STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of AMIYN ABDULLAH,

Petitioner,

-against-

ROBERT J. EBERT, Superintendent,
Otisville Correctional Facility,
GLENN S. GOORD, Commissioner,
N.Y.S. Department of Correctional
Services, et al.,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST6751 Index No. 2582-06

Appearances:

Amiyn Abdullah
Inmate No. 95-A-0219
Petitioner, Pro Se
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Otisville, NY 10963-0008

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State of New York
Attorney For Respondent
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(Steven H. Schwartz
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Otisville Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination which denied his grievance concerning the practice of the Muslim Faith. He alleges that on September 12, 2005 he was in the yard/gym of Otisville Correctional Facility. When it was time to offer the Maghrib Prayer he withdrew to a secluded area to offer the prayer, so as not to disturb anyone. A few minutes after performing the prayer, he was informed by a correctional officer that he was not allowed to make prayer in the yard/gym area. On September 14, 2005 he filed a grievance. The Inmate Grievance Review Committee considered the matter, but were deadlocked as to a determination. Petitioner appealed the determination to the Superintendent, who denied the grievance in the following decision:

> "Remedy requested denied. Per Directive 4202, 'Religious Programs and Practices', Section K.1.: 'Individual demonstrative prayer by inmates will only be allowed in the privacy of their own living quarters and in designated religious areas whenever feasible, as determined by the Superintendent.' Grievant may make prayer in the Mosque and/or in his cube; the gym/yard is not a designated religious area."

Petitioner then took an appeal to the Central Office Review Committee, which issued the following decision:

> "Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby denied. CORC

> upholds the determination of the Superintendent for the reasons stated."

Petitioner has alleged that in the Muslim Faith he is required to offer prayer five times a day at specified times determined by the position of the sun in the sky. He indicates that at times he is forced to leave his housing unit and go to the gym/yard. He argues that the prohibition against individual demonstrative prayer in the gym/yard means, as a practical matter, that members of the Muslim Faith must choose whether to attend programming or stay in their housing unit all day. He maintains that if a member of the Muslim Faith remains in the housing unit, he risks being disciplined for refusing to participate in programming.

Correctional Law § 610 (1) provides "[a]ll persons who may have been or may hereafter be committed to or taken charge of by any of the institutions mentioned in this section, are hereby declared to be and entitled to the free exercise and enjoyment of religious profession and worship, without discrimination or preference." Such statutory requirement is reflected in the applicable regulations of the Department of Correctional Services. 9 NYCRR § 7024.1 provides:

> "(a) Prisoners have an unrestricted right to hold any religious belief, and to be a member of any religious group or organization.
> (b) Prisoners are entitled to exercise their religious beliefs in any manner that does not constitute a threat to the safety, security or good order of a local correctional facility, or the health of any individual. ***
> (d) Equal status and protection shall be afforded all prisoners in the exercise of their religious beliefs, except when such exercise results in facility expenditures which are unreasonable or disproportionate to those extended to other prisoners for similar purposes."

It has been held that "[i]nmate rights to religious freedom must be balanced against security

considerations and the State's legitimate correctional goals" (Matter of Cancel v Goord, 278 AD2d 321, 323 [2d Dept 2000]).

> "In making this determination four factors are considered: (1) whether there is a logical connection between the prison practice and legitimate governmental interests, (2) whether there are alternate means of exercising the right, (3) the impact upon staff and other inmates and the allocation of prison resources, and (4) whether there are alternatives that adequately address the concerns (Matter of Lucas v Scully, 71 NY2d 399, 405)" Matter of Malik v Coughlin, 158 AD2d 833, 834 [3d Dept 1990]).

In addition, the Religious Land Use and Institutionalized Persons Act of 2000 (42 U.S.C. § 2000cc-1, hereinafter RLUIPA) prohibits respondent from imposing a substantial burden on the religious exercise of a prisoner unless respondent demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. (42 USC § 2000cc-1 [a]). However, even under the RLUIPA, legitimate safety and security concerns take precedence (see Cutter v Wilkinson, 544 US 709, 722 [2005]).

> Notwithstanding the importance of safety and security concerns,
>
> "'(a) reviewing court, in dealing with a determination * * * which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis' (Securities Comm. v Chenery Corp., 332 U.S. 194, 196; cited with approval Matter of Barry v O'Connell, 303 NY 46, 50-51). Review is limited to a consideration of the statement of the factual basis for the determination and whether, in light of the agency's own standards, the findings, supported by substantial evidence, sustained the conclusions. A court cannot surmise or speculate as to how or why an agency reached a particular conclusion. Failure of the agency to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review (Matter of Simpson v Wolansky, 38 NY2d 391, 396;

Matter of Barry v O'Connell, supra).” (Matter of Montauk Improvement v Proccacino, 41 NY2d 913, 913-914 [1977]; see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]; Matter of Police Benevolent Assn of N. Y. State Troopers v Vacco, 253 AD2d 920, 921 [3d Dept 1998]).

