STATE OF NEW YORK
COUNTY OF ALBANY SUPREME COURT

IVEY WALTON; RAMONA AUSTIN; JOANN HARRIS; the OFFICE OF THE APPELLATE DEFENDER; and the NEW YORK STATE DEFENDERS ASSOCIATION,

Petitioners,

Index No 04-1048

-against-

June 25, 2004

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; and MCI WORLDCOM COMMUNICATIONS, INC.,

Respondents.

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF RESPONDENT DEPARTMENT OF CORRECTIONAL SERVICES' MOTION TO DISMISS THE VERIFIED PETITION AND COMPLAINT

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Preliminary Statement

Respondent-defendant New York State Department of Correctional Services (hereinafter "DOCS") moved to dismiss this combination Article 78/declaratory judgment proceeding in its entirety on a number of procedural and substantive grounds. Petitioners have filed a sixty-seven page memorandum of law, with nearly as many footnotes, opposing the motion. While that opposition is replete with misstatements and misrepresentations of DOCS' motion[1], it offers little new ground warranting a response. Certain aspects of their papers, however, so mischaracterize controlling legal precedents, the pleadings and the arguments advanced by DOCS as to mandate this response. Accordingly, DOCS offers this reply memorandum in further support of the motion to dismiss. For the most part, however, the arguments raised by DOCS in its initial papers remain the basis for the instant motion.

For the reasons set forth in the original motion papers, as supplemented here, the Verified Petition and Complaint (hereinafter "Petition") clearly fails to state a cause of action under any of the enumerated theories and should, therefore, be dismissed in its entirety.

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[1] For example, petitioners' suggestion that DOCS has engaged in a "desperate effort to evade adjudication" of the merits is untrue and sanctionable where, as here, DOCS has sought dismissal on the merits of each of petitioners' claims in addition to raising viable threshold procedural defenses. Petitioners' apparent displeasure that DOCS has "yet again" raised certain issues is, of course, understood only when recognizing that this is at least the third forum in which petitioners' counsel has chosen to litigate these issues. That DOCS has repeatedly, and thus far unsuccessfully, been sued over this issue does not somehow preclude it from raising its available defenses anew in each action.

Argument

POINT I

ALL CLAIMS, BUT THOSE BROUGHT IN CLAIM ONE, SHOULD BE DISMISSED AS UNTIMELY

In their memorandum opposing dismissal petitioners argue that they "seek relief that is unavailable through an Article 78 proceeding." Pets.' Mem. of Law, p. 5. They make similar arguments throughout the brief explaining why relief under Article 78 is unavailable to them and that their claims are not untimely. Id. at pp. 5-12. In the face of this argument, however, petitioners' memorandum is alarmingly silent on why, if Article 78 relief is unavailable to them, they commenced this proceeding, in part, pursuant to that very statute. The Notice of Petition, by which they commenced this proceeding, characterized it as one seeking "an order pursuant to Article 78 of the New York Civil Practice Law and Rules ("CPLR") and CPLR § 3001." Notice of Petition, p. 1. The notice further demanded a response pursuant to CPLR § 7804. Id. at p. 2. The Verified Petition and Complaint itself makes abundantly clear that "[t]his is a proceeding pursuant to CPLR §§ 3001 and 7801 et seq." Petition, ¶ 15; see also id. at ¶ 16. Petitioners cannot have it both ways - either their claims are brought pursuant to Article 78, in which case they are clearly untimely, or the petition frivolously asserted claims pursuant to that Article.

Properly viewing the procedural posture of this case, therefore, the appropriate limitations period is the four month period provided for in CPLR § 217(1). "It is the responsibility of the court in the first instance to determine the true nature of a case in order to discover whether the six-year Statute of Limitations for declaratory judgment actions or the much shorter four-month Statute of Limitations for CPLR article 78 proceedings applies," Llana v. Town of Pittstown, 234 A.D.2d 881,

882 (3d Dep't 1996), and petitioners' papers offer no basis for finding the four month statute of limitations inapplicable here. Petitioners' contention that this case involves an ongoing wrong to them in which each new bill results in the accrual of a new claim is of little value to them for a number of reasons. First, any such new claim would be governed by a four month limitations period and nothing in the petition demonstrates that any petitioner was in fact billed during the four months prior to filing this claim. Even if they could make such a showing all claims beyond that four month limitations period would now be untimely in any event and not actionable here. More to the point, however, in an effort to avoid this clear limitations problem, petitioners ignore that the crux of their claim is the propriety of the DOCS-MCI contract itself. The contract, effective April 1, 2001, is the basis of this lawsuit. Petitioners have challenged its constitutional propriety and DOCS' ability to enter into and perform under the contract. That claim, rather than a series of individual challenges to the particular bills, is what is at issue here. Such a challenge clearly should have been brought within four months of the contract's effective date.

