

IN THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,  
DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

TREVOR J. STEFANO,  
Respondent.

Supreme Court No. S-17892

Trial Court Case No. 3AN-19-09950 CI

APPEAL FROM THE SUPERIOR COURT,  
THIRD JUDICIAL DISTRICT AT ANCHORAGE,  
THE HONORABLE PETER RAMGREN, JUDGE

BRIEF OF RESPONDENT  
TREVOR J. STEFANO, PRO SE



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of the State of Alaska  
on January \_\_\_\_\_, 2021.

MEREDITH MONTGOMERY,  
CLERK  
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By: \_\_\_\_\_  
Deputy Clerk

## Pertinent Factual Background

On August 18, 2006 Respondent Trevor Stefano (Stefano) was arrested at the age of nineteen on a single count of second degree felony murder; he had no prior convictions. On May 29, 2008 Stefano was sentenced to 40 years with fifteen years suspended subsequent to a jury trial conviction. Stefano was sent to the Spring Creek Correctional Center and entered the Youthful Offender's Program where he worked and enrolled in a degree program through U.A.F. and earned the support of education staff at the facility (Exc. 1).

Twelve years later, in February of 2018, Stefano was encouraged by his Institutional Probation Officer (IPO) to apply for the electronic monitoring (EM) program being that Stefano had been granted discretionary parole effective in 2021 and had completed numerous DOC programs. Stefano was also a dog trainer in the Wildwood Correctional Center S.P.O.T. program and trained "Gizmo", a deaf Australian Cattle Dog in sign language and bonded closely with the pup. Stefano applied to the EM program and received a policy override for program acceptance based upon his demonstrated "exceptional rehabilitation" based upon his conduct and IPO support. (Exc. 2).<sup>1</sup>

Stefano was granted the override for "exceptional rehabilitative progress" by the DOC Director and released to the EM Program in Fairbanks where he became the General Manager of the Splash & Dash Carwash owned by Stefano's friend Gerald "Jerry" Timmons. The Wildwood Correctional Center administration and Stefano kept in supportive contact and Stefano was permitted to adopt "Gizmo" from the prison dog program. (Exc. 3).

1. DOC Policies and procedures Chapter 903.06, Community Electronic Monitoring, Procedure 1A4 requires that an offender is not eligible for the program if "The offender has more than three (3) years left or less than three (3) day to serve; and/or NOTE: If offender exhibits exceptional rehabilitative progress an offender's application can be forwarded for an exception to the three (3) year timeframe. The Director of Probation and Parole or designee may override and grant approval. Respondent received an override and was approved for entry into the EM program.

Stefano worked hard at the carwash where he ultimately met the woman who became his wife, Sonya, and was otherwise complying with all the EM rules protocols, and office check-in requirements. Stefano got married while on the EM program and Sonya is a Russian National. Eventually, Stefano transferred employment to the Fairbanks Nissan Dealership where he worked as a department manager for some time (Exc. 4) before moving with his wife and Gizmo to Anchorage where he interviewed with the International Brotherhood of Electrical Workers (IBEW). (Exc. 5).

When making the move to Anchorage, Stefano had to coordinate with his biological brother Connor, who is a felon, to help secure housing in Anchorage prior to the move. Stefano first sought permission to have contact with his felon brother (Exc. 6), this permission was granted and Stefano was given a travel pass by the EM officer to go to Anchorage with his wife and stay the night at his felon brother's house (Exc. 7). That next day Stefano and his wife viewed an apartment, signed a lease agreement, and headed back to Fairbanks and provided the EM officers with a copy of the lease (Exc. 8), at which point the Fairbanks EM office coordinated with the Anchorage EM office regarding the logistics of Stefano's transfer.

Stefano was informed by the Fairbanks EM office that he was approved to move to his apartment in Anchorage but that his new Anchorage EM Officer (PO Cospere) needed to conduct a "home inspection" on the apartment premises prior to final authorization. PO Cospere coordinated with Stefano's felon brother Connor to meet at the apartment so Connor could show the apartment to PO Cospere (Exc. 9), the meeting took place, the apartment was approved and Stefano, Sonya, and Gizmo moved to Anchorage.

Stefano interviewed with the IBEW and subsequently ended up working for Adam Electric LLC as an electrician's apprentice through AV TECH under

the tutelage of the company (TR. 32,33,46-48). Stefano also worked secondary employment at Pizza Hut where his brother Connor also worked (TR 24),

PO Cosper was aware of Stefano's employment and that Connor worked with Stefano at Pizza Hut.

### The DV Arrest

On July 8, 2019 Stefano and his wife got in an argument (TR 31-32), Stefano wanted to give his wife some space but could not leave the residence without permission from his EM officer. Stefano called the night-time EM Officer, explained fully his contentious situation, and asked permission to go to a hotel for the evening (TR 32); permission was denied and Stefano was instructed to call APD on his wife; Stefano elected not to do that. Instead Stefano called his sister-in-law and requested she call Sonya and calm her. During the course of that conversation, Stefano's brother was in proximity to his wife, overheard the call, and elected to drive to Stefano's residence on his own initiative. While this happened, Stefano's wife called APD and both Connor and APD arrived at Stefano's residence within one minute from each other.

