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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF BOTTOM,

Appellant,

-against-

No. 135

ANNUCCI,

Respondent.

20 Eagle Street
Albany, New York 12207
September 11, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So counselor, do you
2 want to come up? Do you want any rebuttal time,
3 counselor?

4 MR. EFFMAN: Two minutes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes, you have
6 it; go ahead, you're on.

7 MR. EFFMAN: Thank you. May it please the
8 court - - - I'm a traditionalist; I have to start
9 that way.

10 Last night I started thinking, rather than
11 sleeping, on this case, and I said, why am I here and
12 how did I get here on what amounts to under fifty
13 cents worth of stamps with a time-served sentence on
14 a prison disciplinary hearing?

15 CHIEF JUDGE LIPPMAN: So tell us, why - - -
16 why are you here if we're talking about fifty cents
17 disciplinary?

18 MR. EFFMAN: Number one, it's a good
19 opportunity to see all of you. Number two, this case
20 - - -

21 CHIEF JUDGE LIPPMAN: Well, we like to see
22 you too.

23 MR. EFFMAN: I - - - I appreciate that,
24 Judge. This case has significance well beyond the
25 very bare bone facts that we're here on.

1 CHIEF JUDGE LIPPMAN: Talk to us about the
2 particular regulation or whatever you want to call -
3 - - call it that we're dealing with, and how that
4 impacts on the bigger picture. Is this just a
5 localized management rule, or is this something
6 broader? In that context, tell - - - tell us what -
7 - -

8 MR. EFFMAN: All right.

9 CHIEF JUDGE LIPPMAN: - - - what your view
10 of this is.

11 MR. EFFMAN: Well, first I have to thank
12 the Attorney General's Office and my opponent here,
13 because while I think the record is expanded by her
14 brief and it includes materials that were not from
15 anything that we were - - - had available below, it
16 is extremely enlightening with respect to your
17 question, Judge Lippman, and that is, I last saw the
18 Attica rules probably in the 70s, and it said "Attica
19 Rule Book". It said "Local Facility Rules".

20 It is attached as an appendix to the
21 respondent's brief at A-1. And maybe if - - - maybe
22 the cover does tell you what the book's all about,
23 because in this case, and I was quite surprised when
24 I saw it, it says "Inmate Orientation Guideline
25 Manual". It doesn't say local rules.

1 And while there's only something like - - -
2 JUDGE ABDUS-SALAAM: Does it have to,
3 though, counsel? Does it have to explicitly use the
4 term "Local Rules" to be a local rule?

5 MR. EFFMAN: No, no, it depends on the
6 context, I would think. But it surprised me in that
7 respect and - - - and while you only - - -

8 JUDGE RIVERA: But doesn't - - - but
9 doesn't your argument result in the requirement of
10 submission to the Secretary of State of the minutia
11 of what goes on in every single facility, and that's
12 really not the intent of the statute?

13 MR. EFFMAN: I agree that that would not be
14 an appropriate resolution based on what is contained
15 in these materials, but I think the issue becomes
16 whether the agency, DOCCS, can slip in rules that
17 result in a liberty interest in what appears to be a
18 mere - - -

19 CHIEF JUDGE LIPPMAN: Is this a liberty
20 interest that affects everybody in all - - - all
21 prisoners in the state?

22 MR. EFFMAN: Well, it depends on what those
23 other local rules are. I have no idea what's in
24 them. For example, in - - - in - - -

25 CHIEF JUDGE LIPPMAN: Well, what about this

1 particular one?

2 MR. EFFMAN: Well, this particular one
3 affects at least 2,000 or 2,200 inmates, and - - -
4 and the reality is that the Department of Corrections
5 and Community Supervision have something like fifty
6 different facilities. I don't know how many inmates
7 there are now. There were 70,000. Now there's
8 probably 50,000 or 45,000, so - - -

9 JUDGE PIGOTT: Was your argument - - - I -
10 - - I assumed your argument was rational basis with
11 respect to its decision. But are you simply saying
12 that they have no right to set any rules with respect
13 to any of the inmates unless they go through this - -
14 - the - - - the - - -

15 MR. EFFMAN: Yeah - - -

16 JUDGE PIGOTT: - - - rule making?

17 MR. EFFMAN: In - - - in a way I am saying
18 that. That if you have a dis - - -

19 CHIEF JUDGE LIPPMAN: Define a rule in
20 answering Judge Pigott's question.

21 MR. EFFMAN: Okay. A rule, okay. There
22 are eighty-nine pages in this document according to
23 the table of contents. We only have about seven or
24 eight. Of those eight pages or so - - - or four
25 pages - - - there are something like five, what would

1 appear to be, rules that are punishable by
2 discipline, one of them being you can't take loose
3 stamps into the law library, right. Now you - - -

4 CHIEF JUDGE LIPPMAN: And the other - - -
5 just for curiosity's sake, the other three on that
6 page, are they rules that were filed with the
7 Secretary of State?

