

Matter of White v Fischer

2011 NY Slip Op 30621(U)

March 1, 2011

Supreme Court, Albany County

Docket Number: 5816-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of JOHN WHITE,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER,
 NYSDOCS,

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
 RJ1 # 01-10-ST1889 Index No. 5816-10

Appearances: John White
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 Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Upstate Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated June 24, 2010 in which he was found guilty of violating prison rules. The charges arise from an incident in

which he allegedly refused to take a urinalysis test. He was found guilty of a violation of Rule 106.10, refusing a direct order, and Rule 180.14, Urinalysis Testing Violation (see § 270.2 of the Rules of the Department of Correctional Services, 7 NYCRR 270.2).

Because it does not appear that the petitioner raised an issue of whether or not the determination was supported by substantial evidence (see CPLR 7803 [4]), the Court finds that it should retain the proceeding for disposition, rather than transferring it to the Appellate Division pursuant to CPLR 7804 (g) (see Matter of Taylor v Fischer, ___ AD3d ___, 914 NYS2d 691 [3d Dept., January 20, 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

The petitioner argues that he could not be found guilty of a violation of the rules with regard to the taking of a urinalysis test by reason that the respondent failed to demonstrate that he received a copy of the Department of Correctional Services “DOCS”) Rule Book. In a similar vein, he maintains that because he did not receive a copy of the DOCS Rule Book, he could not be found guilty of refusing a direct order.¹ As a part of the foregoing argument, he maintains that the Hearing Officer improperly denied his request to call his employee assistant, C.O. Simmons, as a witness on his behalf. The petitioner desired to have

¹The Court rejects the foregoing reasoning. It is well settled that a prison inmate is required to obey all orders, even the ones with which he does not agree (see Matter of Ferrar v Selsky, 1 AD3d 671, 671-672 [3d Dept., 2003]; Matter of Miller v Goord, 2 AD3d 928, 930 [3d Dept., 2003]). “The fact that [an inmate considers] the officer's order to be unfair d[oes] not excuse him from obeying it” (Matter of Johnson v Duncan, 303 AD2d 811, 812 [3d Dept., 2003], citing Matter of Cruz v Goord, 273 AD2d 569, 570). The reason for this is that “[a]ny holding to the contrary would simply encourage inmates to break rules as a means of addressing their grievances and invite chaos” (Matter of Thompson v Selsky, 289 AD2d 809, 809-810 [3d Dept., 2001], citations omitted).

C.O. Simmons testify that the petitioner never signed for, or received a DOCS Rule Book at Upstate Correctional Facility prior to the incident in question. The petitioner maintains that it was improper for the respondent to direct him to undergo a urinalysis test on June 9, 2010, by reason that he had recently (on May 18, 2010) tested positive for marijuana, and that residual THC (Tetrahydrocannabinol) was likely still in his system. The petitioner also argues that the penalties imposed were excessive.

Under Correction Law § 138, all inmates must receive a copy of DOCS rules and regulations. In addition, an inmate may not be disciplined “except for a violation of a published and posted written rule or regulation, a copy of which has been provided the inmate” (*id.*, para. 5). Significantly, evidence that an inmate has received a copy of the DOCS Rule Book at another correctional facility has been held to obviate the need to reissue the book to him or her upon a subsequent transfer (see Matter of Berrian v Duncan, 289 AD2d 655 [3d Dept., 2001]). Notably, while there is no requirement that an inmate sign a receipt for a rule book (see Matter of Tumminia v Goord, 294 AD2d 727, 727 [3d Dept., 2002]), in this instance the respondent produced a copy of a receipt signed by the petitioner to establish that he received a DOCS Rule Book at Downstate Correctional Facility on June 19, 2008. Inasmuch as the petitioner desired to call C.O. Simmons to establish that the petitioner never signed for or received a DOCS Rule Book upon transfer to Upstate Correctional Facility, the Hearing Officer properly found that the evidence was not relevant. The Court finds petitioner’s argument, that the Hearing Officer erred in refusing to call C.O. Simmons as a witness, has no merit.

With respect to whether there was residual marijuana in petitioner’s system, the

petitioner called as his own witness C.O. Wood, who performed the prior urinalysis test on May 18, 2010. The purpose of calling C.O. Wood was to obtain an opinion from him with regard to whether there would still be marijuana residue in petitioner's system dating back to the May 18, 2010 urinalysis test. C.O. Wood testified that the marijuana residue should clear petitioner's system within a week; perhaps ten or twelve days, if his consumption was extremely high. C.O. Wood testified he was trained in conducting urinalysis tests and had performed approximately six thousand such tests. The Hearing Officer's determination that C.O. Wood was qualified to provide an expert opinion had a rational basis.

The Hearing Officer imposed a penalty of eighteen months each for incarceration in special housing, loss of package privileges, loss of commissary, loss of telephones, and loss of good time. On appeal the special housing was reduced to twelve months, with all other sanctions remaining at eighteen months. "Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law" (Matter of Kelly v Safir, 96 NY2d 32, 38 [2001], mot for reargument denied 96 NY2d 854, citing Matter of Featherstone v Franco, 95 NY2d 550, 554, and CPLR 7803 [3]). The penalty imposed by an administrative agency must be upheld unless it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (Matter of Pell v Board of Educ., 34 NY2d 222, 233 [1974], citations omitted; Matter of Featherstone v Franco, *supra*; Matter of Torrance v Stout, 9 NY3d 1022, 1023 [2008]; Matter of Bottari v Saratoga Springs City School District, 3 AD3d 832, 833 [3d Dept., 2004]; Matter of Martindale v Novello, 13 AD3d 761, 763-764 [3d Dept., 2004]; Matter of Waldren v Town of Islip, 6 NY3d 735, 736-737 [2005]; Matter

of JMH, Inc. v New York State Liquor Authority, 61 AD3d 1260 [3rd Dept., 2009]; Matter of Liguori v Beloten, 76 AD3d 1156 [3rd Dept., 2010]). Here, the Court cannot conclude that the penalties imposed are so disproportionate to the offenses as to be shocking to one's sense of fairness.

There is nothing in the record to support petitioner's argument that the Hearing Officer was not fair and impartial.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

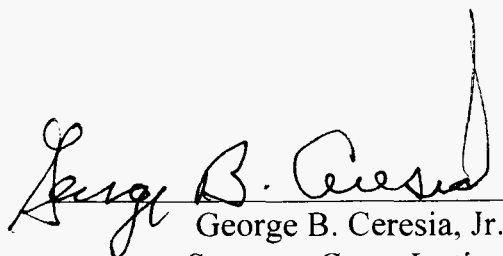
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

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 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: March 1, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 9, 2010, Petition, Supporting Papers and Exhibits
2. Answer dated December 23, 2010, Supporting Papers and Exhibits