Stefano was arrested under the mandatory arrest law, AS 18.65.530, and transported to the Anchorage Jail and attended an arraignment hours later with the Municipality declining prosecution and mentioning for conditions to be expedited, vacated, and dismissed. (Exc. 10). Stefano immediately sought his release back on to the EM program but instead, ten days later, was given notice of his "termination" from the program in a single document which also charged him with violating 22 AAC 05.400(c)(19), disobeying direct order of a staff member, under the assertion he had unauthorized contact with a felon; his brother Connor, in violation of his EM conditions. PO Cosper authored the report.

The Violation of EM Terms & Conditions

Stefano was charged by PO Cosper with the violation of two specific Terms & Conditions of the EM program: numbers 9 and 21. Term 9 reads:

I will obtain prior approval from EM officers before having visits from friends, family members, and/or associates to my residence with the exception of unannounced visits (i.e. public and local business persons)

Term 10 reads:

I agree to have no non-employment-related, non-reentry related contact with a convicted felon without the permission of EM officers, I agree to have no contact with, or be in a position of authority over, offenders who are under any kind of DOC supervision without the permission of EM officers.

(Exc. 11).

According to PO Cosper, a violation of these two terms constituted not only a violation of the voluntarily agreed to Terms of the EM program, but also a violation of 22 AAC 05.400(c)(19) for disobeying a direct order of a staff member. Apparently, despite being a program that Stefano volunteered for and voluntarily agreed to the terms of, PO Cosper treated it as a direct order contract.

But while Stefano agreed to the two Terms & Conditions he alleged to have violated, he also agreed to Term & Condition number 32 which reads:

I understand that any violation of the above listed terms and conditions will subject me to disciplinary procedures as stated in DOC P&P 809.04 and DOC P&P 902.16.

The specific incorporation of DOC policy 809.04 into the EM program via Term & Condition 32 is very significant, as DOC P&P 809.04 governs the disciplinary procedures that Stefano was subjected to for the alleged violation of the above two Terms and that process clearly produces a record capable of review.

However, the DOC now argues before this Honorable Court that the

disciplinary hearing which Stefano was subjected to for violating Terms 9 and 21 was entirely unrelated to the "separate administrative decision" to remove Stefano from the EM program, despite the clearly shown fact the disciplinary process given to Stefano was a result of Term 32 and not an entirely separate process. Thus, the subject matter jurisdiction argument the DOC presents as its sole issue on appeal is without merit. The DOC's jurisdiction argument is misleading to this Court and advanced from a poltroonery position which seeks to capitalize upon the lack of legal sophistication of this pro se prisoner litigant.

#### The EM Appeal Process of DOC Policy 903.06

The argument made by the DOC is that EM policy 903.06 has its own appeal process, that Stefano engaged in that process, and because that process produced only a paper record, that the record was insufficient for appellate review in the Superior Court and that the Honorable Judge Ramgren was therefore without jurisdiction. This argument is made by the DOC under the claim that the disciplinary hearing record was separate record from the paper appeal Stefano did from his removal from EM. This is where the crux of the DOC's jurisdiction argument lies and where close review also shows it fails.

Stefano turns this Court's attention to DOC P&P 903.06 procedure I.H.3.b. which reads:

b. An offender that is terminated as a result of a violation, may be eligible to reapply for EM placement. The length of time will be dependent on the type of violation (i.e. 90-120 days for high-moderate, 30-60 days for low moderate).

This is important because it shows that a violation of the EM Terms & Conditions will be equated to a high or low moderate infraction which is only contained in 22 AAC 05.400 Prohibited Conduct and only adjudicated

under the disciplinary hearing procedures of policy 809.04, the very procedures Stefano was subjected to. Implicit in this fact is that the adjudication of EM violations are done under policy 809.04, which is confirmed by EM Term number 32, and that a violation of an EM term & condition is afforded a due process analysis of whether an alleged violation of an EM Term was indeed committed, and, it is afforded under the disciplinary hearings of policy 809.04, which adequately produce a record capable of review.

However, the 903.06 EM policy built a subpar appeal process procedure into the EM policy, seemingly so the DOC would retain the ability to advance the argument they make now: ~~that~~ the appeal process only produces a paper record and therefore will forever be inadequate for appellate review in the Superior Court and any challenge to the removal from EM must be brought as an original action civil suit which most likely will take so long to resolve, the offender would be released before final resolution of the litigation, not to mention that only a very small percentage of prisoners have basic legal knowledge sufficient enough to even file a pro se civil suit, let alone prevail on the merits through design of written argument, or are possessing of the monetary resources required for retention of private counsel.

