

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

2009 NY Slip Op 32961(U)

December 22, 2009

Supreme Court, Albany County

Docket Number: 3081-09

Judge: Joseph C. Teresi

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of  
ALPHONSO SIMMONS,

Petitioner,

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

**DECISION and ORDER**  
**INDEX NO. 3081-09**  
**RJI NO. 01-09-ST0311**

-against-

THE NEW YORK STATE DEPARTMENT  
OF CORRECTIONAL SERVICES,

Respondent.

---

Supreme Court Greene County All Purpose Term, December 11, 2009  
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

Alphonso Simmons, 06-A-5276  
*Pro Se Petitioner*  
Green Haven Correctional Facility  
PO Box 4000  
Stormville, New York 12582

Andrew M. Cuomo, Esq.  
Attorney General of the State of New York  
*Attorney for the Respondent*  
(C. Harris Dague, Esq. AAG)  
The Capitol  
Albany, New York 12224

**TERESI, J.:**

Petitioner commenced this Article 78 proceeding seeking reversal of Respondent's determination to seat another inmate, instead of Petitioner, on the Attica Correctional Facility Inmate Greivance Resolution Committee (hereinafter "Attica IGRC") and resulting monetary

damages. Respondent's pre-answer motion to dismiss was denied, and it has now answered the petition. Because Petitioner failed to demonstrate that Respondent's actions were "arbitrary and capricious" or affected by an error of law, this proceeding is dismissed.

Administrative determinations are reviewed, pursuant to CPLR Article 78, to ascertain "whether the agency determination was arbitrary and capricious or affected by an error of law." (Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753, 758 [1991]; Heintz v. Brown, 80 NY2d 998 [1992]). This court cannot substitute its judgment for that of the agency unless the agency's determination is clearly arbitrary, capricious or contrary to the law. (Matter of Flacke v. Onondaga Landfill System, 69 NY2d 355 [1987]). Moreover, "[i]t is axiomatic that deference should be given to an administrative agency's interpretations of its own regulations." (Medina v. Building Maintenance Service, 302 AD2d 774 [3d Dept. 2003], Gaines v. New York State Div. of Housing and Community Renewal, 90 NY2d 545 [1997], Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin., 10 NY3d 474 [2008]).

On this record, the following facts are undisputed. Attica's IGRC held an election to seat two inmate representatives, and Petitioner received the third highest number of votes. The inmate who received the highest number of votes was not seated, thus creating a vacancy on the IGRC. To fill the vacancy, Respondent did not seat the Petitioner.

While Petitioner claims that 7 NYCRR 701.4(3)(i) requires that he fill the vacancy. Respondent alleges that Petitioner was not seated because "the current IGRC agree[d] upon the appointment of a new representative who [met] with the approval of the superintendent" pursuant to 7 NYCRR 701.4(3)(ii). Thus, at issue is Respondent's interpretation of 7 NYCRR 701.4(3).

The regulatory standard for “[f]illing vacancies between elections” is set forth in

7 NYCRR 701.4(3), which states:

(i) Alternate inmate representatives (those placing third or fourth in the most recent election) will be used to fill vacancies between elections.

(ii) When there is a need for additional inmate representatives or alternate representatives to complete a term until the next regular election, the supervisor has the option of: exhausting the most recent election list in numerical sequence for representatives; having the current IGRC agree upon the appointment of a new representative who meets with the approval of the superintendent; or holding another election.

Such regulation, like a statute, must be “construed as a whole, and... all [of its] parts... are to be read and construed together to determine the legislative intent.” (Statutes §97, *see generally* Matter of St. Margaret's Ctr. v Novello, 23 AD3d 817 [3d Dept. 2005]). It is assumed “that every provision thereof was intended for some useful purpose.” (Statutes §144, comment).

Contrary to Petitioner’s arguments, by construing 7 NYCRR 701.4(3) as a whole, subdivision (i) does not supercede subdivision (ii). Rather, the two subdivisions must be reconciled. While subdivision (i) contains mandatory language, the mandate extends only to the inmates who may be considered to fill a vacancy in the IGRC. Subdivision (i) provides a choice between two inmates, i.e. “those placing third or fourth in the most recent election”. Subdivision (ii)’s provisions then provide three procedures the superintendent may employ to select between the two inmates.

Here, the superintendent chose to have “the current IGRC agree upon the appointment of a new representative who [met] with [his] approval.” (7 NYCRR 701.4[3][ii]). While Petitioner was one of the two individuals the IGRC and the superintendent were required to consider, the inmate placing fourth highest in the most recent election was also available to be appointed. (7 NYCRR 701.4[3][i]) Accordingly, Respondent was not required to name Petitioner to the

IGRC. Moreover, on this record, Petitioner failed to demonstrate that the individual who was appointed to the IGRC did not receive the fourth highest number of votes in the most recent election. As such, Petitioner failed to demonstrate that either the Respondent's interpretation or its determination were arbitrary, capricious or contrary to the law.

Likewise, because Petitioner failed to demonstrate that he was an IGRC member he cannot demonstrate that Respondent could not transfer him by operation of 7 NYCRR 701.4(c). (*see generally Johnson v. Ward*, 64 AD2d 186, 189 [3d Dept 1978]). Respondent has "broad discretion" in determining whether to transfer an inmate, and Petitioner failed to demonstrate that his transfer was "irrational or arbitrary and capricious." (*Salahuddin v. Goord*, 64 AD3d 1091, 1092 [3d Dept. 2009]).

Lastly, as Petitioner's main claim for relief is denied, there is no basis for an award of damages. Accordingly, the petition is dismissed in its entirety.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York  
December 22, 2009

  
Joseph C. Teresi, J.S.C.

**PAPERS CONSIDERED:**

1. Order to Show Cause, dated April 24, 2009; Verified Petition of Alphonso Simmons, dated April 9, 2009 with attached Exhibits A-E;
2. Answer, dated November 16, 2009, Affirmation of C. Harris Dague, dated November 16, 2009, with attached Exhibits A-E;
3. Response of Alphonso Simmons, dated November 24, 2009.