Petitioner has cited the findings in Matter of Abdullah v Smith, (115 Misc 2d 105 [1982], affd 96 AD2d 742 [1983]), to establish “that a Moslem must offer a prayer five times a day at specified times determined by the position of the sun in the sky. The prayers involve physical movements: kneeling down, bending forward, touching the forehead to the ground, and motioning with the hands and arms. These actions consume about five to twelve minutes of time.” (id. at 107). The verified petition also alleges that such demonstrative prayer is mandatory in his religion. Moreover, this Court may take judicial notice of matters of common knowledge (see Domermuth Petroleum Equip. & Maintenance Corp. v Herzog & Hopkins, 111 AD2d 957, 959 [3d Dept 1985]). While it may not take judicial notice of detailed canonical issues (see Rector, Churchwardens & Vestrymen of Christ’s Church at Pelham v Collett, 208 App Div 695, 699 [2d Dept 1924], affd 240 NY 563 [1925]), courts have regularly taken judicial notice of well known religious practices and beliefs (see e.g. Toomey v Farley, 2 NY2d 71, 83 [1956]; Kalina v General Hosp. of City of Syracuse, 18 AD2d 757, 760 [4th Dept 1962] [dissent]; Brown v Heller, 51 Misc 2d 660, 662-663 [1966]; Sorrentino v State of New York, 22 Misc 2d 330, 335 [1960]). The Court finds that it is of sufficiently common knowledge that members of the Muslim Faith engage in demonstrative prayer several times each day to take judicial notice of such fact. Petitioner has shown that

he is required to choose between physical exercise in the yard, which is essential to a prisoner's physical and mental health and well being, and prayer, which is essential to his spiritual health and well being. It is therefore determined that petitioner has made a prima facie showing that respondent's policy of prohibiting demonstrative prayer in the gym/yard area of the correctional facility imposes a substantial burden on the practice of petitioner's religion.

The burden thus shifts to respondent to establish a compelling governmental interest. As stated in the Superintendent's decision, directive 4202, dated May 12, 2004, recites in pertinent part as follows:

> "K. Prayer or Devotions.
>
> "1. Individual demonstrative prayer by inmates will only be allowed in the privacy of their own living quarters and in designated religious areas whenever feasible, as determined by the Superintendent.

The decision then concludes that because the gym/yard has not been designated as an area for prayer, it may not be used as such. However, the directive specifically authorizes the Superintendent to designate appropriate religious areas. The decision does not indicate any reason why some portion of the gym/yard could not safely be designated a religious area. The decision does not establish a compelling governmental interest, or any governmental interest for the denial.

Even if the Court were to relax the rule that respondent is limited to the grounds stated in its decision due to the fact that it involves prison administration with potentially dangerous consequences, respondent's submissions still fail to show a compelling governmental

interest. Respondent has submitted an affidavit from the Deputy Superintendent of Security at Otisville Correctional Facility. Such affidavit is entirely conclusory and speculative. It contends that the yard is inappropriate for individual demonstrative prayer because it was not designed for such an activity, that it might impinge upon the rights of other inmates leading to altercations, and that it is difficult to supervise inmates away from the larger group. There is no evidence that the yard is so small that a portion could not be set aside to allow such prayer, that any correctional facility has experienced any problems associated with demonstrative prayer in a recreation yard, or that prisoners regularly stay in a large group when in the recreation yard. Moreover, this is not a new issue. The Court in Matter of Abdullah v Smith, (115 Misc 2d at 108-109) found that the recreation yard was an appropriate area for demonstrative prayer and enjoined the restriction on such prayer unless inmates were allowed to return to their cells to perform the prayers. Such case was decided more than 20 years ago, yet respondent has not offered any proof that it has caused any actual security or safety issues.

The failure of the Superintendent or the Central Office Review Committee to set forth the factual basis and reasoning behind the determination renders meaningful judicial review impossible (see Matter of Bierenbaum v Goord, 13 AD3d 945, 946 [3d Dept 2004]). The Court would be engaging in pure speculation to assume that the determination was based upon the existence of safety and security issues or some other compelling governmental interest. Therefore, the issues must be remanded to the respondent Ebert for further

proceedings, including at a minimum, a determination which sets forth the facts and reasoning supporting the outcome.

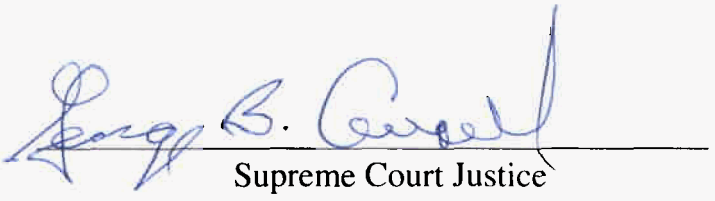
Accordingly it is

ORDERED and ADJUDGED, that the petition is hereby granted to the extent that the determination is hereby vacated and annulled and the issues are remanded to respondent Ebert for further proceedings consistent herewith.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: April 2, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated April 20, 2006, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 13, 2006, Supporting Papers and Exhibits
3. Petitioner's Reply To Answer dated November 1, 2006.