Procedure I.H.4.a. of Policy 903.06 states that the EM Appeal Form must be submitted within five business days of notification of the termination from the EM program. It should be noted that the EM Appeal Form does not come attached to the notice of termination but must be requested by the offender by submitting a Request For Interview Form to a probation officer requesting the EM Appeal Form. Five business days is the same time frame allotted to DOC staff per policy to respond to a

a Request For Interview made by a prisoner, so it is very possible that an EM program participant may not even be able to submit an appeal within the allotted time frame and there is no provision in the EM policy 903.06 which grants an extension of time to submit the EM Appeal Form. Nor is there enough time to review the EM file for relevant mitigating documents prior to the date the EM Appeal Form must be submitted. Under the EM Appeal Form there is not opportunity for potential witnesses to an alleged EM violation to provide a statement, and no opportunity to question the writer of the incident report.

DOC cannot have it both ways, that is, subject an offender accused of an EM violation to the appeal procedure of policy 903.06 while also subjecting them to disciplinary procedures under policy 809.04 based on an infraction of 22 AAC 05.400 which can only stand to the extent the Terms & Conditions of the EM program have first been violated. This is especially so given that a prisoner is presumed innocent of an infraction and the facility has the burden of establishing guilt, 22 AAC 05.455(a). If the presumption of innocence attaches to an infraction and that infraction's entire narrative report is based upon the violation of EM Terms, then the presumption of innocence stands outside of any decision on an EM Appeal Form which is given prior to the adjudication of infraction itself, at disciplinary hearing under P&P 809.04.

Stefano filed the EM Appeal Form *(see DOC exempt 0009)* and on the appeal Stefano wrote:

I am appealing the decision to terminate me from DOC EM. I think the decision to grant or deny this appeal should be decided pending the final outcome of the C-19 write up, which is the basis of my program termination...

Nevertheless, the decision on Stefano's EM appeal was rendered prior to



to his disciplinary hearing taking place; the appeal was denied on the basis Stefano did not have permission to have contact with his brother, which was the same allegation contained in Stefano's 22 AAC 05.400 infraction. Stefano received notice of his EM program termination on July 18, 2019. Stefano submitted the EM Appeal Form on July 19, 2019. The decision denying Stefano's EM Appeal Form was given on July 27, 2019 on the grounds Stefano did not have permission for contact with this brother but this very allegation was the reason Stefano was charged with violating EM Terms 9 and 21 and given the 22 AAC 05.400(c)(19) infraction. Before Stefano could be found guilty of the infraction, the disciplinary officer had to first find that Stefano violated the two EM Terms & Conditions he was charged with violating. The disciplinary officer confirmed as much on record:

Basically, what -- the way I read these reports is what - what I'm trying to figure out is if you violated these two conditions by having your brother at your residence... That's the way I'm interpreting this. (TR. 26) (Emphasis Added)

Thus, the July 24, 2019 decision denying Stefano's EM appeal was entirely arbitrary because Stefano hadn't even been adjudicated yet at the disciplinary hearing which occurred on July 30, 2019. This meant that the disciplinary hearing provides an opportunity to second-guess the arbitrary finding made on July 24, 2019, and clearly shows the incident report alleging violation of EM Terms & Conditions which was adjudicated at the disciplinary hearing was contiguous to the rendered decision on the 903.06 EM Appeal Form.

Further, the decision on appeal of the EM Appeal Form told Stefano that he was not eligible to return to EM for the remainder of his incarceration. <sup>(see state excerpts)</sup>  
<sub>0008</sub> This was a decision made in violation of the EM appeal process contained in Policy 903.06 which states an offender

is eligible to reapply to EM after 90-120 days if given a high-moderate infraction which Stefano's 22 AAC 05.400(c)(19) fell in the category of. Stefano had to argue this policy with the EM supervising PO McKnuckles before being told he could reapply after 120 days but would just be denied anyways; Stefano has this in writing but its not a part of this record. Stefano reapplied anyways and his application was denied, he appealed, and the decision on that appeal was rendered on January 29, 2020 and reads in relevant part: "Based on the totality of your violations, to include the information included in the C19 IR, I see no reason to allow you to reapply for EM during the remainder of your incarceration."

(Exc. 12 ).

This demonstrates a clear nexus between the decision to remove Stefano from EM and the reliance to do so based upon the finding of guilt made at Stefano's disciplinary hearing which certainly produced a record capable of review; the decision to remove Stefano from EM was not a "separate administrative decision"; it was tied to the information which was adjudicated at Stefano's disciplinary hearing.

### The Disciplinary Hearing

The DOC states in brief to this Court that "the hearing did not consider or address DOC's decision to terminate Mr. Stefano from EM". That statement is simply not true. The disciplinary process was entirely centralized around the decision to terminate Stefano from EM. Before the hearing officer could decide if Stefano was guilty of 22 AAC 05.400(c)(19), the officer first had to determine the narrative of the written infraction, and in doing so, had to adjudicate whether Stefano had indeed violated Terms & Conditions numbers 9 and 21 of the EM program. As the hearing officer stated on record: "what I'm trying to figure out is if you violated

these two conditions by having your brother at your residence... That's the way I'm interpreting this." (TR. 26).