8 MR. EFFMAN: None of them. None of them.

9 CHIEF JUDGE LIPPMAN: They're all more in
10 the nature of whatever you want to call these things.

11 MR. EFFMAN: Yeah, I mean, in a sense,
12 prisons are not that much unlike college campuses.
13 You go there. You're a freshman, you're given a
14 book. This book has eighty-nine pages.

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. EFFMAN: And then you have the
17 statewide rule book which is very specific, and of
18 course, has to be filed based on a decision of this
19 case, that I'm well aware of from - - -

20 JUDGE RIVERA: He has quite the incentive
21 to know what's in this rule book, does he not?

22 MR. EFFMAN: I'm - - - excuse me?

23 JUDGE RIVERA: He has quite the incentive
24 to know what's in the rule book, does he not? I mean
25 - - -

1 MR. EFFMAN: Oh.

2 JUDGE RIVERA: - - - it's not quite like a
3 college campus in that.

4 MR. EFFMAN: Yeah, this book though, is not
5 rule book. What it tells you is - - -

6 CHIEF JUDGE LIPPMAN: Are any - - - are any
7 of the rules that are in this book ones that are - -
8 - were filed with the Secretary of State or are they
9 all, whatever you want to call it, applications of
10 those rules?

11 MR. EFFMAN: I would be speculating, Judge,
12 because I've only - - - I don't have the eighty-nine
13 pages.

14 CHIEF JUDGE LIPPMAN: What would be your
15 guess?

16 MR. EFFMAN: My guess is that there are
17 probably ten rules in here that - - -

18 CHIEF JUDGE LIPPMAN: That are Secretary of
19 State. Okay.

20 MR. EFFMAN: - - - actually can result in
21 disciplinary action. And I - - - and I guess the
22 point is that inmates are transferred daily from one
23 facility to another.

24 CHIEF JUDGE LIPPMAN: Right.

25 MR. EFFMAN: And they get there and they're

1 given this book, and every facility has its own book.

2 CHIEF JUDGE LIPPMAN: Right.

3 MR. EFFMAN: And - - - and can you be on
4 notice as to what is prohibited - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MR. EFFMAN: - - - if you keep moving
7 around. Now, Mr. Bottoms - - - by the way, this is a
8 historic case, and I don't know how much this plays
9 in it - - -

10 JUDGE RIVERA: Well, that - - - that - - -
11 that could be true even if it's filed with the
12 Secretary of State.

13 MR. EFFMAN: What - - -

14 JUDGE RIVERA: That - - - that is - - -
15 really what you're describing - - -

16 MR. EFFMAN: But - - - but that's - - -

17 JUDGE RIVERA: - - - is the practical
18 difficulty of an inmate being able to really know - -
19 -

20 MR. EFFMAN: Right.

21 JUDGE RIVERA: - - - what they can and
22 cannot do at this level of minutia.

23 MR. EFFMAN: Again, it's the heart - - -

24 JUDGE RIVERA: I appreciate that but - - -

25 MR. EFFMAN: Right.

1 JUDGE RIVERA: - - - this is a question of
2 whether or not this needed to be filed with the
3 Secretary of State.

4 MR. EFFMAN: No, what I think they have to
5 do, Judge, is understand that you can't punish
6 someone for not following the guidelines, okay. If
7 there's - - -

8 JUDGE RIVERA: You can punish them for not
9 complying with the rule that's published though,
10 correct?

11 MR. EFFMAN: Yes.

12 JUDGE RIVERA: Okay, so if the rule says
13 that you can't have - - -

14 MR. EFFMAN: Can't have authorized property
15 in a non - - -

16 JUDGE RIVERA: - - - you can't - - - you
17 can't possess it as an item that - - -

18 MR. EFFMAN: Right, yes.

19 JUDGE RIVERA: - - - right, that - - -
20 that's prohibited.

21 MR. EFFMAN: Right.

22 JUDGE RIVERA: Then - - -

23 MR. EFFMAN: How do I distinguish?

24 JUDGE RIVERA: - - - you've got to find out
25 what those items are.

1 MR. EFFMAN: Right.

2 JUDGE RIVERA: Or I - - - this goes back to
3 my other question. Do you - - - are you really
4 arguing that then they have to file with the
5 Secretary of State every single item that is
6 prohibited?

7 MR. EFFMAN: I'll give you what I believe
8 is an appropriate response - - -

9 JUDGE RIVERA: Okay.

10 MR. EFFMAN: - - - for DOCCS on something
11 like this.

12 JUDGE RIVERA: Yes, yes.

13 MR. EFFMAN: The guideline says you can't
14 bring loose stamps into the law library. And by the
15 way, in my opponent's brief, she reflects on the fact
16 that in other maximum security facilities, much like
17 Attica - - - Auburn, Clinton, Wende, all maximum - -
18 - that no such rule exists.