The constitutional and statutory challenges made in the petition, therefore, should be dismissed as untimely.

POINT II

PETITIONERS ASK THE COURT TO APPLY THE INCORRECT STANDARD OF REVIEW FOR THEIR SPEECH AND ASSOCIATION CLAIMS

While recognizing that their right to communicate with incarcerated persons is not absolute, Pets.' Mem. of Law, p. 47, petitioners nonetheless ask the Court to ignore established standards for evaluating free speech claims involving inmates in favor of more "traditional" First Amendment type

claims involving government regulation of speech. Their argument misapprehends the nature of their right to communicate with prisoners and the important role prison administrators have in regulating inmate conduct as it relates to phone calls.

Courts have long viewed regulations or laws restricting communication with inmates through a test which balances "the competing interests at stake: the importance of the right asserted and the extent of the infringement are weighed against the institutional needs and objectives being promoted." Lucas v. Scully, 71 N.Y.2d 399, 406 (1988); see also Turner v. Safley, 482 U.S. 78, 89 (1987). While most of the applications of that standard come in claims brought by inmates, the fact that petitioners themselves are not incarcerated does not make it less applicable to these facts. Lucas and Turner have their origin in the well-established doctrine that prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." Bell v. Wolfish, 441 U.S. 520, 547 (1979). That should be no different on these facts.

Petitioners suggestion that as family members of inmates, their claims should be excused from the Turner analysis is directly contrary to established law. In Overton v. Michigan, the Supreme Court last year was faced with a challenge to various restrictions on inmate visitation which was brought by "prisoners, their friends, and their family members." 539 U.S. 126, ___, 123 S. Ct. 2162, 2166 (2003). Overton applied the Turner analysis to the claims raised there, id. at 2167-68, just as this Court should apply it here. Application of Turner to claims brought by non-inmates is not new. In Thornburgh v. Abbott, the Court recognized that "any attempt to forge separate standards for cases implicating the rights of outsiders is out of step" with its precedents. 490 U.S. 401, 410 n. 9 (1989). As such, it is clear that Turner's "deferential standard applies notwithstanding

that this case implicates the rights of non-inmates as well as those of a prisoner." Hernandez v. McGinnis, 272 F. Supp.2d 223, 226 (W.D.N.Y. 2003). Any other conclusion "would unreasonably constrain the corrections system." Id.

Apart from this clear law, Hernandez demonstrates why petitioners' position is ill-advised as a matter of policy as well. Petitioners' notion that this case "does not implicate prison security, control of prisoners' behavior, or the internal prison environment," Pets' Mem. of Law, p. 49, is naive at best. Reports of inmate use of telephones to further their own criminal enterprises or promote prison contraband unfortunately are not uncommon. See, e.g., Pabon v. Coombe, 249 A.D.2d 629 (3d Dep't 1998) (inmate disciplined for using facility phone to aid narcotics distribution); Melendez v. Goord, 242 A.D.2d 881 (4th Dep't 1997) (inmate disciplined for using phone to solicit smuggling of drugs into correctional facility); Moretti v. Coughlin, 232 A.D.2d 685 (3d Dep't 1996), lv. denied, 89 N.Y.2d 803 (1997) (inmate used phone to solicit drug purchase); State v. Ford, 646 A.2d 147 (Sup. Ct. Conn. 1994) (prosecution of inmate who made threatening calls to witness from jail); Petition, Ex. B, p. 2 of 5. It is essential, therefore, for DOCS' telephone contract to provide it the means to address such security concerns. More importantly, petitioners' position, that an exception to Turner-type review must be conducted when the petitioner is not an inmate, would essentially eviscerate Turner. For example, while prison officials now are free to restrict various forms of visitation, correspondence, and phone privileges for an inmate confined to a disciplinary special housing unit under Turner, petitioners would assert that the inmate's family or friends would have an independent free speech claim that could not be viewed under the Turner standard. Such a result could lead to unreconcilable conflicts between courts thereby imposing upon prison officials enormous burdens in the day to day administration of their prisons. Petitioners'

proposed free speech analysis, based on the unrealistic view that communications to and from those outside the prison walls, do not implicate basic security concerns flies in the face of established law in this regard and must be rejected.