The hearing officer considered many other of the EM Terms & Conditions on record (TR. 15-17). Regarding Stefano's requests to have the alleged phone recording between himself and his wife admitted as evidence the hearing officer stated: "what does phone recordings have to do with you - with your brother being either at your residence in violation of these conditions or not? (TR. 28).

Stefano said on record to the officer that he called the night PO and explained that his brother was at his residence and the EM officer did not care that Stefano's brother was there, and that the APD officer called the EM officer while on scene and when the APD officer told the EM officer Stefano's brother was at the residence and is a felon, the EM officer told the APD officer that they did not have a problem with Stefano's brother being there and were only concerned if a DV occurred. The disciplinary hearing officer replied: "Okay. I can take that as fact, I - I have no problem with it." (TR. 25). The hearing officer was able take that as a factual assertion because he knew that Stefano had permission to have contact with his brother; he chose to find Stefano guilty anyways.

Stefano argued on record that the EM program was a rehabilitative program and his removal without notice was harming his rehabilitation. (TR. 14, 30-33, 46-48). Stefano made the officer aware that Stefano was in an electrical apprenticeship program, also had employment at pizza and otherwise had many civil debt obligations incurred as a part of his participation in the EM program.

Stefano was found guilty and told the officer he was violating

Stefano's rights. When Stefano subsequently requested a copy of the disciplinary hearing audio, the disciplinary hearing officer responded: "Offender of society Stephano, offender 506410, you lost your rights when you decided to break the laws of society. Crying about rights will get you no where, Denied." (Exc. 13).

After the guilty finding, Stefano appealed to the Superintendent asserting several points of appeal. Stefano specifically asserted that he did not violate the Terms of his EM and that his rehabilitation was being ruined by his abrupt removal from the program (Exc. 14). The Superintendent upheld the disciplinary finding and in doing so made even further adjudication on the decision to remove Stefano from the EM program writing: "It is Stefano's responsibility to have his family and friends abide by the conditions of his EM placement." and "The fact remains that his EM was terminated due to his failure to follow his stated conditions." The Superintendent even addressed Stefano's rehabilitation writing: "prisoner is to be commended on his actions while in prison. He has done well during his incarceration and I don't think his rehabilitation is ruined. The fact remains that his EM was terminated due to his failure to follow his stated conditions." (Exc. 15).

The Terms & Conditions of Stefano's EM, his rehabilitation, and his termination from the EM program were clearly addressed during the hearing and on the appeal to the Superintendent. This detailed record clearly produced a record capable of review, just as Judge Ramgren found.

#### Honorable Judge Ramgren Had Jurisdiction Over EM Removal of Stefano

Stefano has demonstrated above quite clearly that his disciplinary hearing adjudicated his alleged violations of his EM Terms & Conditions. This adjudication took place during the disciplinary hearing officer's

consideration of the very EM Terms Stefano was alleged to have violated and also on Stefano's appeal of the disciplinary officer's findings that Stefano did violate those EM Terms by his brother being at his residence made to the Superintendent. The Superintendent denied Stefano's appeal and found his "rehabilitation was not ruined by his removal from the EM program." (Exc. 15).

The appellate jurisdiction of the superior court is governed by this Court's case law and AS 22.10.020. Subsection (d) of that statute designates that the superior court has appellate jurisdiction over all matters appealed to it from an administrative agency decision when appeal is provided by law. This Court has recognized the right for judicial review of a DOC administrative decision only "where there is an alleged violation of fundamental constitutional rights in a adjudicative proceeding producing a record capable of review." Welton v. State, Dep't of Corr. 315 P.3d 1196, 1198 (Alaska 2014)(citing Brandon v. State, Dep't of Corr., 938 P.2d 1029, 1031 (Alaska 1997)).

In Welton v. State, Dept. of Corrections, this Court held that the DOC grievance procedure was not sufficiently adjudicatory for appellate review and reaffirmed the required characteristics:

"The essential elements of adjudication include adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in question."

Welton, 315 P.3d at 1198.

This Court has held in a number of cases that, in order for the superior court to have jurisdiction over a DOC decision in administrative appeal, the decision must involve a fundamental constitutional right and be adjudicative in nature. Brandon v. Dept. of Corrections, 938 P.2d 1029, 1031-32 (Alaska 1997);

Owen v. Matsumoto, 859 P.2d 1308, 1310 (Alaska 1993); Kraus v. Dept. of Corrections, 759 P.2d 539, 540 (Alaska 1988); McGinnis v. Stevens, 543 P.2d 1221, 1236 n. 45 (Alaska 1975). In Brandon, the court referenced the criteria set out to determine when an administrative agency decision is "adjudicative":

The essential elements of adjudication include adequate notice to persons to be bound by the adjudication, the parties' rights to present and rebut evidence and argument, a formulation of issues of law and fact in terms of specific parties and specific transactions, a rule of finality specifying the point in the proceeding when presentations end and a final decision is rendered, and any other procedural elements necessary for a conclusive determination of the matter in judgment. Restatement (Second) of Judgments sec. 83(2)(1982).