19 JUDGE RIVERA: Um-hum.

20 MR. EFFMAN: And - - -

21 CHIEF JUDGE LIPPMAN: Do you agree though
22 that different places may have different security
23 needs or management needs or whatever you want to
24 call them?

25 MR. EFFMAN: Well, they may but - - - and

1 may not, because the - - - my opponent purports to
2 give some argument for the re - - - for the logic of
3 this rule that it prevents bartering or - - - or use
4 of something that could be exchanged.

5 CHIEF JUDGE LIPPMAN: But Attica, for
6 instance, could have a particular problem that
7 another place doesn't, that might require a
8 management rule - - -

9 MR. EFFMAN: Internal management.

10 CHIEF JUDGE LIPPMAN: - - - whatever you
11 want to call it.

12 MR. EFFMAN: Exactly. So what do you do if
13 you have an internal management rule? You have a
14 rule saying in Attica, because of what's happened in
15 the past or whatever, you can't bring loose sta - - -

16 CHIEF JUDGE LIPPMAN: Right.

17 MR. EFFMAN: - - - stamps into the law
18 library. So what do you do if you find someone with
19 loose stamps going to the law library? Guess what?
20 You - - - you didn't follow the orientation manual.

21 CHIEF JUDGE LIPPMAN: So your main point is
22 you - - -

23 MR. EFFMAN: You don't go to the library.

24 CHIEF JUDGE LIPPMAN: - - - you can't
25 discipline them.

1 MR. EFFMAN: Right. It's not - - -

2 JUDGE ABDUS-SALAAM: Counsel - - -

3 JUDGE STEIN: Well, isn't that discipline?
4 You don't get to go to the library?

5 MR. EFFMAN: No, because like in every
6 facility, there's a process for acquiring privileges
7 within that facility. If you want to go to Medical
8 Call Out, you have to put in a tab.

9 JUDGE STEIN: But don't they sometimes
10 discipline by removing privileges? Isn't that - - -
11 doesn't that happen all the time?

12 MR. EFFMAN: You could - - -

13 JUDGE STEIN: I mean, it's not always that
14 you go to SHU?

15 MR. EFFMAN: Well, the - - - the difference
16 is that if you are subjected to a Tier hearing - - -
17 a disciplinary hearing - - - you have a liberty
18 interest at stake.

19 JUDGE STEIN: So you're saying that they
20 should be able to with - - - withhold or withdraw
21 privileges without a disciplinary hearing.

22 MR. EFFMAN: Correct, just like if - - - if
23 you have a dress code, and - - - and you have to wear
24 a jacket and tie to a restaurant. The answer is
25 either you give that person the jacket to go in - - -

1 JUDGE RIVERA: Coun - - - counselor, maybe
2 - - - maybe it is a great idea. Maybe they'll take
3 it under consideration, but is it the role of this
4 court to micromanage the facilities - - -

5 MR. EFFMAN: No.

6 JUDGE RIVERA: - - - and tell them how to
7 discipline or not discipline, what to include, what
8 not to include, how to notify and not notify - - -

9 MR. EFFMAN: No.

10 JUDGE RIVERA: - - - beyond, of course, the
11 Constitutional issues of notice.

12 MR. EFFMAN: It is the duty of this court
13 to enforce the Constitution that says if you're going
14 to take a disciplinary action which involves a
15 liberty interest, then you must follow the
16 Constitution and put - - - give notice.

17 JUDGE ABDUS-SALAAM: Counselor, are you
18 making that ar - - -

19 CHIEF JUDGE LIPPMAN: Even - - -

20 JUDGE ABDUS-SALAAM: I'm sorry.

21 CHIEF JUDGE LIPPMAN: Go ahead, sure.
22 Judge Abdus-Salaam.

23 JUDGE ABDUS-SALAAM: You're making that
24 argument now, but did you make that argument below
25 that this was of Con - - -

1 MR. EFFMAN: Well, it - - -

2 JUDGE ABDUS-SALAAM: - - - this was of
3 Constitutional magnitude? I know we've been talking
4 about the merits, but I think we've kind of skipped a
5 step.

6 MR. EFFMAN: I was hoping that you wouldn't
7 bring up exhaustion.

8 JUDGE ABDUS-SALAAM: I know you - - - I
9 know you would, counsel. I know you, but - - -

10 MR. EFFMAN: Well, as you know, this was a
11 pro se petition. So we got into it after - - - and
12 it raised substantial evidence, so it automatically
13 got transferred to the Appellate Division under
14 7804(g) of Article 78. And I looked at it, and I
15 keep reliving my past and I said, well, I won this
16 case in 1985; can I do it again?

