



Department of Public Safety and Correctional Services

Office of the Secretary

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STATE OF MARYLAND

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June 27, 2006

DIVISION OF CORRECTION

DIVISION OF PAROLE AND
PROBATION

DIVISION OF PRETRIAL
DETENTION AND SERVICES

PATUXENT INSTITUTION

MARYLAND COMMISSION
ON CORRECTIONAL
STANDARDS

CORRECTIONAL TRAINING
COMMISSION

POLICE TRAINING
COMMISSION

MARYLAND PAROLE
COMMISSION

CRIMINAL INJURIES
COMPENSATION BOARD

EMERGENCY NUMBER
SYSTEMS BOARD

SUNDRY CLAIMS BOARD

INMATE GRIEVANCE OFFICE

Mr. Vernon Evans #172357
Maryland Correctional Adjustment Center
401 East Madison Street
Baltimore, Maryland 21202

RE: IGO Case No. 20060555

Dear Mr. Evans:

Enclosed is a copy of the Order resulting from the hearing of your complaint by the Office of Administrative Hearings.

Sincerely,

Mary Ann Saar
Secretary

Enclosure

c: Commissioner Frank C. Sizer, Jr.
Inmate Grievance Office
Warden Lehrman Dotson
Assistant Attorney General Scott Oakley
Stephen Hut, Jr., Esq., WilmerHale
Anne Harden Tindall, Esq., WilmerHale
Anne H. Geraghty, Esq., WilmerHale

VERNON EVANS, # 172357

GRIEVANT

v.

MARYLAND DIVISION

OF CORRECTION

* BEFORE DENISE OAKES SHAFFER,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH NO.: DPSC-IGO-002-06-19279

* IGO NO.: 20060555

* * * * *

PROPOSED RULING ON CROSS MOTIONS FOR SUMMARY DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
DISCUSSION
CONCLUSIONS OF LAW
PROPOSED ORDER

STATEMENT OF THE CASE

On March 14, 2006, Vernon Evans, #172357, filed a grievance with the Infrate Grievance Office ("IGO"). The grievance is an appeal of a denial of a Request for Administrative Remedy filed on December 9, 2005. The Warden at Maryland Correctional Adjustment Center ("MCAC") denied the Request on January 3, 2006. Mr. Evans appealed to the Commissioner of Correction. The Assistant Commissioner of Correction denied the appeal on February 27, 2006.

After the IGO denied a request by the Division of Correction ("DOC") to stay the hearing, the grievance was forwarded to the Office of Administrative Hearings ("OAH"). On April 7, 2006, the DOC filed a Motion for Summary Decision. Mr. Evans responded to that Motion and filed his own Motion for Summary Decision on April 24, 2006. The DOC responded on May 9, 2006. Scott Oakley, Assistant Attorney General, represented the DOC. A.

Stephen Hut, Jr., Anne Harden Tindall and Anne H. Geraghty of the law firm of WilmerHale represented Mr. Evans. I conducted a hearing on the Motions on May 15, 2006 at the OAH in Hunt Valley, Maryland. Md. Code Ann., Corr. Serv. § 10-207(c) (1999).

The contested case provisions of the Administrative Procedure Act, the IGO's general regulations and the OAH's Rules of Procedure govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2005); Code of Maryland Regulations ("COMAR") 12.07.01.08 and .09; and COMAR 28.02.01.

ISSUES

The Motions for Summary Decision raise these issues:

1. Do the procedures by which the DOC intends to execute Mr. Evans violate section 3-905 of the Correctional Services Article, the Maryland Declaration of Rights and the U.S. Constitution?
2. Do the execution protocols constitute regulations that must be adopted in compliance with the Administrative Procedure Act ("APA")?
3. Will the execution protocols, as applied to Mr. Evans, result in a cruel and unusual punishment?

SUMMARY OF THE EVIDENCE

Exhibits

An exhibit list is attached to this decision.

DISCUSSION

In a grievance concerning an institutional administrative decision, the grievant bears the burden of proving, by a preponderance of the evidence, that the action taken was arbitrary and

capricious, or in violation of the law. COMAR 12.07.01.09A; COMAR 12.07.01.09C(1).

