Matter of Gee v Goord
2007 NY Slip Op 30567(U)
April 2, 2007
Supreme Court, Albany County
Docket Number: 0754206/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of CARL GEE, 98-B-1658,

Petitioner,

-against-

GLENN S. GOORD, AS COMMISSIONER OF DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent,

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-ST7262 Index No. 7542-06

Appearances: Carl Gee
Inmate No. 98-B-1658
Petitioner, Pro Se
Five Points Correctional Facility
P.O. Box 119
Romulus, New York 14541

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DECISION/ORDER/JUDGMENT

The petitioner, an inmate at Five Points Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review the determinations of several grievances concerning his desires to practice and learn the Shi'a Muslim Faith. The grievances are numbered FPT 15468-06, FPT 15614-06, FPT 15778-06 and FPT 15824-06. Petitioner has also filed similar grievances which are not challenged herein. Respondent has raised an objection in point of law that grievances FPT 15778-06 and FPT 15824-06 were not final as there had been no determination of petitioner's appeal to CORC at the time the instant proceeding was commenced.

The Court finds that the objection that the challenges to the latter two grievances was premature is sufficiently specific to raise the objection of failure to exhaust administrative remedies. It is well settled that a petitioner must await the final determination of the administrative proceedings before commencing an article 78 proceeding. The subsequent issuance of a determination on the administrative appeal does not cure the defect (see Matter of West v McGinnis, 4 AD3d 654 [3d Dept 2004]; Matter of Robinson v Bennett, 300 AD2d 715 [3d Dept 2002]; Matter of Abdullah v Girdich, 297 AD2d 844 [3d Dept 2002]). Therefore, it is determined that petitioner failed to exhaust his administrative remedies, requiring dismissal of the challenges to grievances FPT 15778-06 and FPT 15824-06.

The standard of judicial review in an article 78 proceeding challenging a determination of a grievance is limited to "whether the record as a whole provides a rational

basis for the underlying determination, which will not be disturbed absent a showing that it is 'wholly arbitrary or without any rational basis' (Cove v Sise, 71 NY2d 910, 912; see, Matter of Curtiss v Angello, 269 AD2d 675)." (Woodward v Governor's Office of Employee Relations, 279 AD2d 725, 726-727 [3d Dept 2001]). Moreover, administrative determinations carry a presumption of regularity (see Altamore v Barrios-Paoli, 90 NY2d 378, 386 [1997]; Nehorayoff v Mills, 282 AD2d 932 [3d Dept 2001]). The petitioner must overcome such presumption by submission of "factual allegations of an evidentiary nature or other competent evidence tending to establish his or her entitlement to the requested relief" (Matter of Rodriguez v Goord, 260 AD2d 736, 736-737 [3d Dept 1999]; see also Matter of Barnes v La Vallee, 39 NY2d 721 [1976]; Matter of Tebout v Goord, 290 AD2d 833 [3d Dept 2002]; Matter of Vandermark-Crayne v New York State Dept. of Civ. Serv., 225 AD2d 979 [3d Dept 1996]; Matter of Reynoso v Le Fevre, 199 AD2d 886 [3d Dept 1993]; Matter of Bogle v Coughlin, 173 AD2d 992 [3d Dept 1991]); Matter of Malik v Berlinland, 158 AD2d 836 [3d Dept 1990]). Conclusory assertions do not meet that burden and fail to overcome the presumption of regularity.

Petitioner's grievances allege various forms of religious discrimination. 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]).

Grievance FPT 15468-06 alleged that petitioner was being discriminated against because the Shi'ite religion did not have a classroom in which to meet for weekly studies,

books, supplies and a locker in a designated area to keep such materials. The Superintendent denied the appeal from the denial of the grievance on the ground that "[a] faith group may conduct a class if the facility has at least two inmates for that group. At the present time, you are the only inmate who has requested a Shi'ite Muslim class." CORC affirmed the Superintendent's determination and added that the Department of Correctional Services had a Shi'ite Muslim protocol which provided for joint religious services for both Sunni and Shi'ite Muslims, with separate educational classes. CORC further found that petitioner had been provided with appropriate educational materials as well as contact information with respect to the Department's Shi'ite Imam.