17 So, yes, we raise it for the first time on
18 the transfer brief. But then the issue becomes - - -
19 and - - - and it's the Watergate kind of watershed
20 case in dealing with, is it futile to raise it and
21 exhaust the administrative remedies? Or, more
22 importantly in this case, could the agency have
23 altered anything if it did get raised in an
24 administrative appeal from a disciplinary hearing?
25 And what would have happened?

1 Administrative appeals are done all the
2 time, done by inmates, done pro se, and the - - - the
3 tape is reviewed by somebody at DOCCS, and they
4 affirm or modify, whatever. But the issue of the
5 Constitutionality of enforcing it has never - - -

6 CHIEF JUDGE LIPPMAN: Counselor, let me ask
7 you one more question because you go - - - before you
8 go to - - - to your adversary and then rebuttal.

9 MR. EFFMAN: Oh, my. I didn't - - - I
10 don't see red lights; it's bifocals.

11 CHIEF JUDGE LIPPMAN: Okay. When you talk
12 about liberty interest, I get it that if it's a
13 liberty interest, it affects every inmate; I get it.
14 Does it matter whether it affects 10, 20, 1,000,
15 2,000 or every inmate in terms of - - -

16 MR. EFFMAN: Well, distinguishing this, as
17 you indicated, like from Jones itself - - -

18 CHIEF JUDGE LIPPMAN: Yeah.

19 MR. EFFMAN: - - - the point is that we
20 have such a fluid corrections system in this state
21 that it does affect every inmate who is subject to
22 corrections in New York, because you don't know when
23 you're going to end up in a facility that - - -

24 CHIEF JUDGE LIPPMAN: You mean, your point
25 is - - - is - - - is beyond the stamps, you think it

1 affects inmate, or the stamps issue itself could
2 affect every inmate?

3 MR. EFFMAN: No, I - - - well beyond the
4 stamps. If - - - if you put - - -

5 CHIEF JUDGE LIPPMAN: You mean the concept
6 of what's going on?

7 MR. EFFMAN: Yeah, the - - - the concept of
8 disciplining someone under the Tier system requires
9 that if you're going to discipline them, that the
10 rule they're accused of - - -

11 JUDGE FAHEY: Okay.

12 MR. EFFMAN: - - - violating should be
13 filed - - -

14 JUDGE FAHEY: So - - -

15 MR. EFFMAN: - - - so you can find it.

16 JUDGE FAHEY: So Mr. Effman, so - - - so
17 then you're saying that every handbook for every
18 prison has to be filed pursuant to the State
19 Constitution because of the fluidity of the structure
20 itself, inmates are moved around so much?

21 MR. EFFMAN: Only, Judge Fahey, in a
22 situation where they intend to enforce it through the
23 disciplinary system. If they enforce these so-called
24 guidelines or orientation programs through, well, you
25 didn't do it right, so for today you can't go to the

1 law library, try again tomorrow - - -

2 JUDGE PIGOTT: Yeah, but what do you do - -
3 - I don't know how many - - - how many prisons do we
4 got? Do you ever count them?

5 MR. EFFMAN: Fifty, I would think.

6 JUDGE PIGOTT: So fifty handbooks end up in
7 the Secretary of State's desk and he - - - and he or
8 she approves them all. Is - - - does that solve the
9 Constitutional issue now, because we say they've all
10 been approved, they've all, you know, been - - - been
11 subject to it?

12 MR. EFFMAN: Well - - -

13 JUDGE PIGOTT: No one's reading them
14 anyway.

15 MR. EFFMAN: Again, I'm not totally
16 advocating for that. I think it - - - it would, of
17 course - - - if it's filed with the Secretary of
18 State or it's filed in 7 NYCRR and if you're an
19 inmate or a family member you can look up 7 NY - - -
20 you know - - - CRR on the line and see what the rules
21 are.

22 JUDGE STEIN: But here, didn't - - - didn't
23 he admit or acknowledge that he received a copy of
24 these guidelines?

25 MR. EFFMAN: Yeah, you know, Anthony

1 Bottoms was in Attica back in the '70s and he
2 probably received one then - - - then too, but he
3 also made it - - - it's obviously - - - it's clear
4 from this record, he had no recollection of that
5 rule. He was totally unaware of it. And it's found
6 buried in eighty-nine pages of - - -

7 JUDGE STEIN: But - - - but if - - - but if
8 you're saying that somehow the filing it with the
9 Secretary of State amongst however many rules there
10 are filed with the Secretary of State, he's - - -
11 that he's going to be more likely to - - - to notice
12 it?

13 MR. EFFMAN: Well, number one, he would be
14 able to find it. Number two, I think - - -

15 JUDGE STEIN: Well, if he has the handbook,
16 he could find it too.

17 MR. EFFMAN: Well, the handbook says, this
18 is your orientation handbook. It doesn't say you can
19 be punished for violating the orientation procedures.