COMAR 28.02.01.16D sets forth the OAH procedural rule on summary decision:

D. Motion for Summary Decision.

(1) A party may move for summary decision on any appropriate issue in the case.

(2) A judge may grant a proposed or final summary decision if the judge finds that:

(a) There is no genuine issue of material fact; and

(b) A party is entitled to prevail as a matter of law.

This regulation is substantially similar to both Maryland Rule of Procedure ("Md. Rule") 2-501 and Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

I find that there are no material facts in dispute with regard to the question of whether the execution protocols are regulations required to be adopted in compliance with the APA. Because I find that portions of the execution protocols are regulations, Mr. Evans is entitled to prevail as a matter of law on this point.¹ I find that there are no material facts in dispute with regard to the question of whether the execution protocols violate section 3-905 of the Correctional Services Article, the U.S. Constitution or the Maryland Declaration of Rights. Because I find that the answer to that question is compelled by the Court of Appeals decision in Oken v. State, 81 Md. 580, 851 A.2d 538 (2004), the DOC is entitled to prevail as a matter of law on this point. I find that there are material facts in dispute concerning whether the state of Mr. Evans' veins will render the execution protocols, as applied to him, violative of the Eighth Amendment prohibition on cruel and unusual punishment. Therefore, an evidentiary hearing would be required on this point.

¹ Ordinarily a decision on this question would end further inquiry. Because this is a proposed decision, however, and for reasons of efficiency, I will address all of the arguments raised by the parties.

Portions of the execution protocols are regulations that have not been adopted as required by Maryland's APA and are therefore ineffective.

Mr. Evans argues that the execution protocols found in the Execution Operations Manual (DOC Ex. D) and as described by James V. Peguese, the Execution Commander, in two affidavits (DOC Ex. A & K) are regulations that were not adopted in compliance with the APA. The DOC argues that the protocols are not regulations because (1) they do not have general application; (2) they concern only internal management of the DOC and do not directly affect the rights of the public; (3) there is no specific statutory direction to promulgate regulations; and (4) portions of the protocols have been determined to be confidential because they implicate security concerns.

The definition of regulation is found in section 10-101 (g) (1) of the State Government Article:

"(1) "Regulation" means a statement or an amendment or repeal of a statement that:

(i) has general application;

(ii) has future effect;

(iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;
2. govern organization of the unit;
3. govern the procedure of the unit; or
4. govern practice before the unit; and

(iv) is in any form, including:

1. a guideline;
2. a rule;
3. a standard;
4. a statement of interpretation; or
5. a statement of policy.

(2) "Regulation" does not include:

(i) a statement that:

1. concerns only internal management of the unit; and
2. does not affect directly the rights of the public or the procedures available to the public;

(ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or

(iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.

(3) "Regulation," as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation.

The DOC points to specific steps in the execution process and argues that each step is not significant enough to warrant codification in a regulation. The procedures governing the execution of an inmate are not mere "routine management guidelines." Rather, they detail the minute steps and delicate procedures that a successful execution requires. While many of the individual steps are small, none are insignificant, and, as the DOC argued, executions in Maryland are rare, rendering any execution something other than routine. The culmination of these discreet steps is an execution that satisfies the high standards stemming from the U.S. Constitution's and the Maryland Declaration of Rights' mandate for a humane death. Thus, it is misleading to look at each step in the process individually and to argue that each seemingly inconspicuous step does not rise to level of a guideline, rule or standard. Instead, each step is carefully and precisely linked to the surrounding steps requiring that the execution protocols be considered as a whole when assessing whether compliance with the APA is required.