The record shows that petitioner was the only inmate registered as a Shi'a Muslim at Five Points Correctional Facility at the time the grievance was made. Given the absence of any other registered adherents, there is clearly a rational basis for determining that petitioner may study his religion in his cell on his own. The determination of the grievance is necessarily limited to the facts which existed at the time of the grievance. If other inmates have changed their religious designation to Shi'a Muslim after the grievance was made, that would not alter the outcome. Petitioner must make a new request for classes in conjunction with the other designated Shi'a Muslims. Moreover, there is clearly a rational basis for not incurring the expense and administrative burden of providing a religious educator for the benefit of a single prisoner.

Petitioner has alleged that there are three other inmates who are interested in studying

the Shi'a Muslim religion. However, he has submitted an affidavit from only one of them. The affidavit is entirely conclusory and fails to state when and where the affiant requested a change in his religious designation. Furthermore, it does not state that he actually changed his religious designation. Petitioner contends that inmates other than those designated as of a specific faith may also attend religious classes of other religions. Directive 4202 sets forth a general rule that inmates may only attend services and educational classes of their own designated religion. There is provision for inmates to learn of other religions, but they must receive permission from the chaplain or spiritual advisor of such other faith group and are limited to only three services or study sessions per year. The Directive clearly contemplates attendance at existing study groups held by an existing chaplain or spiritual advisor. Since there are no Shi'ite chaplains or spiritual advisors, and no existing study sessions at Five Points Correctional Facility, petitioner may not use his friends' professed interest to bootstrap his claim of a need for a Shi'a classroom, books, supplies or a locker.

Moreover, the facts of the grievance do not show any interference with or substantial burden upon petitioner's practice of his religion. At best, the allegations show a failure to facilitate petitioner's practice of the Shi'a Muslim faith. The Court therefore finds that there was a rational basis for the denial of grievance FPT 15468-06.

Grievance FPT 15614-06 alleged that the Sunni Muslim sect at Five Points Correctional Facility has its own account, a library, can order its own religious books and may conduct fund raisers. He objects that the Shi'a Muslim sect does not have an account

for funds, a library, can not order books and does not have fund raisers. Petitioner claims that this constitutes religious discrimination. The Superintendent denied the appeal from denial of the grievance on the ground that the "[a]ctivities and materials of the Muslim Community are open for all Muslim inmates and are governed by the general teaching of Islam and the rules and directives of the Department of Corrections." CORC denied petitioner's appeal on the grounds raised by the Superintendent and added that petitioner "may pursue the establishment of a Shi'ite account and fundraiser in accordance with Directive 4760, Inmate Organizations." It is certainly not the responsibility of the Department of Correctional Services to sua sponte create religious organizations on the chance that an adherent of that religion might be assigned to a specific correctional facility. Petitioner's grievance does not allege that he or any other Shi'a Muslim inmate at Five Points Correctional Facility has been denied the right to create a Shi'a Muslim organization. The fact that no inmates had created an organization prior to the time of the grievance does not indicate any discrimination nor does it give rise to the right to any relief. The Court therefore finds that there was a rational basis for the denial of grievance FPT 15614-06 as well.

Accordingly it is

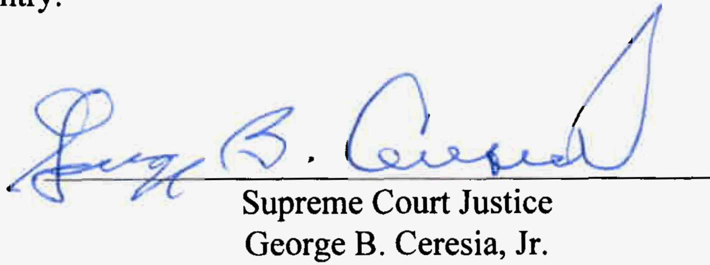
ORDERED and ADJUDGED, that the petition is hereby dismissed.

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 November 20, 2006, Petition, Supporting Papers and Exhibits, Affidavit of Wilton Wongshing sworn to September 11, 2006
2. Respondent's Answer dated January 11, 2007, Affirmation of Steven H. Schwartz, Esq. dated January 11, 2007 and Exhibits
3. Petitioner's Reply To Answer dated January 19, 2007.