20 CHIEF JUDGE LIPPMAN: Okay, counsel.
21 Thanks. You're going to have your rebuttal. Let's
22 hear from your adversary.

23 MS. LEVINE: May it please the court, while
24 petitioner's Constitutional claim is unpreserved,
25 it's also meritless.

1 CHIEF JUDGE LIPPMAN: Well, tell us, what -
2 - - what - - - what is this - - - this particular
3 provision that you're disciplining this inmate on,
4 what is it? Is it a rule, it is a management rule,
5 is it - - - what is it?

6 MS. LEVINE: Well, he was charged under a
7 valid rule that says that he - - -

8 CHIEF JUDGE LIPPMAN: "Rule" in what
9 context?

10 MS. LEVINE: He - - - he was charged under
11 a valid regulation that says that he can't have
12 authorized items in an unauthorized place.

13 CHIEF JUDGE LIPPMAN: That's one that was
14 filed with the Secretary of State?

15 MS. LEVINE: That's one that was filed with
16 the Secretary of State, that's - - -

17 CHIEF JUDGE LIPPMAN: So is there a rule
18 about stamps?

19 MS. LEVINE: There's not a rule about
20 stamps filed - - -

21 CHIEF JUDGE LIPPMAN: What is there about
22 stamps?

23 MS. LEVINE: There's provisions in the
24 Attica handbook that are tailored to Attica's
25 security concerns that prohibit loose stamps in the

1 law library.

2 JUDGE FAHEY: So why - - - why would in
3 Attica, loose stamps be prohibited in the law
4 library? Wouldn't they be prohibited in any library
5 in any prison in New York, because they're - - -
6 they're considered currency, right?

7 MS. LEVINE: Right, exactly. They're - - -
8 they're frequently used as a currency.

9 JUDGE FAHEY: So isn't it a rule that
10 inherently would apply to all the prisons in New
11 York?

12 MS. LEVINE: No, because there's fifty-
13 eight prisons in New York. Some are max; some are
14 minimums; some are - - -

15 JUDGE FAHEY: But it would seem that the
16 principle that stamps are currency and therefore
17 that's our basis for denying them, that principle
18 would apply if you're in Wyoming or Attica or
19 wherever.

20 MS. LEVINE: That is true, Your Honor, but
21 some facilities have work-release programs, for
22 example. And those inmates have access to - - - to
23 real currency - - - to real money, so for them,
24 stamps aren't nearly as - - - as attractive as a
25 currency.

1 JUDGE ABDUS-SALAAM: Counsel, do we need to
2 decide whether this particular rule has to apply to
3 all of the prisons in New York, if - - - if it is
4 indeed a local rule and each prison has the
5 opportunity or authority to issue a local rule? Do
6 we need to decide the broader issue on whether this
7 is a local rule or not?

8 MS. LEVINE: No, because even - - - even if
9 every facility did have this rule - - - which it
10 doesn't, as we stated in our brief - - - it would
11 still be a guidance or interpretive statement. It
12 merely provides the - - - the guidelines or
13 implementation of an already-filed parent rule.

14 JUDGE PIGOTT: If we got down to the merits
15 of it, two of his claims are, number one, I wasn't in
16 the library - - -

17 MS. LEVINE: Right.

18 JUDGE PIGOTT: - - - and number two, I was
19 not in an unauthorized area - - - area, I think. It
20 seemed to me those were pretty good arguments. Do
21 you have a response to that?

22 MS. LEVINE: Yes, attempts are - - - are
23 punished to the same degree. There's a - - - there's
24 a reg on that. It's 7 NYCRR 270.3(b).

25 CHIEF JUDGE LIPPMAN: That's filed with the

1 Secretary of State?

2 MS. LEVINE: Yes, that's filed with the
3 Secretary of State.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MS. LEVINE: And that - - - that reg says
6 attempts are punishable to the same extent as - - -
7 as completed acts.

8 JUDGE PIGOTT: Yeah, in mentioning
9 attempts, I thought even in the transcript, the - - -
10 the hearing officer kept saying, you know, you
11 overlooked this, it was an accident, it was - - - it
12 - - - it almost got to the point where you thought he
13 was going to say, look, I'm going to dismiss this;
14 happy trails. And then of course, he says, I find
15 you guilty and I'm giving you seven days keeplock.

16 MS. LEVINE: Right.

17 JUDGE PIGOTT: Can you explain how that
18 might have been?

19 MS. LEVINE: Yeah, what he's - - - what - - -
20 - right. So he uses the word "inadvertent", and he
21 says "honest mistake, wouldn't you say", but what
22 he's - - - what the hearing officer is referring to
23 there is that he's crediting petitioner's claim that
24 he didn't know that there was a rule, that he lacked
25 actual notice. But what we actually know is that he

1 had constructive notice. He - - - he got the
2 handbook. He had access to it. He was aware of it.

3 CHIEF JUDGE LIPPMAN: Yeah, but you don't
4 dispute the fact that this guy probably had no clue
5 that there was - - - that there was a rule about
6 this?

7 MS. LEVINE: I - - -

8 CHIEF JUDGE LIPPMAN: Or do you?

9 MS. LEVINE: Well, I - - - I don't dispute
10 that the hearing officer credited - - -

11 CHIEF JUDGE LIPPMAN: Right.

12 MS. LEVINE: - - - his - - - his testimony
13 - - -

14 CHIEF JUDGE LIPPMAN: Right.

15 MS. LEVINE: - - - on that point. But as I
16 said, what we know now is that all inmates get the
17 handbook when they come in. They get superior notice
18 than they would otherwise get if it was filed in the
19 NYCRR - - -

20 JUDGE PIGOTT: But it makes sense, though,
21 that Mr. Effman is very upset that you call it an
22 orientation book as opposed to saying a book of rules
23 and regulations that can put you in keeplock, for
24 example.

25 MS. LEVINE: Yeah, they - - - they have a

1 lot of names, actually. If you - - - if you talk to
2 someone at the facility, they call them policies and
3 procedures. Sometimes they're referred to as the
4 inmate orientation manual.

5 CHIEF JUDGE LIPPMAN: Yeah, yeah, but the -
6 - - but the point is, do you know you're going to be
7 disciplined for viola - - - violated them?

8 MS. LEVINE: Oh, yes, you do, because there
9 - - - there's regs on - - - on point. There's
10 regulations on point. Inmates already know because
11 there's regulations on point, that - - -

12 CHIEF JUDGE LIPPMAN: What regulations on
13 point are you talking about?

14 MS. LEVINE: Sure. There's the regulation
15 - - - the one that comes right before - - - I'm
16 sorry, right after this regulation that says that
17 inmates can't have anything unless it's already been
18 authorized. And then the regulation that comes after
19 this says, inmates can't bring anything authorized to
20 some - - -

21 CHIEF JUDGE LIPPMAN: Does it then say, and
22 if you do, you will be subject to certain penalties?

23 MS. LEVINE: Well, it's in the inmates'
24 standards of conduct, so - - - so they understand
25 that yes, there - - - there are penalties.

1 CHIEF JUDGE LIPPMAN: But if - - - if the
2 rule is on page eighty-nine, you know, and it says
3 you can't take stamps into the library or whatever,
4 does it say, if you take stamps into the library - -
5 - you know, much like the - - - the penal law says
6 this is the felony and therefore you look up felony
7 and find out what you're going to do. Does it say in
8 there that this is a violation of the rule subject to
9 discipline, and then you look up discipline and it
10 says you can get up to thirty days for carrying
11 stamps into the library?

12 MS. LEVINE: It - - - it doesn't
13 explicitly, Your Honor, but inmates, as I said, know
14 that they are - - - they can't have anything unless
15 it's been authorized, and they know that they can't
16 just bring it anywhere unless they've been authorized
17 to do so. You know, they're allowed to have hot
18 pots, for example. But they understand that they
19 can't just bring them out to the yard. They
20 understand that they can only use them in - - - in
21 certain areas.

22 CHIEF JUDGE LIPPMAN: Why wouldn't you just
23 say, so don't come into the library, as your
24 adversary said, instead of just a guy had a couple of
25 stamps, you bring him up on formal discipline? Why

1 wouldn't it in a practical sense - - - why wouldn't
2 they have just said, well, all right, we have them;
3 you don't - - - you can't go to the library for
4 whatever?

5 MS. LEVINE: You mean, why did the hearing
6 officer - - -

7 CHIEF JUDGE LIPPMAN: Yeah, why wasn't it -
8 - - rather than a formal disciplinary thing, why
9 wasn't it more handled in a - - -

10 MS. LEVINE: Well, because - - -

11 CHIEF JUDGE LIPPMAN: - - - low - - -
12 lower-key way?

13 MS. LEVINE: Well, I - - - I think it was
14 handled in a lower-key way, because he received seven
15 days of time-served keeplock.

16 CHIEF JUDGE LIPPMAN: No, but that's the -
17 - - the punishment. But he had a - - - a formal
18 disciplinary - - -

19 MS. LEVINE: Because stamps - - -

20 CHIEF JUDGE LIPPMAN: - - - process.

21 MS. LEVINE: Because stamps are taken very
22 seriously in a - - - in a maximum security prison,
23 Your Honor. They're seen as - - -

24 CHIEF JUDGE LIPPMAN: So you wouldn't just
25 do it by some lower level slapping of the hand?

1 MS. LEVINE: Well, I - - - I think in
2 prison, keep - - - keeplock is sometimes considered
3 less than SHU, so you know, it went - - - it went to
4 the hearing officer's determination of the penalty as
5 opposed to his determination of guilt.