When the steps in the execution protocols are considered together, it is clear that they embody a guideline or rule that has general application and future effect. The DOC argued that the protocols do not have general application because they apply only to those few inmates under

a sentence of death. This argument is unpersuasive. The protocols apply to all inmates under a sentence of death. If there were hundreds under that sentence, the same protocols would apply. This is not the case where a rule applies randomly to a single person or entity as in Dep't of Health and Mental Hygiene v. Chimes, 343 Md. 36, 681 A.2d 484 (1996). Rather these procedures apply to every similarly-situated inmate. The fact that the relative number of inmates under a sentence of death is small is irrelevant. See Delmarva v. Power & Light Co., 370 Md. 1, 26, 803 A.2d 460, 474 (2002) (rules dealing with narrow subject matter are nonetheless regulations); Dep't of Publ. Safety and Corr. Servs. v. Demby, 390 Md. 580, 606-607, 890 A.2d 310, 325-326 (2006) (rule is regulation where it "substantively affected the rights of a specific group of inmates."). It is also clear, and the DOC does not dispute, that the protocols have future effect. In fact, the DOC represents that the protocols will be used in Mr. Evans' case as well as in any executions that follow. Finally, the DOC has adopted the protocols to carry out the Death Penalty Statute, a law it is responsible for administering. Thus, the protocols clearly meet the definition of regulation found in section 10-101 (g)(1) of the State Government Article.

Similarly, the protocols are not excepted from the definition by subsection (2) of section 10-101(g). As previously discussed, the protocols, when viewed as a coherent whole, address far more than the internal management of the DOC. They address how the DOC will accomplish the awesome task of carrying out a sentence of death. The DOC is charged with accomplishing this task without offending the Eighth Amendment of the U.S. Constitution or Article 25 of the Maryland Declaration of Rights. Ensuring that the State complies with the Constitution is an interest in which all Maryland citizens have a stake, not just those under a sentence of death.

The recent Court of Appeals decision addressing the issue of whether the DOC was required to promulgate regulations governing the discipline of inmates in the DOC system

supports this analysis. Massey v. Secretary, Department of Public Safety and Correctional Services, 389 Md. 496, 886 A.2d 585 (2005). First, the Court reviewed the history of the directives governing disciplinary proceedings within the DOC. Originally, the DOC was sued in federal court and agreed to several federal court orders requiring certain procedures to ensure that the inmates subject to the rules were afforded their due process rights. See Bundy v. Cannon, 453 F.Supp. 856 (D. Md. 1978) and Bundy v. Cannon, 538 F.Supp. 410 (D. Md. 1982). The fundamental public right was an inmate's liberty interest protected by the Fourteenth Amendment. Massey, 389 Md. at 514, 886 A.2d at 595. The consent orders eventually expired and evolved into the directives which governed disciplinary proceedings prior to the Massey decision.² The Court concluded that because the directives "proceeded from and were designed to implement, a basic Federal due process requirement" there was "powerful evidence that they were not merely guidelines for routine, or even non-routine, internal management, subject to change at the whim of the Secretary or Commissioner." Massey, 389 Md. at 516, 886 A.2d at 597.

A similar situation exists here. The execution protocols developed by the DOC are designed to protect the public's and the inmate's Eighth Amendment interest in a humane death that is neither cruel nor unusual.³ The protocols should not be subject to change at the whim of the Secretary or the Commissioner. The protocols affect constitutionally-derived fundamental rights and do not merely order the transaction of the agency's business. Massey, 389 Md. at 518, 886 A.2d at 598.

² The DOC has since promulgated emergency regulations governing inmate disciplinary proceedings. COMAR 12.02.07 (33 Md. Reg. 7 (March 31, 2006)).

³ The Court of Appeals expressly acknowledged that the general public has a right to be concerned about humanitarian and civil rights issues. Massey, 389 Md. at 522, 886 A.2d at 600.

As was the case in Massey, references to cases from other jurisdictions are not persuasive. For example, the DOC relies upon Abdur'rahman v. Bredesen, 181 S.W.3d 292 (Tenn. 2005) for the principle that the lethal injection protocol is not a "rule" required to be adopted in compliance with Tennessee's Administrative Procedure Act. The Tennessee APA, however, contains a specific exemption for "statements concerning inmates of a correctional or detention facility." Tenn. Code Ann. §4-5-102(10)(G). The Maryland APA contains no such exemption. In fact, the DOC has proposed that this exemption be adopted as part of Maryland's APA and that legislation has not passed. See HB 432 (2006 Session).

Moreover, the fact that there is no specific statutory direction to promulgate regulations in the Death Penalty Procedure Statute is not controlling. There is a general direction in section 2-109 of the Correctional Services Article:

(c) Correctional facilities.- (1) Except as provided in paragraph (2) of this subsection, the Secretary shall adopt regulations to govern the policies and management of correctional facilities in the Division of Correction in accordance with Title 10, Subtitle 1 of the State Government Article. (2) Paragraph (1) of this subsection does not apply to a guideline pertaining to the routine internal management of correctional facilities in the Division of Correction.

Md. Code Ann., Corr. Serv. §2-109 (1999 & Supp. 2005). This directive applies to the Secretary in this context. There is no need for the General Assembly to repeat it each time it passes legislation concerning correctional facilities.

Finally, the DOC argues that some portions of the execution protocols are confidential because they implicate security issues immediately preceding an execution. I agree that some details, specifically how and where the inmate is moved in the days leading up to the execution, should not be the subject of regulation. As the redacted Execution Operations Manual and the

Affidavits of Mr. Peguese demonstrate, however, the majority of the procedures in the protocols are not confidential and should be codified in regulations.

As the protocols clearly meet the definition of regulation and are not excluded from the definition, it follows that the protocols should have been adopted in compliance with the APA. Because the protocols were not so adopted, they are legally ineffective.

The decision of the Court of Appeals in *Oken v. State*, 381 Md. 580, 851 A.2d 538 (2004) requires a rejection of Mr. Evans' claim that the execution protocols fail to comply with Section 3-905 of the Correctional Services Article.

Mr. Evans argues that the portions of the execution protocols found in the Execution Operations Manual (DOC Ex. D) and described in the Affidavit of James V. Peguese (DOC Ex. A), are invalid for the additional reason that they conflict with the language of the Death Penalty Procedure Statute, Md. Code Ann., Corr. Servs. §§ 3-901 - 09. The specific conflicts alleged are: (1) that the Statute requires the administration of (a) "a lethal quantity of an ultra short-acting barbiturate or other similar drugs" followed by (b) "a chemical paralytic agent" while the protocols require three drugs to be administered; (2) that the Statute requires "continuous intravenous administration of" these drugs while the protocols require administration of the drugs in separate bursts; and (3) that the Statute requires the execution to be performed by persons trained to administer the lethal injection while the protocols require the hiring of "trained" persons without defining the word "trained." Md. Code Ann. §§ 3-905(a) & 3-906(c)(1); (DOC Ex. D).

In *Oken v. State*, 81 Md. 580, 580-1, 851 A.2d 538, 538 (2004) the Court of Appeals held:

[T]he method of execution intended to be implemented by the Division of Correction does not violate the provision of Maryland

Code §3-905 of the Correctional Services Article or constitute a cruel and unusual punishment.

Judge Bell's dissent makes it clear that Mr. Oken raised the same arguments that Mr. Evans raises here. Specifically, Judge Bell argued that the method of execution conflicts with the statute based on the number of drugs used - three rather than two and on the method of their administration - in bursts rather than a continuous flow. Oken, 381 Md. at 581-2, 851 A.2d at 539 (Bell, C.J., dissenting). The Execution Operations Manual has not been revised since Mr. Oken's execution. According to the DOC, the same procedure used to execute Mr. Oken in June of 2004 will be used to execute Mr. Evans (DOC Ex. K, Affidavit of James Peguese).

Mr. Evans argued that the Oken decision is less persuasive because it was a short, *per curiam* opinion. He also argued that he has asked the Court of Appeals to reconsider the Oken decision in his case currently pending in the Court of Appeals. I am unpersuaded by Mr. Evans' arguments that I am not bound by the precedent in the Oken decision. Even if I agreed with Judge Bell, I am not free to disregard the majority opinion. Moreover, if the Court of Appeals does reverse its decision in Oken, and holds in Mr. Evans' case that the execution protocols and resulting method of execution is invalid, then that decision would render this decision moot. Consequently, I find that the DOC is entitled to prevail as a matter of law on this issue. I propose that the DOC's Motion for Summary Decision on the issue of whether the execution procedures conflict with the statute or constitute generally a cruel and unusual punishment be granted.