It is clear that petitioners' free speech claim is premised, whether they concede so or not, on a theory that their rights are unduly burdened based solely on the cost of calls from inmates. So construed, their claim lacks merit for the reasons outlined in DOCS' initial motion papers.

POINT III

PETITIONERS' EQUAL PROTECTION CLAIMS LACK MERIT

Petitioners' opposition with regard to their equal protection claims is insufficient to overcome the clear grounds for dismissal raised in DOCS' initial papers. They raise several distinct arguments in support of their equal protection claims. First, they contend that they have a viable equal protection claim based on the disparate treatment of taxpayers occasioned by the commission. Pets.' Mem. of Law, pp. 53-55. They also argue that the commission impinges on their right to free speech and association and, therefore, is subject to strict scrutiny. Id. at pp. 55-56. For the reasons just outlined, this speech claim does not state a claim for relief. Unable to state an independent claim under that theory, petitioners' cannot now bootstrap that claim under the rubric of heightened equal protection review. Nordlinger v. Hahn, 505 U.S. 1, 10-11 (1992). Nor can petitioners' taxpayer claim serve as a ground to defeat dismissal at this juncture.[2]

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[2] Petitioners also briefly argue that the commission lacks a rational basis. See Pets.' Mem. of Law, pp. 56-59. For the reasons initially argued in Point IX(B)(2) of DOCS' initial brief, those arguments should be rejected.

With regard to the taxpayer question petitioners take exception to DOCS' suggestion that the appropriate classification for equal protection analysis is review of differences between those who receive calls from inmates and those who do not. Pets.' Mem. of Law, p. 55. Instead they argue that they, as taxpayers, are discriminated against vis-a-vis other taxpayers and have an equal protection claim based on this theory. Id. That argument was previously addressed by defendants and clearly is no basis for relief for petitioners.

First, as already outlined, the commission is not a tax. In any event, the claim lacks merit even assuming it could be classified as a tax. "A tax statute violates the Equal Protection Clause[] . . . if it permits similarly situated [parties] to be taxed unequally." Killeen v. New York State Office of Real Property Servs., 253 A.D.2d 792, 793 (2d Dep't 1998) (citing cases). "Thus the creation of different classes for purposes of taxation is permissible as long as the classification is reasonable and the taxes imposed are uniform within the class." Foss v. City of Rochester, 65 N.Y.2d 247, 256 (1985). As defendants have already pointed out, the commission affects only those who receive calls from correctional facilities. Nor is there a claim that those who are charged the commission are charged discriminatorily different rates. In fact, under the newest filed tariff all callers are charged the same rate. These undisputed facts preclude, for the reasons initially outlined in the motion to dismiss, the type of equal protection claim petitioners assert.

POINT IV

PETITIONERS' REMAINING CONTENTIONS ARE UNAVAILING

A number of the issues raised by petitioners warrant just a brief response.

A. Petitioners are not Entitled to an Accounting

Contrary to petitioners' opposition papers, DOCS does not contend that an accounting is available only when a fiduciary relationship exists. Instead, DOCS has argued that absent such a relationship, petitioners were entitled to an accounting only if they could demonstrate wrongdoing on the part of DOCS. Having failed to establish that any of their claims has merit, they have failed to satisfy this requirement and are, therefore, not entitled to an accounting.

B. Petitioners are not Entitled to an Order against DOCS with respect to PSC Proceedings

While petitioners spend considerable time in their opposition arguing that this Court should read into the PSC's October 2003 Order certain "implications" for the parties, Pets. Mem. of Law, p. 23, they cannot demonstrate that they are entitled to the relief they seek on this claim. Suggesting that the order has "clear implications" for DOCS, id., is, in essence, a concession that the order did not compel DOCS to take any actions or prohibit it from taking any actions. As such, this Court cannot, under the guise of enforcing that order, require DOCS to do anything.

C. Class Certification Should Be Denied

At the outset, because DOCS submits that no cause of action is stated by the Verified Petition and Complaint, the application for class certification should simply be denied as moot. On the merits of the application, petitioners recognize the applicability of the "government operations" rule

on which DOCS relies to oppose class certification, but suggest it is discretionary and should not be applied on these facts. Pets.' Mem. of Law, pp. 65-67. Their contention in this regard is unconvincing primarily because it ignores the nature of their own complaint. In addition to constitutional challenges, petitioners assert a statutory claim under the General Business Law. As DOCS pointed out in its initial motion, such a claim is not amenable to class certification. See Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1999). Petitioners do not dispute this in opposing the motion, instead simply ignoring this fact in arguing for class certification. CPLR § 901(a)(5) requires that a class action be the superior manner for litigating a case. Petitioners cannot credibly argue that pursuing their entire claim as a class, which includes a claim the Court of Appeals has recognized should not be considered as a class action, is the superior means of litigating this case. Certification should, therefore, be denied.

D. The Filed Rate Doctrine Bars Petitioners' Claims

Petitioners suggest that this doctrine does not apply primarily because "they challenge DOCS' authority to charge and retain an unfiled and unauthorized surcharge." Pets.' Mem. of Law, p. 14. As part of their opposition, however, they submitted MCI's post-PSC decision tariff filing which specifically lists the DOCS commission. Meeropol Affirm., Ex. B. By definition, therefore, the rate, which the PSC order itself directed MCI to file, is "on file" with the PSC.

Perhaps more importantly, the doctrine bars litigation of these claims because, as MCI points out in their reply papers, petitioners, in a very real sense, seek to engage this Court in rate-making. At the heart of the filed rate doctrine is the belief that "courts are not institutionally well suited to engage in retroactive rate setting." Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 19 (2d Cir. 1994).

Here, petitioners concede that DOCS is entitled to some commission to finance the phone system. Pets.' Mem. of Law, p. 27 n. 18.[3] While they set the appropriate rate at approximately $300,000 per year, id., their basis for doing so is flawed and highlights the extent to which petitioners ask this Court to make determinations about what rates should be charged for inmate phone calls. Petitioners apparently use that figure based on a statement in a DOCS press release regarding the MCI contract which states, in part, that "[c]ommissions on the phone home program pay $330,000 annually for operation and maintenance of phone equipment." Petition, Ex. B, p. 4 of 5. Citation to that statement is incomplete, however, because petitioners ignore the remainder of that sentence which specifically notes that that figure

> excludes the staff hours and equipment devoted to interface the system with the Department's mainframe, the cost of counselors maintaining individual inmate phone registries, the staff time to monitor inmate phone calls and the salaries, expenses, and resources of investigators on the federal, state and local law enforcement level probing allegations of misuse of the system or its use in criminal activities.

Id.[4] These necessary expenses are also a part of DOCS' cost in operating the call home program and petitioners apparently would leave it to the Court to determine which of these costs DOCS should be permitted to recoup through commissions and at what rate. Avoiding placing such a task on the courts is at the heart of the filed rate doctrine. Petitioners contention that this Court should do so retroactively for a period of roughly nine years is expressly prohibited under the filed rate doctrine.

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[3] Conceding that DOCS may collect a smaller commission to finance the phone system would seem to fly in the face of petitioners' argument that the commission is an illegal tax.

[4] Nor does that figure include compensation for the space occupied by the phones or for access to the telephone user which, as MCI's papers demonstrate, are properly recoverable through commissions under governing FCC determinations.

