuesday from 1:00 to 4:00.

En la oficina de PLS (Servicios Legales para Prisioneros) se habla español. El número directo de PLS para los presos del DOC es *9004#. Los presos de los condados deben llamar el número (617) 482-4124 (a carga reversada).