There is a dispute about a material fact, namely, whether Mr. Evans' veins can withstand the method of execution. Thus, an evidentiary hearing is required before the finder of fact can determine whether the method of execution, as applied to Mr. Evans, would constitute a cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution and Article 25 of the Maryland Declaration of Rights.

Mr. Evans has alleged that decades of heroin use has compromised his veins in such a way that intra-venous ("IV") access to his body cannot reliably be achieved through his arms. He argues that the three drug injections and the bursts used by the DOC to administer the drugs will not effectively deliver the drugs and that he will suffer an inhumane death as a result. The DOC argues that Mr. Evans' veins can withstand the method of execution it intends to employ.

Each party has supported its argument with affidavits from medical personnel who inspected Mr. Evans' veins. Dr. Thomas Scalia examined Mr. Evans' veins and concluded to a reasonable degree of medical certainty that Mr. Evans has "no usable veins in his upper right extremity" and no "usable veins in his lower extremity." (Evans' Ex. 5 at pp. 7-9). He stated that though it may be possible to establish an IV in Mr. Evans' left arm even though those veins are also compromised, the rapid nature of the administration of the drugs create a risk that the veins will "rupture and the drugs will be . . . only partly effective." (Evans' Ex. 5 at p. 8). Dr. Scalia suggested that a central line is the only reliable means of venous access for Mr. Evans. In Maryland, only a physician may insert a central line.

The DOC submitted the affidavits of a Certified Nurse Assistant and two Emergency Medical Technicians who also examined Mr. Evans. Each asserted that Mr. Evans' veins "seemed healthy enough, by sight and by touch, in our individual and collective opinions, to support an IV catheter and fluid administration." (DOC Exs. F, G & H at p. 2).

Clearly, there is a dispute about a material fact, namely, whether Mr. Evans' veins can withstand the method of execution proposed by the DOC. While many of the factors relevant to the issue of credibility, including relative qualifications and length of examination of Mr. Evans, can be determined based upon the affidavits, many other factors including demeanor and response to cross-examination, can only be determined after an evidentiary hearing. Thus, with

regard to whether the state of Mr. Evans' veins renders the execution protocols unconstitutional as applied to him, summary decision is not appropriate.

I propose that if the Secretary disagrees with and reverses the proposed decision on the APA issue, that the case be remanded to the OAH for an evidentiary hearing.

CONCLUSIONS OF LAW

Having considered the evidence and arguments presented, I conclude that Mr. Evans' Motion for Summary Decision on the issue of whether the execution protocols are regulations should be granted. I conclude that the DOC's Motion for Summary Decision on the issue of whether the execution protocols violate section 3-905 of the Correctional Services Article, the Maryland Declaration of Rights and the U.S. Constitution should be granted. Oken v. State, 81 Md. 580, 851 A.2d 538 (2004). I also conclude that Summary Decision is inappropriate on the issue of whether Mr. Evans' veins can withstand the method of execution.

PROPOSED ORDER

I PROPOSE that the Mr. Evans' Motion for Summary Decision be GRANTED in part. In the event that the Secretary affirms this decision no further order is needed.

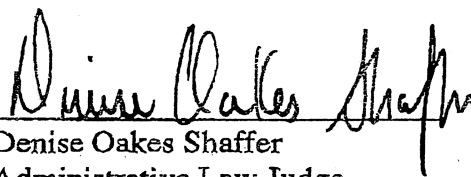
I PROPOSE that the DOC's Motion for Summary Decision be GRANTED in part.

I PROPOSE that, if the Secretary reverses the decision granting in part Mr. Evans' Motion for Summary Decision, that the case be REMANDED to the OAH for an evidentiary hearing.

June 2, 2006

Date

Dos/jc
#81522


Denise Oakes Shaffer
Administrative Law Judge

DEPARTMENT
OF
PUBLIC SAFETY AND CORRECTIONAL SERVICES

ORDER OF THE SECRETARY

In this matter, Vernon Evans, #172357, the Grievant, filed a grievance with the Inmate Grievance Office on March 14, 2006. The grievance was ultimately forwarded to the Office of Administrative Hearings (OAH), and motions for summary decision were filed both by the Division of Correction (DOC) and the Grievant. On May 15, 2006, a hearing was conducted on the motions at OAH.

The issues raised by the motions for summary decision are as follows:

Do the execution protocols established by DOC constitute regulations that must be adopted in compliance with the Maryland Administrative Procedure Act (APA), Md. Code Ann., State Government Article, Section 10-101?

Do the procedures by which the DOC intends to execute the Grievant violate Md. Code Ann., Correctional Services Article, Section 3-905, the Maryland Declaration of Rights and the U.S. Constitution?

Will the executive procedures, as applied to the Grievant, constitute cruel and unusual punishment in violation of the U.S. Constitution?

In a proposed ruling on the cross motions for summary decision, the Administrative Law Judge (ALJ) ruled as follows:

The execution protocols established by DOC are regulations which should have been adopted in compliance with the APA.

As the Court of Appeals held in Oken v. State, 81 Md. 580, 851 A.2d. 538 (2004), the execution procedures do not violate the Correctional Services Article, Section 3-925, the Maryland Declaration of Rights or the U.S. Constitution.

Inasmuch as there is a dispute about the material fact; i.e., whether the Grievant's veins can withstand Maryland's method of execution, there must be an evidentiary hearing to determine whether an execution of the Grievant would amount to cruel and unusual punishment.

By way of background, it is important to note that the Grievant currently has cases pending in both state and federal court. Both the first and second issues raised by the Grievant were argued before the Court of Appeals in May 2006 and are currently awaiting decisions. The third issue is scheduled for trial in the United States District Court for the District of Maryland in September 2006. Therefore, it is likely that the decisions in these cases will be dispositive of the issues in this grievance.

I.

The DOC has prepared an Execution Operations Manual (EOM or Manual) which provides details such as what staff will be involved in the execution process, what steps will be taken to prepare for an execution starting two weeks prior to the execution, post-execution procedures, who shall be present in the command center, and the lethal injection checklist. At issue is whether this Manual amounts to a regulation under the definition of "regulation" in the Md. Code, State Government Article, Section 10-101(g).

The definition of "regulation" from the above-cited statute is as follows:

- (g) *Regulation.* -- (1) "Regulation" means a statement or an amendment or repeal of a statement that:
- (i) has general application;
 - (ii) has future effect;
 - (iii) is adopted by a unit to:
 1. detail or carry out a law that the unit administers;
 2. govern organization of the unit;
 3. govern the procedure of the unit; or
 4. govern practice before the unit; and
 - (iv) is in any form, including:
 1. a guideline;
 2. a rule;
 3. a standard;
 4. a statement of interpretation; or
 5. a statement of policy.
- (2) "Regulation" does not include:
- (i) a statement that:
 1. concerns only internal management of the unit; and
 2. does not affect directly the rights of the public or the procedures available to the public;
 - (ii) a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or
 - (iii) a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.
- (3) "Regulation", as used in §§ 10-110 and 10.111.1, means all or any portion of a regulation.

While there is certainly a widespread interest in Maryland and throughout the nation, regarding the death penalty, the actual procedures involved in the execution of an individual concern only a very limited number of persons. Thus is raised the question whether the EOM truly has general application.

As the Court of Appeals held in Dep't. of Health & Mental Hygiene v. Chimes, Inc., 343 Md. 336, 681 A.2d 484 (1996), where a "growth cap" designed to limit reimbursements to private providers applied only to a limited number of providers in a particular program, then the rule in question was not one of "widespread application." *Id.* at 346.

The same can be said in this situation where the EOM, like the “rate cap” in the *Chimes* case, is certainly of interest to many people, it still is of very limited application. The test for determining whether a governmental procedure or guideline is a regulation is not simply whether it is a matter of public concern, but truly whether it has broad application to more than just a handful of persons. Moreover, the Division of Correction procedures “did not formulate new rules of widespread application, change existing law, or apply new standards retroactively to the detriment of an entity that had relied on the agency’s past pronouncements. *Id.* at 346; Maryland Ass’n. of Health Maintenance Organizations v. Health Services, 356 Md. 581, 601, 741 A.2d 483 (1999).