Part and parcel of petitioners' argument is that they or the courts should be able to dictate to DOCS exactly how it spends the money it receives from the commissions, especially in relation to their utilization in the Family Benefit Fund. See Pets.' Mem. of Law, p. 30 & n. 21. As other courts have recognized, this is and should be within the Department's discretion and is not a subject for judicial micromanagement. See Shabazz v. Cuomo, No. 93-Civ.-7692, 1998 WL 102050, at * 4 (S.D.N.Y. Mar. 5, 1998) (copy annexed hereto in Appendix).[5]

E. Petitioners' Takings Claim Overlooks Basic Facts

Petitioners argue at length that they have stated a takings claim. Their opposition, however, ignores a basic factual threshold question which clearly precludes their claim. They were charged for services undeniably rendered by MCI. They do not assert that they were entitled to some due process protection for each telephone call they accepted from an inmate at a New York correctional facility.[6] They were completely capable of avoiding the charges that they now complain of simply by declining to accept collect calls made to them by inmates. While petitioners may contend that other constitutional or statutory provisions render those charges unlawful, they cannot dispute that they accepted a service from MCI and having done so simply may not claim that their property was taken from them unlawfully. Petitioners' takings claims, therefore, must be dismissed.

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[5] Petitioners apparent position that the legislative appropriation of funds to the Family Benefit Fund is not relevant here because it is merely an "act appropriating money," Pets.' Mem. of Law, p. 35, n. 30, is interesting insofar as it suggests that the Legislature would appropriate money which he did not believe the agency was permitted to have. That assertion is simply not a credible and petitioners' arguments in this regard should be rejected.

[6] Indeed, it would seem that the opportunity to accept or decline the call in the first instance, a decision entirely within the petitioners' discretion, would be sufficient opportunity to protect themselves from DOCS' alleged wrongdoing.

Conclusion

For the reasons set forth above and in the initial moving papers, the petition should be dismissed in its entirety as to the New York State Department of Correctional Services.

Dated: Albany, New York
June 24, 2004

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APPENDIX

Westlaw.
1998 WL 102050
(Cite as: 1998 WL 102050 (S.D.N.Y.))

H
Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

Michael Aziz ZARIF SHABAZZ, a/k/a Michael Hurley, Plaintiff,
v.
Mario M. CUOMO, Governor of the State of New York, Thomas A. Coughlin, III, Commissioner of the Department of Correctional Services, et al., Defendants.

No. 93 CIV. 7692(DLC).

March 5, 1998.

James P. Tallon, Mojirade James, Shearman & Sterling, New York, for the Plaintiff.

Dennis C. Vacco, Attorney General of the State of New York, New York, Jeanne Lahiff, Assistant Attorney General, for the Defendants.

OPINION & ORDER

COTE, District J.

*1 Michael Aziz Zarif Shabazz ("Shabazz"), an inmate at Sing Sing Correctional Facility, filed this action *pro se* on November 9, 1993, pursuant to 42 U.S.C. § 1983. He alleged, *inter alia,* that the defendants conspired to violate his constitutional rights and those of fellow prisoners when the Department of Correctional Services ("DOCS") ceased its policy of providing inmates with a weekly allotment of five free postage stamps for personal mail. [FN1] The procedural history of Shabazz's action is lengthy. Briefly stated, the case was initially dismissed by the district court on the very day it was filed. This dismissal was reversed by the Second Circuit on March 31, 1994. The case was then transferred to this Court, which, by Opinion dated August 6, 1996, dismissed the plaintiff's claims against Cuomo and Coughlin in their personal capacities, and against Pataki, as successor to Cuomo, in his official capacity. The Court denied the defendants' motion to dismiss the claim against Coombe, as successor to Coughlin, for injunctive and declaratory relief.

FN1. The plaintiff does not challenge through this lawsuit any prison regulation concerning inmates' legal mail.

The plaintiff subsequently obtained counsel. Certain of the plaintiff's claims having survived the motion to dismiss, the parties proceeded to brief cross-motions for summary judgment. By Order dated October 16, 1997, the Court ordered the parties to brief a threshold issue that they had failed to address--namely, whether the plaintiff has standing to challenge the change in policy of which he complains. Having reviewed these submissions, the Court finds that the plaintiff does not have standing to assert his claim that the change in policy, as applied to him, violated the First Amendment. The Court also finds that the plaintiff's claim that he was deprived of a property interest in the free stamps without due process of law must be dismissed.

Discussion

Article III of the United States Constitution requires that a "case" or "controversy" be present for a district court to have jurisdiction over a claim. As the Second Circuit recently restated the case or controversy requirement:

> [S]tanding to sue is an essential component of [Article III's case or controversy] requirement. The party seeking to invoke the jurisdiction of the court bears the burden of establishing that he has met the requirements of standing. At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he *personally has suffered some actual or threatened injury* as a result of the putatively illegal conduct of the defendant....