938 P.2d at 1033-34, citing Johnson v. Dept. of Fish & Game, 836 P.2d 896, 908 n. 17 (Alaska 1991). The court in Brandon also cited to Wickersham v. Comm. Fisheries Entry Comm'n, 680 P.2d 1135, 1144 (Alaska 1984) where it held that "when an agency makes individual factual determinations on which the impact of the law on the individual depends, it is acting in an adjudicative capacity." 938 P.2d at 1033.

Here, Stefano's disciplinary hearing met all of these hallmarks. There was a hearing where Stefano could present and rebut evidence which was done through the narrative of the report, the e-mails requesting permission for contact with Stefano's brother which were admitted as evidence and read into record, and interpretation given by the disciplinary officer regarding the intent of EM Terms and Conditions Stefano was alleged to have violated. Stefano was allowed to request witnesses, albeit they were denied, and Stefano had the opportunity to call the writer of the report and the assistance of a hearing adviser. There was a summary of all the evidence that was reviewed and where it was obtained, and opportunity to appeal the ultimate decision rendered.

The entire disciplinary hearing was conducted under DOC policy 809.04, produced an audio recording, and was clearly adjudicative in nature. Judge Ramgren was with jurisdiction to rule on the merits of both the finding of

guilt, and the removal of Stefano from the EM program based upon that finding of guilt because the decision process clearly involved formulation and application of issues of law and fact which resulted in factual determinations being made after consideration of a burden of proof. Stefano's disciplinary hearing was sufficiently adjudicative for purposes of satisfying the Welton requirements and was squarely within the jurisdictional parameters for Judge Ramgren's review.

#### Placement On And Removal From DOC EM Program; Significant Factors

The DOC takes the position that "EM is an administrative placement determination - akin to DOC's decision to transfer an inmate from one facility to another within the state - not a rehabilitative program." (See DOC Pet. For Review p. 9). However, a review of statutory law regarding the computation of good time and statutorily mandated factors of consideration prior to allowing an offender on to the EM program conclusively disclaim the DOC's position.

The Computation of good time statute (AS 33.20.010) at subsection (c) precludes an EM program participant from receiving a good time deduction for time spent under electronic monitoring. DOC does not possess administrative power to house offenders under conditions which preclude the earning of good time, unless such housing assignment is voluntarily agreed to by the offender. Further, the actual EM statute (AS 33.30.065) places mandatory considerations upon the commissioner of DOC prior to permitting an offender to service their sentence on the EM program (See AS 33.30.065(b)(1)-(8)). These factors of consideration are not required when transferring prisoners from one state facility to another, as the DOC attempts to equate the EM program with.

Moreover, the DOC does not provide the housing or employment that is required to participate in the EM program and program participants are required to waive their right to have DOC provide food, shelter, medical care, dental

care, and must agree to not hold DOC liable for those things (See EM Term & Condition number 19) (Exc. 11). It is clear that the decision to permit an offender acceptance to the DOC EM program is not simply akin to transferring from one facility to another.

#### DOC EM Program Is A Rehabilitative Program

Every inmate has a fundamental right to rehabilitation while in DOC's custody. Hertz v. Macomber, 297 P.3d 150, 157 (Alaska 2013); Brandon v. State, Dep't of Corr., 938 P.2d 1029, 1032 (Alaska 1997). This Court has repeatedly "expressed the need to 'make the constitutional right to reformation a reality and not simply something to which lip service is being paid.'" Ferguson v. State, Dep't of Corr., 816 P.2d 134, 139 (Alaska 1991), quoting Abraham v. State, 585 P.2d 526, 530, 533 (Alaska 1978). Thus, DOC must provide inmates due process before infringing that right. Id. at 140 n. 13.

Due process is flexible, however, meaning some right warrant more precedural protections than others. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) ("Due process is flexible and calls for such procedural protections as the particular situation demands."), Matter of K.L.J., 813 P.2d 276, 278 (Alaska 1991)(same). Courts apply a balancing test to determine whether the state provided due process, taking into account three factors: (1) the private interests at stake, (2) "the risk of erroneous deprivation of such interest through the procedures used, and the [probable] value, if any, of additional or substitute procedural safeguards," and (3) the government's interest, including financial and administrative burdens. Barrington v. Alaska Commc'ns Sys. Grp., Inc., 198 P.3d 1122, 1132 (Alaska 2008), as amended on denial of reh'g (Jan. 29, 2009) (alteration in original), quoting Mathews, 424 U.S. at 335.

However, there can be no due process violation without an attendant constitutional right. Chijide v. Maniilaq Ass'n of Kotzebue, Alaska 972 P.2d 167, 171 (Alaska 1999)("The protections of due process apply only when an



an individual has a life, liberty, or property interest to protect.") Thus, Stefano must show that he has a "life, liberty, or property interest to protect" in his assertion that his removal from the DOC EM program violated his due process right. This requires a look at the language of AS 33.30.065 which governs the service of sentence by electronic monitoring.

AS 33.30.065 states:

A decision by the commissioner to designate a prisoner to serve a term of imprisonment or a period of temporary confinement, or a part of the term or period, by electronic monitoring **does not create a liberty interest in that status for the prisoner.** The prisoner may be returned to a correctional facility at the discretion of the commissioner.

The legislature has written words into law that conflict with Stefano's constitutional right to due process under the constitution which reads:

No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

Alaska Const. art. I. sec. 7.

Stefano challenged the constitutionality of AS 33.30.065(c) in his brief before Judge Ramgren and at oral arguments; the DOC conceded the legislature does not have authority to write words into law that conflict with the constitution. Nevertheless, that is what has happened with AS 33.30.065(c).

In McGinnis v. Stevens, 543 P.2d 1221 (Alaska 1975), this Court explained that if disciplinary hearings "threaten major deprivations of a prisoner's [already] limited liberty," then the inmate is entitled to extensive due process. See id. at 1236-37. The rights include, but are not limited to: "the right to call witnesses and produce documentary evidence in his favor [subject to some limitations]; the right to confront and cross-examine witnesses; and the right to have the entire hearing recorded for purposes of administrative appeal and potential further appeal to superior court." id. at 1236.

In this present case, Stefano was removed from the community based upon the allegations he violated two specific Terms & Conditions of the EM program. He was given a disciplinary infraction based upon the violation of the EM Terms and ultimately given a sanction of 30 days punitive segregation. Thus, the disciplinary report given to Stefano on the basis he violated specific Terms of the EM program clearly implicate Stefano's due process rights as he went from living in the community with his wife and Gizmo while in an electrician's apprenticeship program, to back in prison facing punitive segregation, the process of which also negatively effected Stefano's rehabilitation. Stated differently, if McGinnis provides due process protections for prisoners in general population of a correctional facility prior to being housed in punitive segregation, then how much more so does that due process protection extend to a participant of the EM program who is removed for a first-time technical infraction and then subjected to disciplinary process the same as the general population prisoner? Especially when the program participant loses employment, housing, potentially marital status, has credit adversely affected, and then is expected to clean all that up at his next release.

When looking at the scenario of a participant's removal from the EM program in relation to the three-prong test for due process analysis under Mathews and Barrington, supra, Stefano's private interests at stake were very large. As of March 31, 2020, Stefano's financial burden since his return to custody includes a loss of approximately \$12,000 in wages from his two jobs; a \$5,600 arrearage on his apartment rental lease from July 2019 through February 2020; \$375 for autopay telephone bills which Stefano had not been able to cancel; \$400 for autopay auto insurance and \$300 for accrued credit card interest. Stefano's financial burdens will have a significant impact on his ability to

obtain credit in the future. Additionally, Stefano left an amazing employer without notice and this affected not only company reputation but also Stefano's job history and jaded Mr. Moore of Adam Electric LLC. to such an extent he is unwilling to assist in prisoner reentry again by employing EM program participants.

Stefano has faced continued mental anguish and emotional distress due to being separated from his wife and family, fear that his wife will be subject to immigration deportation proceedings, and anguish over his helplessness and inability to assist his frail grandmother and care for his special needs pet Gizmo who only responds to Stefano's sign language.

In Judge Ramgren's Order Denying Appellant's Motion for Reconsideration of Order Granting Routine Extension, Judge Ramgren wrote: "The court recognizes that the consequences Stefano experiences in extensions to the briefing schedule are real and substantial."

When considering the second prong: "the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards", the procedure used for removing Stefano from EM was the procedure contained in DOC policy 809.04 as was required by Term 32 of the EM conditions.

The DOC interest, including financial and administrative burdens, when removing Stefano from EM is an increase in finance housing expenses for DOC as it costs the DOC less to keep Stefano on EM. The DOC argues to this court that providing a classification hearing when removing an EM program participant from the EM program by returning them to a correctional facility is a large administrative burden on the DOC to which there currently is not policy for. Again, that is not a true statement and this Court should not be misled: DOC Policy 700.01 governs Prisoner Classification. Procedure V. B. 1. states

an "initial classification is the first classification of a prisoner which occurs within five (5) days of remand, and is used only once during incarceration." Because the DOC treats a return to a correctional facility from the EM Program as a remand which runs the program participant through booking procedures, a classification hearing is suppose to occur anyway. So when Stefano requested a classification hearing after being removed from EM (see DOC except 6015\_\_\_), this is actual something that the DOC was suppose to provide and conduct as a matter of procedural course; instead they argue to this Court how doing so would be a burden.

Being that the Classification Policy 700.01 states "the classification process shall identify prisoners' rehabilitative and reentry requirements that promote public safety and provides for the responsible reformation and and reintegration of offenders" and that "regular reviews of each prisoner's custody and rehabilitative status shall be completed" (DOC Policy 700.01 procedures VI. B & D), it seems this is an appropriate course of action for the DOC<sup>to</sup> undertake when "terminating" an EM program participant, especially given the detrimental affect removal from the program has on employment, credit, housing, family, and so many other factors upon subsequent release. "It is the policy of the Department of Corrections (DOC) to utilize electronic monitoring (EM) as a tool to effectively manage offenders for their successful re-reentry and transition to the community." (DOC Policy 903.06 & 818.10).

Successful re-reentry and transition to the community is not being promoted when an EM program participant is not afforded due process prior to removal.

Moreover, while the acceptance of a prisoner in the EM program is not a transfer akin to moving a prisoner from one state facility to another, being that good time, housing, employment, and other factors are involved, when an EM program participant is transferred back to a correctional facility, the Prisoner Classification policy 700.01 must be adhered to. Procedure VII. D. states "no prisoner shall be transferred without the approval of Central Classification, the Director's Office, or Commissioner's Office". Procedure VII. D. 7. provides that a prisoner is able to appeal the classification of transfer to the extent it has access on rehabilitative programs.

Classification Hearings are suppose to be recorded as prisoner's are entitled "access to the recording of a related disciplinary hearing or the classification review being appealed..." (DOC policy 700.01 procedure VII. F. 4.).

#### DOC POLICY 808.04 AND 818.03

DOC Policy 818.03 is titled: Prisoner Work Release Program (Exc. 16). This work release program provides the platform for prisoners to work at the canneries and fish processing plants. Prisoners who are able to participate live on site at the cannery, must sign Terms & Conditions, and are required to wear a DOC electronic monitor which they are required to pay for. This policy was created because:

The Department of Corrections (DOC) recognizes that by providing an opportunity for certain prisoners to engage in productive / pro-social work outside of the institution those prisoner start to connect to appropriate resources and become self-sufficient. This increase in independence along with a continuum of care from the Department can aid in a prisoner's successful transition and reentry in to the local community upon their release.

Policy 818.03. (Exc. 16 )

Policy 818.03 is actually very similar to the DOC EM program, however, this Prisoner Work Release Program incorporates policy 808.04 titled: Removal

from Rehabilitation and Court-Ordered Treatment Programs and the purpose of that policy is "to establish due process guidelines for the removal of a rehabilitation program." The EM program does not. Procedure VII. D. 1. of Policy 808.04 states that "non-institutional employment work programs and vocational education programs" are classified as rehabilitation programs.

Stefano submitted a Request For Interview to the Education/Programs officer inquiring whether the DOC EM program is a rehabilitative program and a non-institutional work release program that should be covered by policy 808.04; the programs officer responded that EM is a rehabilitative work release program .

REMOVAL FROM EM DOES NOT NEED TO BE BROUGHT IN ORIGINAL ACTION SUIT

There is a few concerns with the DOC's notion that termination from the DOC EM program should be adjudicated through the filing of an original action law suit. (1) the DOC has argued that despite applying only to "prisoners" in "state facilities", the prohibited conduct contained in 22 AAC 05.400 nevertheless extends to participants of the EM program who live in the community and reside at private residences. The fact that Judge Ramgren ruled 22 AAC 05.400 can be applied to a prisoner not in a state facility creates a severe disadvantage for an offender who may attempt to contest removal from the DOC EM program in an original action.

This is so because, if a participant of EM is "terminated" from the program based on a violation of the EM Terms & Conditions which is subject to a 22 AAC 05.400 infraction and adjudicated at a disciplinary hearing, which can be appealed to the superior court, then the DOC will just make the argument they advance now, but in reverse. That is, instead of arguing the disciplinary hearing was separate from "the administrative decision to remove from EM" the DOC would argue they were related and therefore, a stay of one proceeding

should be ordered pending the outcome of the other, or argue that a guilty finding at a disciplinary hearing is sufficient cause for summary judgment on an original action suit.

The vast majority of prisoners lack the requisite legal knowledge necessary to successfully prosecute an original action suit, and are lacking in monetary sufficiency which is adequate enough to retain private counsel. Therefore, it is highly unlikely an original action suit filed by an EM program participant which contests the validity of program termination would even be resolved within the length of time left on the program participant's sentence being that acceptance to the EM program is capped at having no more than three years left on an offenders sentence, unless override is approved based upon demonstrated exceptional rehabilitation as was the case with Stefano. Thus, at that time the DOC would just file to have that case dismissed as moot.