Additionally, the Administrative Procedure Act (APA) rule-making requirements do not apply to “a statement that concerns only internal management of the court” and “does not affect directly the rights of the public or the procedures available to the public.” State Government Article, § 10-101(g)(2). As described above, the vast majority of the EOM deals with internal DOC procedures, such as who shall be on an execution team, what steps need to be taken in the days and then hours leading up to an execution, what steps shall be taken post-execution, and what visits, mail, property, etc. an inmate may have before an execution. All of this is purely internal and does not affect the rights of the public or involve procedures available to the public.

The ALJ relies heavily on the Court of Appeals decision in Massey v. Secretary, DPSCS, 389 Md. 496, 886 A.2d 585 (2005) in which the Court ruled that the DOC, Division of Pretrial Detention and Services, and Patuxent Institution had to adopt their rules regarding inmate discipline through the APA rule-making process. However, a significant difference between this case and Massey is that there was a specific statute authorizing the Commissioner of Correction to adopt regulations for the operation and maintenance of units in the DOC and requiring such regulations to provide for the discipline and conduct of inmates. Correctional Services Article, § 3-205. There is no analogous requirement in the statutes establishing Maryland’s death penalty procedures. Correctional Services Article, §§ 3-901 – 3-909.

Moreover, the Court in Massey acknowledged that the “myriad of rules governing the details of prison life,” including “rules governing security” do not constitute regulations under the definition in State Government Article, § 10-101(g). Massey, 389 Md. at 524. Of course, there are constitutional ramifications to many conditions of confinement, including rules pertaining to sanitation, hygiene, phone calls, mail, visits, etc.; despite this, the Court of Appeals has not considered these rules to require adoption under the APA.

Therefore, it is my conclusion that the EOM is not a regulation requiring adoption pursuant to the APA rule-making provisions. Thus, I reverse this portion of the ALJ’s proposed decision.

II.

In Oken v. State, 381 Md. 5809, 851 A.2d 538 (2004), the Court of Appeals held that the method of execution utilized in Maryland does not violate the Correctional Services Article, § 3-905 or constitute cruel and unusual punishment. Because the issues in this regard raised by the Grievant are the same as those raised in the Oken case, the holding in Oken is dispositive and requires affirmance of this portion of the ALJ’s proposed decision.

III.

The Grievant asserts that his veins are compromised in such a way that intravenous (IV) access to his body cannot be obtained through his arms. He further argues that the method used by DOC to perform executions will cause him to suffer an inhumane death. The Grievant supported his motion for summary decision on this point with affidavits from medical personnel.

The DOC argued that it could perform the introduction of the drugs through IV access through his arms without resort to the need for a central line. This position also was supported by affidavits from medical personnel who examined the Grievant.

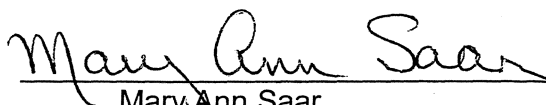
In her proposed decision, the ALJ concluded that there were material facts in dispute and that she could not make a final determination without an evidentiary hearing. As a backdrop to this is the fact that the federal court in Baltimore has scheduled a trial on these same issues for the week of September 18, 2006. I have no doubt that, absent some extraordinary circumstances, no matter the result in federal court, the matter will be appealed to the United States Court of Appeals for the Fourth Circuit and the Supreme Court.

In light of the fact that the same issues are being litigated in federal court and in the administrative arena and to avoid an additional appeal to court from an administrative agency decision, it is my determination that a stay should be issued regarding any evidentiary hearing at OAH until such time as the United States District Court for the District of Maryland renders its decision in the Evans case. It is well-established by the Court of Appeals that in a proper case a court may stay proceedings pending the determination of another proceeding that may affect the issues raised. Coppage v. Orlove, 262 Md. 665, 278 A.2d 587 (1971). This will obviate the need for the parties to present the same evidence in two different fora perhaps only weeks apart and also serve the interest of judicial economy.

CONCLUSION

For these reasons, the proposed decision of the ALJ concerning the applicability of the APA rule-making process to the EOM shall be REVERSED. The portion of the proposed decision relating to Maryland's method of execution not being violative of state law or the U.S. Constitution is AFFIRMED. The part of the proposed decision requiring an evidentiary hearing shall be MODIFIED to the extent that the need for a hearing shall be stayed until the United States District Court for the District of Maryland renders its decision on the constitutionality of the execution procedures as applied to the Grievant.

SO ORDERED this 27 day of June, 2006.



Mary Ann Saar
Secretary

REVIEW RIGHTS

You are entitled to file a petition for judicial review with the circuit court for the county in which the institution you are confined is located within 30 days of the mailing of the decision. Md. Code Ann., Corr. Serv. § 10-210(b). Md. Rules § 7-201 through 7-210. This decision may only be reversed or modified on appeal if any substantial right may have been prejudiced because a finding, conclusion, or decision of the agency: (1) is unconstitutional; (2) exceeds the statutory authority or jurisdiction of the agency; (3) results from an unlawful procedure; (4) is affected by any other error of law; (5) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or (6) is arbitrary or capricious. The circuit court does not accept additional evidence or reassess the credibility of witnesses who have previously testified. Md. Code Ann., State Gov't. § 10-222(h).

VERNON EVANS, # 172357

GRIEVANT

v.

MARYLAND DIVISION

OF CORRECTION

* BEFORE DENISE OAKES SHAFFER,

* AN ADMINISTRATIVE LAW JUDGE

* OF THE MARYLAND OFFICE

* OF ADMINISTRATIVE HEARINGS

* OAH NO.: DPSC-IGO-002-06-19279

* IGO NO.: 20060555

* * * * *

FILE EXHIBIT LIST

IGO Exhibits:

- # 1 December 9, 2005 Request for Administrative Remedy
- # 2 January 3, 2006 Warden's Decision on Request for Administrative Remedy
- # 3 February 27, 2006 Ass't Commissioner's denial of Appeal
- # 4 Transmittal to OAH

DOC Exhibits:

- A January 25, 2006 affidavit of James V. Peguese
- B March 8, 1994 Letter and Testimony of Commissioner Lanham
- C May 6, 1994 Article from Baltimore Sun
- D Redacted Execution Operations Manual as Supplemented on May 22, 2006
- E January 23, 2006 affidavit of Mark Dershwitz, M.D., Ph.D.
- F January 31, 2006 affidavit of Certified Nurse Assistant
- G January 31, 2006 affidavit of Emergency Medical Technician 1
- H January 31, 2006 affidavit of Emergency Medical Technician 2
- I February 1, 2006 transcript of Motions hearing in U.S. District Court
- J January 27, 2006 transcript of Motions hearing in U.S. District Court

Grievant's Exhibits:

- # 1 March 13, 2006 DOC Answer filed in U.S. District Court case number L-06-CV-0149
- # 2 January 19, 2006 Mr. Evans' Complaint in U.S. District Court
- # 3 January 19, 2006 declaration of Mark J. S. Heath, M.D.
- # 4 January 25, 2006 declaration of Dennis R. Geiser, DVM
- # 5 January 25, 2006 declaration of Thomas M. Scalia, M.D.
- # 6 House Bill 498 (1994) Floor Report
- # 7 January 17, 2006 memorandum
- # 8 January 25, 2006 declaration of Vernon Evans, Jr.
- # 9 Morales v. Hickman, U.S. District Court, Northern District of California, February 14, 2006
- # 10 Brown v. Beck, U.S. District Court, Eastern District of North Carolina, April 7, 2006
- # 11A January 24, 2006 transcript of Motions hearing, U.S. District Court
- # 11B January 27, 2006 transcript of Motions hearing, U.S. District Court
- # 11C February 1, 2006 transcript of Motions hearing, U.S. District Court