Jaghory v. New York State Dept. of Ed., 131 F.3d 326, 329-30 (2d Cir.1997) (internal quotations omitted) (emphasis supplied).

Here, the plaintiff has alleged that he suffered an

injury sufficient to confer standing when DOCS altered its Directive 4422 ("the Directive") and ceased to provide him with five free stamps per week. [FN2] As presented in Shabazz's brief regarding standing,

> FN2. The Directive, as in effect in 1986, provided in pertinent part:
> The Department will provide free postage in an amount equivalent to five (5) domestic first class letters of one ounce or less per week to all inmates notwithstanding mail destination....
> Postage in excess of the free weekly allowance shall be made available by for example, the sale of stamps in the commissary or direct charge to the inmates' account ....
> In 1992, the Directive was amended to provide:
> Inmates may receive some free postage for privileged [legal] correspondence ....
> Inmates received at reception/classification facilities ... shall be allotted free postage in an amount equivalent to five (5) domestic first class letters of one ounce per week for personal correspondence for a period not to exceed four weeks....
> *Advances for Personal Postage.* Funds may be advanced to an inmate for postage for one first class one-ounce letter per month in the following circumstances a. the inmate has been confined to SHU [special housing unit] for discipline or administrative segregation for 30 days or more, and has a zero or negative account balance; or
> b. the inmate has been in keeplock status for 30 days or more, has lost telephone privileges, and has a zero or negative account balance; or
> c. the inmate has lost telephone privileges, has a zero or negative account balance, and has not refused to accept available program assignments.

[p]laintiff's injury is that he has been deprived of his First Amendment rights and of his constitutional right to free postage for personal correspondence, or, alternatively, of his property interest in same without due process.... Defendants infringed plaintiff's right to communicate with his family and friends when they terminated the free postage program because, *without free postage, plaintiff's ability to communicate with family and friends was unreasonably curtailed.*

*2 (Emphasis supplied). The crux of the plaintiff's injury, so explained, is that he was denied free postage to facilitate his communication with family and friends.

The Court turns first to the plaintiff's First Amendment claim. Although Shabazz alleges that the lack of free postage "unreasonably curtailed" his ability to communicate, he has not alleged that he was denied the ability to communicate altogether. Indeed, he has not even alleged how much, relatively speaking, the change in policy affected the frequency of his correspondence. Shabazz effectively concedes that he was able buy postage stamps using funds from his inmate account; nevertheless, he argues that "the fact that plaintiff has some money in his inmate account should not vitiate plaintiff's standing in this litigation." Thus, to find jurisdiction over the plaintiff's claims, the Court would have to conclude that the deprivation of five free stamps per week--without any evidence that such deprivation actually materially diminished the plaintiff's ability to communicate [FN3]--is an injury sufficient to confer standing.

> FN3. The record reflects that, as of July 1997, the plaintiff had over $4,700.00 in his inmate account. The record also reflects that the plaintiff has bought stamps every month since 1990, including after the Department of Corrections stopped giving inmates free stamps in 1992.

This the Court declines to do. In *Davidson v. Mann*, 129 F.3d 700 (2d Cir.1997), the Second Circuit considered another aspect of Directive 4422 concerning nonlegal mail. The portion of the Directive at issue in *Davidson* limited access to stamps for nonlegal mail to 100 per month, or 50 for inmates in a special housing unit ("SHU"). As in the present case, the plaintiff in *Davidson* ("Davidson") alleged that the regulation had deprived him of his First Amendment right to send outgoing nonlegal mail. Also as in the present action, Davidson had not made any "specific allegations that the regulation ha[[d] ever actually prevented him from purchasing stamps, much less from sending mail." *Davidson*, 129 F.3d at 701.

The Second Circuit held that "[a]bsent a specific allegation indicating that the directive ha[d] significantly impaired Davidson's ability to communicate with outsiders," the plaintiff had not

stated a civil rights claim under Section 1983. *Id.* Although the Second Circuit did not explicitly discuss the issue of Davidson's standing, its conclusion that Davidson had not stated a claim under Section 1983 is persuasive authority for the proposition that Shabazz does not have standing to bring this lawsuit. "The keystone for determining injury in fact is the requirement that it [the injury] be distinct and palpable--and, conversely, that it not be abstract or conjectural or hypothetical." *Jaghory*, 131 F.3d at 330 (internal quotations omitted). Like Davidson, Shabazz does not have a claim under Section 1983 because he has not shown any personal, concrete injury caused by DOCS' change in policy.

