STATE OF NEW YORK
SUPREME COURT **COUNTY OF CLINTON**

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In the Matter of the Application of
NORMAN B. CALVERT, #97-A-0267,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #09-1-2008-0594.78
INDEX #08-1572
ORI #NY009013J

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services,
DALE ARTUS, Superintendent,
Clinton Correctional Facility, **T. LaVALLEY,**
Deputy Superintendent, and **S. M. GARMAN**
Deputy Superintendent,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Norman B. Calvert, filed in the Clinton County Clerk's Office on September 30, 2008. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the manner in which his alleged "legal mail" has been handled by DOCS staff at Clinton Correctional Facility. The Court issued an Order to Show Cause on October 7, 2008, and has received and reviewed respondents' Answer and Return, verified on November 28, 2008, together with a Letter Memorandum of that date. The Court has also received and reviewed petitioner's unsworn "Letter/Reply" thereto, filed in the Clinton County Clerk's Office on December 5, 2008.

On March 11, 2008, petitioner filed an inmate grievance complaint (CL-56751-08) alleging that "[o]n January 10th, 2008 a Legal Letter from my VA Fiduciary came to me; and this Legal Letter had a note from the Correspondence Department attached to the

envelope, which stated: 'If this is not legal mail, return to correspondence.'" As detailed in petitioner's inmate grievance complaint, the envelope in question contained petitioner's allowance check for the month of January, 2008, as well as a note from petitioner's VA Fiduciary, who is an attorney. The return address on the envelope in question clearly identified the sender as an attorney and contained the handwritten notation "LEGAL MAIL." In his inmate grievance complaint petitioner asserted that the aforementioned note from the facility correspondence department essentially instructed the correction officer delivering the letter to petitioner's cell " . . . to read my Legal Mail . . ." Petitioner further asserted that such correction officer "thoroughly read" the note from his VA Fiduciary, determined that it was not legal mail and returned the note to the facility correspondence department. According to petitioner's inmate grievance complaint, however, the officer delivering the envelope ". . . was only authorized to remove the . . . check from my Legal Mail, and credit it to my inmate account. He was **NOT** authorized to return it [presumably the note] to the Correspondence Department!" (Emphasis in original). Although petitioner annexed a copy of the note in question to his grievance complaint and asserted that the note did, in fact, constitute legal mail, he also took the position that the contents of an envelope were essentially irrelevant to the issue of whether or not the envelope constituted "privileged correspondence," as that term is defined in relevant DOCS regulations. Petitioner concluded his inmate grievance complaint by requesting that the following action be taken:

> "I request that **ALL** DOCS Corrections Officers, and **ALL** of their Supervisors, as well as **ALL** Civilian employees who are subject to handle Privileged Correspondence, be compelled to attend a comprehensive and extensive re-training program, to familiarize them with the provisions of DOCS Directive #4421. I further request **PUNATIVE DAMAGES** in the

> amount of **$10,000,000.00** from New York State, and DOCS." (Emphasis in original).

Under the provisions of 7 NYCRR §721.2(a)(2) [1] "[p]rivileged correspondence" includes correspondence from an attorney received by an inmate from the attorney's "official business address." The reading of incoming privileged correspondence can only be authorized by the facility's superintendent pursuant to 7 NYCRR §721.3(c). The relevant provisions of 7 NYCRR §721.3(b)(5) nevertheless read as follows:

> "(ii). . . all incoming privileged correspondence shall be opened and inspected, in the presence of the inmate to whom it is addressed, for the presence of cash, checks, money orders and contraband and to verify, as unobtrusively as possible, that the correspondence does not contain material that is not entitled to the privilege.
> (iii) When, in the course of inspection, cash, checks, or money orders are found, they shall be removed and credited to the inmate's account.
> (iv)When, in the course of inspection, contraband is found, it shall be removed and forwarded to the security office . . .
> (v)When, in the course of inspection, material is found that does not appear to be entitled to the privilege, all parts of the correspondence shall be forwarded directly to the superintendent without further inspection, and a report from the person opening and inspecting shall detail the circumstances."

The Inmate Grievance Resolution Committee (IGRC) responded to petitioner's grievance complaint on March 17, 2008, stating that "[g]rievant is advised that correspondence staff as well as Security staff have been reminded of the appropriate procedure to follow if upon inspection materials are found that do not appear to be entitled to be privileged correspondence . . ." Petitioner appealed to the superintendent whose designee, First Deputy Superintendent LaValley, responded on May 12, 2008, as follows:

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[1] The relevant provisions of DOCS Directive #4421, referred to by petitioner in his inmate grievance complaint, are codified in 7 NYCRR Part 721. In this Decision and Judgment the Court will quote from the regulation rather then the directive.

> "Grievant is advised that in accordance with Directive 4421, the Block Officer opened the legal mail in grievant's presence and retrieved a check which was properly sent to the Correspondence Office for a receipt. The Officer is authorized to review the contents of correspondence marked "Legal" and insure it is privileged correspondence. The Officer then processed the mail in accordance with [7 NYCRR §721.3(b)(5)(v)].
>
> Grievant is further advised that Security Staff and Correspondence Staff have been reminded of the appropriate procedures. Grievant is also advised that monetary issues are beyond the scope of the IGRC."