6 JUDGE RIVERA: Did the - - - let me ask it
7 this way. Did the - - - did the DOCCS officer have
8 discretion not to issue the report and to take the
9 stamps or - - - or tell him just you can't go into
10 the library with that? Did he have the discretion to
11 do that?

12 MS. LEVINE: To not write him up?

13 JUDGE RIVERA: Correct.

14 MS. LEVINE: Yeah, I think there's always
15 that - - - that discretion, Your Honor. COs get to -
16 - - get to apply the rules, yes, yes.

17 But these rules are - - - are very
18 important to the facilities because - - -

19 JUDGE RIVERA: The - - - the stamps were
20 returned to him?

21 MS. LEVINE: Yes, the stamps were
22 ultimately returned to him, because - - - because
23 he's authorized to have them. He's just not
24 authorized to have them in the space that he brought
25 them to. And all - - -

1 JUDGE RIVERA: But he didn't get in the
2 space?

3 MS. LEVINE: He never quite - - -

4 JUDGE RIVERA: On the merits, he didn't
5 really get in the space.

6 MS. LEVINE: Right, he never quite made it
7 into the space, right. He never quite made it into
8 the space, but - - - but for the CO's - - -

9 JUDGE RIVERA: Because it's an attempt.

10 MS. LEVINE: Right, and - - - and because
11 he almost made it there. He was - - -

12 JUDGE RIVERA: Stopped.

13 MS. LEVINE: - - - intercepted in time. He
14 was frisked in time, right, before he made it into
15 the library, yes, exactly.

16 But as I said before, these - - - these
17 rules are - - - are very important to DOCCS, because
18 they provide flexibility for these agencies.

19 JUDGE RIVERA: We have - - - so let me go
20 to the point I was trying to - - -

21 MS. LEVINE: Sure.

22 MS. LEVINE: - - - have your adversary
23 respond to. So since the rule says you can't have
24 anything you're not authorized to have, it is - - -
25 is the only way for an inmate to know what those

1 things are to look not at what has been filed with
2 the Secretary of State, but to turn to the
3 orientation book - - - I don't know - - - handbook,
4 whatever, I don't know what else you've got going on
5 there, of their respective facility? That's the only
6 way they'll know the - - - the particular items?

7 MS. LEVINE: The - - - the particulars of
8 those rules, yes, Your Honor. And the reason for
9 that - - - right - - - so he knows - - - right. As I
10 said, he knows he - - - he's not authorized to have
11 everything, and he knows he's not authorized to bring
12 everything everywhere.

13 JUDGE RIVERA: Right.

14 MS. LEVINE: And - - - and to find out the
15 specifics, he looks to the directive and the specific
16 provisions of, you know - - - an inmate looks to a
17 directive and the specifics of his handbook.

18 JUDGE RIVERA: Which he has been given in
19 advance - - -

20 MS. LEVINE: Which he has - - -

21 JUDGE RIVERA: - - - when - - - when he
22 enters the facility.

23 MS. LEVINE: Exactly. He can - - -

24 JUDGE RIVERA: He gets to keep those items,
25 yes?

1 MS. LEVINE: Exactly, he gets - - -

2 JUDGE RIVERA: He always has them

3 available?

4 MS. LEVINE: Right, and it's - - - I mean,

5 I - - - I - - - I copied a - - - a page for Your

6 Honors, but it's about the size of my palm.

7 JUDGE RIVERA: Yeah, right.

8 MS. LEVINE: I mean, if he so chooses, he

9 could carry it around the facility and - - -

10 JUDGE RIVERA: He's not prohibited from

11 carrying it around?

12 MS. LEVINE: Not that I'm aware of, Your

13 Honor.

14 JUDGE RIVERA: Including in the li - - -

15 just checking - - -

16 MS. LEVINE: It's a fair question.

17 JUDGE RIVERA: - - - including in the

18 library?

19 MS. LEVINE: I believe he's allowed to

20 bring it into the library.

21 Right, so - - - so - - - but as - - - as

22 you're sort of alluding to, there's - - - there's no

23 discernible benefit here to filing it with the

24 Secretary of State and, you know, going through the

25 complex process under SAPA, because he gets superior

1 notice.

2 JUDGE RIVERA: Well, it may not be in his
3 case. I understand your point, but - - - but there
4 is the public access to these kinds of rules, which
5 is - - - I understand your point.

6 MS. LEVINE: That's true, and that's - - -
7 and that's - - - and that's no small point, Your
8 Honor. But the public - - - this rule doesn't impact
9 the public. It doesn't have a - - - this court in
10 Cubas v. Martinez, the last time the - - - the court
11 addressed this very issue, said that we have to look
12 to the direct public impact. And the public simply
13 does not have an interest in what occurs in one
14 facility in what - - -

15 JUDGE RIVERA: Well, the public's right to
16 know what's going on in - - - in facilities that
17 incarcerate and human beings whose liberty is - - -
18 who don't have liberty - - - who don't have freedom
19 to leave?