In *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir.1975), the Second Circuit found a constitutional right of inmates to communicate with the outside world. Thus, if the change in Directive 4422 materially interfered with Shabazz's access to the outside world, he might have a claim under Section 1983. There is no evidence, however, that the shift in policy had such an effect in Shabazz's case. To the contrary, as noted above, the record reflects that Shabazz routinely bought stamps after the change in policy went into effect. Shabazz's inmate account regularly reflects deductions for postage ranging from 29 cents to $7.45 for a single transaction in the months following the change in policy. While it may be true, as Shabazz argues, that "there is no authority requiring plaintiff to be destitute in order to communicate with friends and family," Article III does require that he have suffered some palpable injury before a federal court has jurisdiction over his claims. [FN4]

> FN4. The fact that Shabazz spent considerable periods of time in SHU and keeplock since Directive 4422 was amended does not alter the Court's analysis. It is undisputed that Shabazz was able to purchase stamps using funds from his inmate account even during his periods of more restricted confinement.

***3** Finding no allegation that Shabazz personally suffered a concrete harm, the Court next considers whether the new policy is unconstitutional on its face. *See Davidson*, 129 F.3d at 701. Although a plaintiff who does not have standing to challenge a regulation as applied to him ordinarily does not have standing to assert a facial challenge to the same regulation, the Supreme Court has carved out an exception to this general rule where the plaintiff challenges a regulation under the First Amendment "overbreadth" doctrine. *See, e.g. City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-99, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). As the Supreme Court explained in *Taxpayers for Vincent*,

> [t]his exception from the general rule is predicated on a "judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression."

Id. at 799 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973)). Although it is not clear that Shabazz's claim should be construed as challenging the DOCS policy on "overbreadth" grounds, *see Taxpayers for Vincent*, 466 U.S. at 801 ("there must be a realistic danger that the [regulation] itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds"), the Second Circuit's decision to consider the facial validity of Directive 4422 in *Davidson* suggests that this Court should do so as well.

To prevail on a claim that the regulation is unconstitutional on its face, Shabazz "must establish that no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). Shabazz cannot meet this heightened standard for proving the regulation unconstitutional on its face.

In *Turner v. Safley*, 482 U.S. 78, 89-90, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), the Supreme Court set forth a four-factor analysis for evaluating whether a prison regulation that impinges on an inmate's constitutional rights is nonetheless valid as reasonably related to a legitimate penological interest. To determine reasonableness, the Court must look to four issues: (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it and whether the governmental interest is legitimate and neutral; (2) whether there are alternative means of exercising the right that remain open to prison inmates; (3) whether and how an accommodation of the asserted constitutional right will impact on guards and other inmates, and on the allocation of prison resources generally; and (4) whether easy alternatives to the policy in question exist. *Id. See also Giano v. Senkowski*, 54 F.3d 1050, 1053 (2d Cir.1995). The plaintiff bears the burden of proving that the disputed regulation is unreasonable. *Giano*, 54 F.3d at 1054.

As the Second Circuit, applying the first factor of this

analysis, concluded of the regulation in *Davidson*, which limited inmates' access to postage for nonlegal mail, "there is a valid and rational connection between the regulations and [DOCS'] interests...." *Davidson*, 129 F.3d at 702. Whereas the interests promoted by the regulation in *Davidson* were in "avoiding a backlog of mail and in allocating prison personnel efficiently," and "avoiding thefts and disputes" over stamps between inmates, *id.*, the interests promoted by the regulation at issue here are budgetary.

*4 Shabazz refutes the defendants' contention that the change in policy reflects a desire to save taxpayer money by pointing to the fact that the free stamp program had been funded by commissions DOCS received on inmates' collect telephone calls. Nevertheless, DOCS reasonably could have decided to direct those funds elsewhere to alleviate the burden on taxpayers. There is no requirement that the funds attributable to commissions on collect calls be directed towards stamps for inmates. DOCS' interest in reducing its budget is both legitimate and neutral, and the elimination of the free stamp program is rationally related to this interest. *See Turner*, 482 U.S. at 89-90.