Upon further administrative appeal the Inmate Grievance Program Central Office Review Committee (CORC) issued a final determination on June 18, 2008, as follows:

> "**GRIEVANT'S REQUEST UNANIMOUSLY ACCEPTED IN PART**
>
> Upon full hearing of the facts and circumstances in the instant case, the action requested herein is accepted in part.
>
> CORC notes that appropriate action was taken and staff have been reminded to follow [7 NYCRR §721.3(b)(5)(v)] which states, i.e.;
>
> When, in the course of inspection, material is found that does not appear to be entitled to the privilege, all parts of the correspondence shall be forwarded directly to the Superintendent with out [sic] further inspection, and a report from the person opening and inspecting shall detail the circumstances."

In this proceeding petitioner alleges that 7 NYCRR §721.3(b)(5)(v) " . . . was disregarded in all respects, in that my Legal Mail was mishandled and no REPORT [by the opening/inspecting officer] was ever filed." He seeks, *inter alia*, judgment directing " . . . that **ALL** DOCS Correctional Officers , and **ALL** of their Supervisors, as well as **ALL** DOCS Civilian employees who are subject to handle Privileged Correspondence, be compelled to attend a comprehensive and extensive re-training program, to familiarize them with the provisions of DOCS Directive #4421, in all respects," as well as directing " . . . that DOCS formulate and initiate a comprehensive and extensive re-training program, to familiarize all DOCS employees with the provisions of DOCS Directive #4421,

in ALL respects, if they in any way handle, or come into contact with, Privileged Correspondence . . .” The petitioner also seeks money damages in the aggregate amount of $105,000,000.00.

Following the commencement of this proceeding the Attorney General’s Office requested First Deputy Superintendent, Thomas LaValley, to review the matter. The Court notes that First Deputy Superintendent LaValley was the superintendent’s designee who reviewed petitioner’s initial administrative appeal in connection with the underlying grievance complaint. In his post-commencement review First Deputy Superintendent LaValley identified two errors directly relevant to the disposition of this proceeding that were committed DOCS staff at the Clinton Correctional Facility. The First Deputy Superintendent concluded that the correspondence to petitioner should have been forwarded to the facility superintendent after it was returned to the correspondence office by the opening/inspecting officer, and that such officer should have more fully detailed the circumstances surrounding his handling of the correspondence.

The Court initially rejects petitioner’s contention that respondents’ Answer and Return was not timely served and that he is therefore entitled to judgment on default. Petitioner’s reliance on CPLR § 320(a) is misplaced in that the cited statute relates to the time frame for a defendant’s appearance in an action commenced by summons and complaint. In this special proceeding under Article 78 of the CPLR, however, the Court issued an Order to Show Cause (CPLR § 7804(c)) on October 7, 2008, directing “ . . .that respondents serve a copy of their answering papers on the petitioner on or before November 28, 2008 . . .” It is clear from the record that respondents’ answering papers

were timely served by mail to the petitioner on that date. *See* CPLR § 2103(c) and 2103(b)(2).

This Court, for a number of reasons, has struggled to fully understand the responses of DOCS officials to petitioner's grievance, both at the superintendent and CORC levels. In the May 12, 2008, decision of the superintendent's designee, all of the actions of the opening/inspecting officer were described to be in accordance with DOCS regulations. The superintendent's designee nevertheless found it appropriate to advise petitioner that DOCS staff had been "reminded of the appropriate procedures." If all procedures were followed, however, why the reminder?

In the final CORC determination of June 18, 2008, it was also noted that staff had been reminded to follow 7 NYCRR §721.3(b)(5)(v). Although the CORC did not make a specific finding that the actions of the opening/inspecting officer were in compliance with departmental regulations, it did observe "that appropriate action was taken . . ." The Court is unable to discern, however, whether the finding that "appropriate action was taken" referred to the actions of the opening/inspecting officer or the actions of unnamed DOCS officials in reminding staff to follow departmental regulations. Even if the latter interpretation is accurate, the CORC did not identify any deficiency in staff's handling of the correspondence in question. In the absence of such identification, the Court finds that it lacks context to evaluate the adequacy of any reminder to follow departmental regulations.

Notwithstanding the foregoing, even if the Court determined that Clinton Correctional Facility staff failed to comply with particular provisions of 7 NYCRR §721.3(b)(5)(v) in processing the letter from petitioner's VA Fiduciary on January 10,

2008, it would not grant petitioner the specific relief he seeks in this proceeding. When rendering a judgment in CPLR Article 78 proceeding a Court may award a grant of restitution of damages, but only where such relief is "incidental" to the primary relief sought. *See* CPLR § 7806 and *Gross v. Perales*, 72 NY2d 231, *rearg den* 72 NY2d 1042. The Court finds, however, that compensatory/punitive damages for any mishandling of petitioner's privileged correspondence are not "incidental" to the primary relief sought within the meaning of Court of Appeals in *Gross*. In addition, the Court finds no basis in the record to even consider the broad intrusion into the day-to-day operations of the Clinton Correctional Facility proposed by petitioner.

Notwithstanding the foregoing, and particularly in view of First Deputy Superintendent LaValley's post-commencement review and conclusions in this matter, the Court finds it appropriate to vacate the CORC determination of June 18, 2008, and to remand this matter for further consideration.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the CORC determination of June 18, 2008, is vacated and the matter remanded for further consideration not inconsistent with this Decision and Judgment.

DATED: March 27, 2009, at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice