

<b>Matter of Rodriguez v Fischer</b>
2010 NY Slip Op 32635(U)
September 2, 2010
Supreme Court, Albany County
Docket Number: 801-10
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 ORLANDO RODRIGUEZ, 99-A-6822,  
Petitioner,  
-against-

BRIAN FISCHER, COMMISSIONER OF THE NEW YORK  
STATE CORRECTIONAL SERVICES,  
Respondent,

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

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJ# 01-10-ST1361 Index No. 801-10

Appearances: Orlando Rodriguez  
Inmate No. 99-A-6822  
Petitioner, Pro Se  
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**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Eastern Correctional Facility, commenced the

instant CPLR Article 78 proceeding to review a grievance determination with respect to a period of post release supervision administratively added to his sentence by the respondent. In 1999 the petitioner entered a plea of guilty to two counts of attempted aggravated assault of a police officer, and a count of robbery in the first degree, all committed in 1999. The sentencing judge imposed determinate terms of imprisonment of ten years each with respect to the counts of attempted aggravated assault of a police officer, and twenty years with respect to robbery first degree, all to run concurrently to one another. The sentencing judge failed to impose a period of post release supervision, as mandated under Penal Law § 70.45[2]).

On October 20, 2009, the petitioner filed a grievance challenging respondent's action in administratively adding a five year period of post release supervision to his sentence. In a determination dated November 4, 2009 the Inmate Grievance Review Committee found that the period of post release supervision should not have been administratively added to petitioner's sentence, and advised him to "seek judicial intervention". The petitioner appealed the determination to the Superintendent who, in a decision dated November 10, 2009, indicated, in part:

"The IRC does not have authority to remove Post Release Supervision time. Grievant is advised to contact his sentencing court for review. Grievance denied."

The petitioner appealed the Superintendent's determination to CORC, which issued the following determination on December 23, 2009:

“Upon full hearing of the facts and circumstances in the instant case, and upon recommendation of Department’s Counsel, the action requested herein is hereby accepted only to the extent that CORC upholds the determination of the Superintendent for the reasons stated.

“CORC notes that the Department of Correctional Services is working with the Office of Court Administration and the various District Attorney Offices in an organized effort to identify every inmate that could be affected by Chapter 141 of Laws of 2008 (Correction Law 601-d) and the Court of Appeals’ recent rulings in *People v Sparber* and *Matter of Garner v DOCS*. Where applicable, the sentencing court and the district attorney will be requested to commence a proceeding to re-sentence the inmate to the post-release supervision required by the Penal Law. The sentencing court will be requested to review such matter and notify DOCS of its decision as soon as possible thereafter.

“In each case, the inmate will receive a copy of the letter that is sent to the sentencing court and the district attorney. Because of the large number of cases that will require further investigation, this whole initiative will require a considerable amount of time to complete.

“If the grievant thinks this determination is in violation of his rights, it is recommended that he consult with his legal representative.”

“Judicial review of administrative decisions [with respect to] inmate grievances is limited to a determination of whether the challenged determination is irrational, arbitrary or capricious” (*Matter of Harty v Goord*, 3 AD2d 701, 702 [3<sup>rd</sup> Dept., 2004] quoting *Matter of Cliff v Brady*, 290 AD2d 895 [2002], *lv denied*, *lv dismissed* 98 NY2d 642 [2002]; *Matter of Cliff v Eagen*, 272 AD2d 687 [2000]; see also *Matter of Clark v Fischer*, 58 AD3d 932 [3<sup>rd</sup> Dept., 2009]). Phrased differently, “[t]o prevail, petitioner must demonstrate that the

Central Office Review Committee's determination was arbitrary and capricious or without a rational basis” (Matter of Patel v Fischer, 67 AD3d 1193 [3rd Dept., 2009] citing Matter of Keesh v Smith, 59 AD3d 798, 798 [2009]; Matter of Green v Bradt, 69 AD3d 1269, [3<sup>rd</sup> Dept., 2010]; Matter of Frejomil v Fischer, 68 AD3d 1371 [3<sup>rd</sup> Dept., 2009]; Matter of Matos v Goord, 27 AD3d 940, 941 [2006]).

It is now well established that the respondent is without power to administratively add a period of post release supervision to an inmate’s sentence, where the sentencing court failed to do so (see Matter of Garner v New York State Dept. of Correctional Servs., 10 NY3d 358, 362 [2008]; People v Williams, 14 NY3d 198, 218 [2010]; Matter of Vincent v Fischer, \_\_\_ AD3d \_\_\_, 2010 NY Slip Op 6261 [3d Dep’t]). In view of the foregoing, the Court finds the determination of CORC with respect to petitioner’s grievance is effected by an error of law, and is irrational, arbitrary and capricious. The period of post release supervision administratively imposed here must therefore be vacated and set aside. This being said the Court further observes however, that petitioner remains subject to the provisions of Correction Law § 601-d.

Accordingly it is

**ORDERED and ADJUDGED**, that the petition be and hereby is granted; and it is further

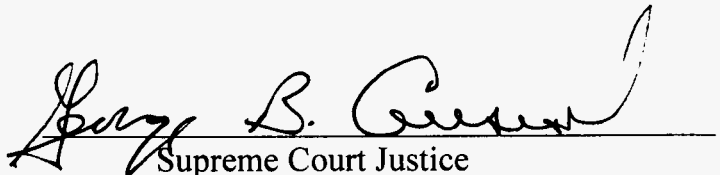
**ORDERED and ADJUDGED**, that the December 23, 2009 determination of CORC is vacated and set aside, and the grievance upheld; and it is further

**ORDERED and ADJUDGED**, that the period of post release supervision administratively added to petitioner's sentence by the respondent be vacated and expunged, subject to any period of post release supervision which has been or may subsequently be imposed by the sentencing court pursuant to the provisions of Correction Law § 601-d.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: September 2, 2010  
Troy, New York

  
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Supreme Court Justice  
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated March 11, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated May 10, 2010, Supporting Papers and Exhibits