Furthermore, being that a prisoner has the procedural right to appeal administrative transfers to the extent such transfer is detrimental to rehabilitation, the legal avenues argued by the DOC as appropriate process for the contesting of removal from the EM program holds the potential for a trinity of litigation based off one specific course of action: the removal from the EM program; an original action suit, an administrative appeal from disciplinary hearing, and an administrative appeal from a transfer which negatively affects rehabilitation. This is not in the best interest of judicial economy and adequate process is protected through a single hearing.

#### The EM Policies 903.06 & 818.10

Stefano applied to the Community Electronic Monitoring program under DOC Policy 903.06. This policy provided for acceptance to the program based upon "exceptional rehabilitation" override. Since the inception of this

litigation, the DOC has newly created DOC Policy 818.10 Sentenced Electronic Monitoring. This new policy has removed the procedural consideration for program acceptance to the program based upon "exceptional rehabilitation" and has wholly failed to comply with the Administrative Procedures Act in its promulgation.

Stefano wishes for this Court to know that through Stefano's own empirical observation, he can attest that under the current DOC administration the individual correctional facilities in Alaska are being ran by arbitrary directive issued through administrative memorandums, and DOC policy is frequently repealed, amended, or enacted with no consideration being given to compliance with the APA. Policy is nevertheless treated as having greater authority than its legally governing authority; that is, policy exceeds the scope of AAC and statutory authority. Additionally, in many instances, the DOC policy which is available for viewing on the prisoner inmate law library is not consistent with the updated policy on the DOC website, and in further instances, The DOC policy which is reflected on the DOC website and the prisoner digital law library is entirely different than the policy staff go off of which is viewable only to them. Of course, this is a separate issue from what is litigated before this court now.

### CONCLUSION

Stefano was given great consideration to his rehabilitation when deciding to accept him to the DOC EM rehabilitative program, and then no consideration when he was terminated from the program. While on EM, Stefano got married, enrolled in an electrical apprenticeship program, signed a lease agreement and was otherwise permitted while on the program to incur civil debt.

The DOC EM program is only functional to the extent that members of the community, i.e., employers and landlords are willing to offer a second chance



to offenders reentering our society. EM program participants must have both employment and housing, which is not provided by the DOC but rather the citizens of our community with hearts compassionate enough to assist in prisoner reentry where others would not. Citizen employers of participants in the DOC EM program are explicitly incorporated into the program by means DOC Form 903.06K (EM Employment Verification Form) and must sign the form acknowledging their duty to report directly to an EM officer specific listed conduct. The EM program requires its participants to submit to the EM officer a copy of the EM program participants lease agreement (Exc. 8).

In the event a program participant is terminated from EM, no notice is to the citizen employer and landlords prior to the termination of the EM program participant, nor is the participant themselves given prior notice. The indisputable resulting effect is that the proxy participants of the EM program, i.e., the citizen employers and landlords are left empty-handed for their attempts at working with the DOC by being willing to assist in prisoner reentry. This undoubtedly leaves room for scorned feelings for having attempted to provide a second chance to prisoners, and serves only to dissuade those compassionate citizens from wanting to, or being willing to, engage DOC in the assistance of prisoner reentry in the future.

In the present case, Stefano's employer, Adam Moore, of Adam Electric LLC. gave Stefano the opportunity to engage in career path employment by being an electrician's apprentice under the tutelage of his company and curriculum of AV TECH. The abrupt removal of Stefano from the EM program frustrated Mr. Moore; he no longer desires to employ DOC EM program participants.

The purpose of the EM program is the successful reentry and reintegration of offenders back into society; this is the same purpose and design of a

furlough. This Court has noted that "furlough was specifically designed to rehabilitate." Hertz v. Macomber, 297 P.3d 150, 157 (Alaska 2013) The statutory factors contained in the furlough statute (AS 33.30.101) requires the DOC to consider the factors in AS 33.30.091 prior to granting a furlough or prerelease furlough under AS 33.30.111.

This is significant because the factors in AS 33.30.091 which must be considered by the DOC prior to granting furlough, are identical to the factors required to be considered by the DOC prior to granting acceptance to the EM program (AS 33.30.065(b)(1)-(8)). Thus, if this Court has ruled that "furlough was specifically designed to rehabilitate." and the statutory factors of consideration prior to the granting of a furlough are the same as the statutory factors of consideration prior to granting acceptance to the EM program, then it is clear the EM program was specifically designed to rehabilitate too.


Because the reason for Stefano's removal from the DOC EM program was based upon the allegation he violated Terms nine and twenty-one of the EM program Conditions, and the violated Terms were adjudicated at a disciplinary hearing having produced a record capable of review, Judge Ramgren was with jurisdiction and power to hear Stefano's appeal. The EM program is clearly rehabilitative. Judge Ramgren was not wrong in his ruling regarding EM and jurisdiction.

CERTIFICATE OF SERVICE

I certify a copy was mailed to:

ANNA JAY      *ON 1/14/2021*  
1031 West 4th, Ste 200  
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RESPECTFULLY SUBMITTED,

  
\_\_\_\_\_  
Trevor J. Stefano  
Pro Se