Turning to the second part of the *Turner* analysis, the Directive makes alternative means available to inmates, even those in SHU or keeplock, so that they may communicate with the outside world. Most importantly, as demonstrated by the record of Shabazz's own inmate account, inmates may purchase stamps with their own funds . [FN5] The final two parts of the *Turner* analysis may be addressed summarily. DOCS has represented, and it is not contested, that continuation of the free stamp program would have a material effect on the allocation of prison resources generally. Finally, there are no ready alternatives for achieving DOCS' goal of reducing its budget for this program. Taking all of these factors into account, the Court finds that the revised Directive is reasonable and facially constitutional. [FN6]

FN5. In the case of an inmate in SHU or keeplock who has no money in his inmate account and is not allowed to work or make telephone calls, the Directive provides for funds to be advanced for one stamp per month. The Court need not reach the question of whether one stamp per month constitutes adequate means of communication under *Morgan v. LaVallee*, 526 F.2d 221, 225 (2d Cir.1975), since "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Taxpayers for Vincent*, 466 U.S. at 800.

FN6. This conclusion is consistent with that reached in *Dawes v. Carpenter*, 899 F.Supp. 892 (1995) (Kaplan, J., sitting by designation), in which a court considered and dismissed on summary judgment a similar challenge to the revised Directive 4422. Although the court in *Dawes* did not go through the *Turner* factors, it concluded that the Directive did not violate the First Amendment, even as applied to a plaintiff in SHU who had no money in his inmate account with which to purchase stamps. The court reasoned that inmates had no more of a right to free stamps than did ordinary citizens, *id.* at 899, and that DOCS' restrictions on an SHU inmate's ability to communicate with the outside world were legitimate as "directly related to the State's interest in order and security." *Id.*

Turning now to Shabazz's claim that he was deprived of property without due process of law, the Court finds that--putting aside the issue of standing--this claim must be dismissed. Shabazz argues that

> [e]ven if this Court finds that plaintiff does not have a constitutional right to free postage for personal correspondence, plaintiff is nevertheless entitled to summary judgment as a matter of law since *plaintiff had a property interest in free postage for personal correspondence which was eliminated without due process.*

(Emphasis added). Shabazz's second claim thus sounds in procedural due process. Regardless of whether he had a right to five free stamps per week, Shabazz claims that he was entitled to some process before the weekly ration was taken away.

This argument must be dismissed summarily. In developing his procedural due process claim, Shabazz has utterly failed to recognize that there was *no* regulation in effect at the time that he was "deprived" of the free stamps which gave him a right to free stamps. DOCS did not deprive Shabazz individually of free stamps while all other inmates continued to receive free stamps under the DOCS policy. Instead, DOCS stopped giving Shabazz free stamps because it had changed its policy with respect to all inmates.

While Shabazz may have enjoyed the benefit of five free stamps per week under Directive 4422 in the years prior to 1992, the fact that he did so did not give him, or any other inmate, a protected right to continue to receive free stamps *ad infinitum,* nor to demand a hearing before the postal policy was changed. Simply put, the Due Process Clause did not restrict DOCS' freedom to change its policy regarding postage for inmates as it saw fit. Despite the urging of the plaintiff, the Court therefore declines to engage in the kind of analysis advanced in *Hewitt v. Helm,* 459 U.S. 460, 471-72, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), to determine whether the former Directive 4422 conferred an entitlement to five free stamps per week on inmates. Because there was no regulation in effect providing for free stamps for inmates at the time that Shabazz stopped receiving a weekly allotment, it is axiomatic that he has no claim for a violation of his right to procedural due process. [FN7]

> FN7. The Court notes that, to the extent that Shabazz may wish to recharacterize his claim as one for a violation of his substantive due process rights, any such claim would only flow from his First Amendment right to communicate with the outside world. The Court has already addressed and dismissed this claim.

Conclusion

*5 For the reasons set forth above, the plaintiff's claims are dismissed. The Clerk of Court shall enter judgment for the defendants and close the case.

SO ORDERED:

1998 WL 102050, 1998 WL 102050 (S.D.N.Y.)

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