20 MS. LEVINE: Yeah - - - yes, they - - -
21 they do. They certainly do. But their interest and
22 their right to know diminishes based on the
23 specificity of - - - of the rule or the provision at
24 issue. And here we have a rule that is specific to a
25 facility. It's specific to an area within the

1 facility and it's specific to an item within that
2 area.

3 So for those reasons, the - - - the
4 public's interest in notice is - - - is not advanced
5 by filing with the Secretary of State.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.
7 Thank you, counselor.

8 MS. LEVINE: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MR. EFFMAN: First of all, Your Honors,
11 there is a specific rule and it is filed. And it's
12 found - - - it's on page 65 of my appendix, where
13 it's quoted, and it's in 7 NYCRR, and it says
14 "Inmates shall not be in possession of stamps in
15 excess of twenty dollars." Period. That's the rule.
16 If you look it up, that's what it says.

17 Secondly, it is a liberty interest. It's -
18 - - the penalty is - - - as - - -

19 CHIEF JUDGE LIPPMAN: So you mean, he would
20 say to himself, oh, I don't - - - I don't have twenty
21 dollars, so this is - - -

22 MR. EFFMAN: Right, I - - - I have fifty
23 cents here.

24 JUDGE PIGOTT: So you're arguing
25 sufficiency of the evidence at the hearing. I mean,

1 we're down to that, not - - -

2 MR. EFFMAN: Well, and also the notice
3 aspect of it, because the question was, is there - -
4 - you asked my opponent, is there a specific rule on
5 stamps. The answer is yes, there is a statewide rule
6 that is filed and is available to the public and to
7 inmates and - - - who have the regulations, the
8 statewide inmate - - -

9 JUDGE PIGOTT: But within that, as - - - as
10 Ms. Levine was saying, you get more specific and I
11 thought it odd, although I'm sure there's a reason
12 for it, that you can take those stamps into the
13 library if they're attached to an envelope. I would
14 think if you could barter them, you could barter them
15 that way too. But I don't know, because I don't - -
16 - I've never lived in a prison.

17 MR. EFFMAN: I - - - I presume it's - - -
18 if the envelope is blank - - -

19 JUDGE PIGOTT: Yeah.

20 MR. EFFMAN: - - - it has more value than
21 if the address is all filled out. But agreed that
22 the - - - the rule might be not logical, but that's
23 really not the issue, because there's lots of - - -

24 JUDGE PIGOTT: No, but it - - - it makes
25 you pause as to how we're supposed to decide

1 something. I mean, how are we to know the - - - the
2 nuances of some of these rules?

3 MR. EFFMAN: Well, we don't, and - - - and
4 there's no way to know it, unless you really get
5 involve with Commissioner Annucci and - - - and find
6 out why the rules are different in each facility.
7 And I can't believe the libraries in Wende, Clinton
8 and Auburn are so much different from that in Attica.

9 JUDGE RIVERA: Would you have had the
10 opportunity if he had exhausted his administrative
11 remedies?

12 MR. EFFMAN: Well, if you exhaust - - -

13 JUDGE RIVERA: And perhaps have a fuller
14 record on this?

15 MR. EFFMAN: Un - - - there would be no
16 better record than you have before you because of the
17 process used in inmate appeals on disciplinary
18 matters.

19 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
20 let me ask you one final question. Let's come back
21 to what you started with. Why is this important and
22 what do you want us to do?

23 MR. EFFMAN: It's important because our
24 corrections system is at the very heart of where we
25 are in society today on how to deal with people who

1 are incarcerated and what is fair and what is due
2 process. And if you can get a Tier hearing which
3 results, not just in a seven-days' keeplock, this is
4 - - - as we used to say, this is part of your
5 permanent file, and when you go to the parole board,
6 they see you got a Tier III hearing. This guy's been
7 to the parole board, you know, maybe he's on the
8 fourth or fifth shot at - - - at parole, and the - -
9 - and the last time he went, you had a Tier hearing.
10 It doesn't matter what the discipline - - - that's a
11 major factor.

12 So it's a liberty interest involving
13 fairness to people who are incarcerated, and I
14 realize that this is not a particular popular subject
15 today, but the reality is, we have to look at due
16 process as it affects those of us who most need it.
17 And in this case, it would be our state inmates.

18 CHIEF JUDGE LIPPMAN: Okay, thanks. I'm
19 sorry, is there any other - - -

20 MR. EFFMAN: Thank you.

21 CHIEF JUDGE LIPPMAN: No? Thank you.
22 Thank you both, appreciate it.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Bottom v. Annucci, No. 135, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 18, 2015