

**Matter of Bedi v New York State Dept. of  
Correctional Servs.**

2007 NY Slip Op 33017(U)

September 25, 2007

Supreme Court, Albany County

Docket Number: 0332206/2007

Judge: George B. Ceresia

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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

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In The Matter of the Application of

PETROS BEDI, 00-A-2646,

Petitioner,

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

-against-

NEW YORK STATE DEPARTMENT  
OF CORRECTIONAL SERVICES,

Respondent.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-06-ST6855 Index No. 3322-06

Appearances:

Petros Bedi, 00-A-2646  
Petitioner *Pro Se*  
Great Meadow Correctional Facility  
PO Box 51  
Comstock, New York 12821-0051

Andrew M. Cuomo  
Attorney General  
State of New York  
Attorney For State Respondents  
The Capitol  
Albany, New York 12224  
(Jaime I. Roth,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER**

George B. Ceresia, Jr., Justice

Petitioner commenced the instant article 78 proceeding challenging the final determination of petitioner's grievance regarding an alleged denial of the right to possess ceremonial religious items. By decision, order and judgment dated November 16, 2006 this Court granted the petition in part. The decision stated "to the extent that respondent's determination of the grievance continued the total prohibition on the use and possession of incense and non-black mala beads, it is arbitrary and capricious and contrary to state and federal law. Respondent is directed allow petitioner to use and possess incense and non-black mala beads, subject to reasonable restrictions." Petitioner has now moved to hold respondent in contempt of court for failure to comply with such decision, order and judgment.

In order to hold respondent in contempt based upon a violation of a court order, petitioner must establish that respondent has violated a lawful court order clearly expressing an unequivocal mandate (see Somerville v Somerville, 26 AD3d 647, 648 [3d Dept 2006]; Labanowski v Labanowski, 4 AD3d 690, 694 [3d Dept 2004]). If there is any ambiguity in the order or it is unclear whether the order has been violated, contempt is inappropriate (see Aumell v King, 18 AD3d 905 [3d Dept 2005]; Quick v ABS Realty Corp., 13 AD3d 1021 [3d Dept 2004]; Matter of Upper Saranac Lake Assn. v New York State Dept. of Envtl. Conservation, 263 AD2d 916, 917 [3d Dept 1999]).

As noted, the decision, order and judgment specifically allowed the respondent to

impose reasonable restrictions on the use and possession of incense. The Court purposefully imposed this condition in order to provide maximum latitude to the respondent in determining how the Court's order could be implemented. In this respect, the judicial mandate is not clear, and was not intended to be. As set forth in detail below, respondent essentially indicates that there is no practical way that it may reasonably regulate the burning of incense in prison cells, and that a complete ban on the practice is necessary. Respondent points out that it does permit the burning of incense during congregate religious services.

Respondent has submitted additional proof with respect to security and safety issues concerning the burning of incense which were not provided in opposition to the petition. Respondent, through the affidavit of Assistant Commissioner Paul Kikendall, points out that it permits the burning of incense at congregate religious services for Buddhist inmates, but that with one exception (noted below) it completely prohibits the burning of any substance by an inmate in his or her cell, including cigarettes, other tobacco products, incense, candles and oil lamps. It is indicated that a primary safety concern is the risk of fire. Assistant Commissioner Kikendall point out that inmates of other religious faith groups including Catholics, Muslims and Rastifarians, are prohibited from burning substances in their individual cells. The one exception to the foregoing is the practice of religious "smudging" by Native American inmates in their cells. Smudging involves the burning of a non-tobacco substance called knnick-knnick. Assistant Commissioner Kikendall indicates that this is a minor accommodation made to a group which is defined by their ethnic heritage, as Native

Americans, and not by their claimed religious belief. Because there are only approximately 300 Native American inmates in the prison population (an extremely small, but easily identifiable subset of the overall prison population), it is indicated that the large-scale safety and security concerns which arise with respect to incense burning within cells are not implicated. Commissioner Kikendall further points out that over the past decade the respondent has imposed a total ban on all indoor smoking within all of its correctional facilities.

The Court, in its decision/order/judgment dated November 16, 2006, directed that respondent allow the use and possession of incense “subject to reasonable restrictions”. Respondent has demonstrated that the burning of incense in prison cells as proposed by the petitioner would present a significant institutional safety and security concern; and that there are no restrictions which the respondent could reasonably impose, other than an outright ban on the practice, which would operate to mitigate this concern. The petitioner, on the other hand, has failed to demonstrate that reasonable alternatives exist which address the safety and security concerns enunciated by the respondent. Under such circumstances, the Court must conclude that the petitioner failed in his burden to demonstrate his entitlement to the relief requested. In addition, as previously noted, inasmuch as there is no clear mandate, relief in the nature of contempt may not be awarded (see Aumell v King, *supra*; Quick v ABS Realty Corp, *supra*; Matter of Upper Saranac Lake Assn. v New York State Dept. of Envtl. Conservation, *supra*).

Petitioner also seeks to hold respondent in contempt for failure to issue a permit for the possession and use of an image of Buddha, a plant, a zabuton or an altar or for an electric candle, an electric bell and a small wooden bench and for failure to revise its statewide directive concerning such issues. The decision, order and judgment denied all relief with respect to an image of Buddha, a plant, a zabuton and an altar on the ground that petitioner had not shown that a request for a permit had been denied, that is, there was no exhaustion of administrative remedies with respect to such issues and no proof of any actual interference with his religious practices. The decision, order and judgment can not reasonably be construed as requiring respondent to allow such items. Similarly, petitioner has not shown that he has followed specified procedures in making a formal request for a permit for such items or an electric candle, an electric bell or a small wooden bench, as alternatives to the open flame candle, bell and zafu which were denied by this Court. Nothing in the decision, order and judgment could be construed as unequivocally mandating the issuance of a permit for such items. Moreover, while the decision, order and judgment would have *stare decisis* effect with respect to other inmates, nothing in the decision, order and judgment could be construed as mandating that respondent revise its directives.

As such, petitioner has failed to show that an order of contempt is warranted with respect to such issues either. Rather, petitioner must exhaust his administrative remedies by following respondent's formal procedures to apply for a permit for the religious items and thereafter commence a new article 78 proceeding in the nature of mandamus if a

determination on the permit application is not made within a reasonable time, or, if items are denied, grieving or appealing any denial of a permit and thereafter commencing a new article 78 proceeding challenging such determination.

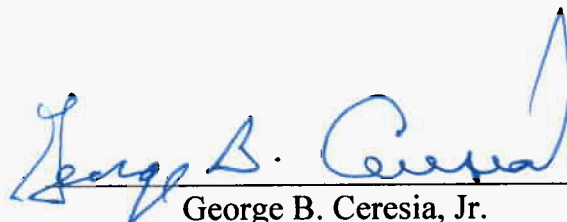
Accordingly it is hereby,

**ORDERED**, that the motion to hold respondent in contempt of court is hereby denied.

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

**ENTER**

Dated: Troy, New York  
September 25, 2007



George B. Ceresia, Jr.  
Supreme Court Justice

**Papers Considered:**

Notice of Motion dated April 23, 2007; Affidavit of Petros Bedi sworn to April 24, 2007, with Exhibits A-G annexed;

Affirmation of Jaime I. Roth, Esq., dated May 25, 2007 with Exhibit A annexed;

Affidavit of Paul Kikendall sworn to May 25, 2007 with Exhibits A-C annexed;

Memorandum of Law dated May 25, 2007

Reply dated May 29, 2007, with Exhibit 1 annexed.