

Matter of McKethan v Annucci
2011 NY Slip Op 31108(U)
March 31, 2011
Supreme Court, Albany County
Docket Number: 4122-10
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of WILLIAM MCKETHAN,

Petitioner,

-against-

ANTHONY J. ANNUCCI, EXECUTIVE
DEPUTY COMMISSIONER, NYSDOCS;
AND MAUREEN BOLL, DEPUTY COMMI-
SSIONER AND COUNSEL, 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
RJI # 01-10-ST1692 Index No. 4122-10

Appearances: William McKethan
 Inmate No. 93-A-6107
 Petitioner, Pro Se
 Woodbourne Correctional Facility
 99 Prison Road
 P.O. Box 1000
 Woodbourne, NY 12788-1000

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Brian J. O'Donnell,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Woodbourne Correctional Facility, commenced

the instant CPLR Article 78 proceeding which generally relates to the alleged failure of New York State Department of Correctional Facility (“DOCS”) to obey a court order issued by the Honorable Henry Zwack in Panayoty v Annucci (Sup. Ct., Albany Co., Index No. 2381-08, October, 2008, unpublished). The petitioner in Panayoty, was a member of the Nations of Gods and Earths religion, whose adherents are commonly referred to as “Five Percenters”. He argued that the DOCS Central Office Media Review Committee (“COMRC”) took too long a period of time to conduct a media review of the Five Percenter newspaper in accordance with the media review procedure set forth in DOCS Directive 4572.¹ This, he argued, unreasonably delayed placement of the publication in facility libraries. Acting Supreme Court Justice Zwack, in a decision/order/judgment issued in October 2008, directed that DOCS must complete its review, and mail out the Five Percenter newspaper to prison libraries within three weeks of receipt by COMRC. The petitioner seeks an order directing, inter alia, that DOCS comply with Judge Zwack’s order. Other related relief, set forth below, is also requested.

The respondents have made a motion to dismiss the petition on grounds of mootness, and that the petition fails to state a cause of action. In support of respondents’ argument concerning mootness, the respondents have submitted the affidavit of respondent Maureen E. Boll, Deputy Commissioner and Counsel of DOCS. Deputy Commissioner Boll indicates that various newspapers are reviewed pursuant to DOCS Directive 4572 by the Counsel’s

¹The purpose of the review process is to screen publications for material which, generally speaking, poses a danger to the safety and security of DOCS facilities (see DOCS Directive 4572, Article II, “Standards”. The publications are reviewed and redacted by COMRC before distribution to prison facilities to eliminate such material. As particularly relevant here, this includes redaction of photographs of individuals who appear to be displaying street-gang hand signs.

office before being distributed to prison libraries. In the course of the review process, notations are made with respect to violations of Directive 4572, and the inappropriate material is redacted. According to Deputy Commissioner Boll, with regard to the Five Percenter newspaper, most violations consist of photographs of individuals displaying inappropriate hand signals that are deemed to be a security threat, as they involve gang-related and inappropriate group symbols and communications. As relevant here, a member of the Counsel's staff must review the newspapers and redact the offending hand signals. Deputy Commissioner Boll indicates that in an effort to comply with Judge Zwack's order in Panayoty v Annucci (supra), she discussed the matter with the staff person who is assigned to perform this task. She also indicates that she will assign additional staff people to the task if needed, in order to comply with Judge Zwack's order. It is further indicated that she expects that there will be an increase in her support staff in the near future, who will be able to provide assistance in the review process. For this reason, she expects that, from now on, review of the Five Percenter newspapers will be accomplished within the three week period directed in Judge Zwack's order.

“It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case pending before the tribunal” (see Hearst Corp. v Clyne, 50 NY2d 707, at 713 [1980], citations omitted; see also Matter of City of New York v New York State Public Employment Relations Board, 54 AD3d 480, 481-482 [3rd Dept., 2008]). “This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine,

and in methodological strictures which inhere in the decisional process of a common-law judiciary” (*id.*, at 713-714; *see also* Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 810-811 [2003], cert denied 540 US 1017; Matter of NRG Energy, Inc. v Crotty, 18 AD3d 916, 918-919 [3rd Dept., 2005]; Matter of Orsi v Board of Appeals of the Town of Bethlehem, 3 AD3d 698, 700-701 [3d Dept., 2004]).

In the Court’s view, respondent Boll has presented adequate evidence that the issue concerning distribution of the Five Percenter newspaper has been, and continues to be addressed, and that the three week deadline will be met. The Court finds that the matter is now moot.

In a related, but separate argument, the petitioner maintains that written explanations given for the redactions of material in the Five Percenter newspaper do not satisfy the requirements set forth in DOCS Directive 4572, Article III, paragraph C. The respondent has submitted copies of written notices which explain the redactions to the Five Percenter newspaper. The Court finds these explanations to be fully compliant with the Directive, and that this issue is also moot.

The petitioner requests the following additional relief: a detailed explanation of how the hand signs violate Directive 4572; a description of the hand signs; the names of the unauthorized organizations the hand signs have been linked to; an order directing that the respondent cease and desist from a policy, custom and practice of discriminating against the Nation of Gods and Earth; a determination that the hand signal for “Peace” in American Culture is entitled to First Amendment protection; and an order directing that respondents make available un-redacted copies of the Five Percenter newspaper. Notably, while the

petitioner makes passing reference in the petition to the filing of various grievances, he never specifically identifies a single grievance determination for which review was sought with regard to the foregoing matters. Nor does he attach such determinations to the petition². In this respect it is unclear whether or not the petitioner seeks review of the grievance determinations. In addition, the Court has no way of knowing what arguments advanced in the petition directly relate to matters raised in his grievances. As pointed out by the respondent, petitioner has not alleged facts demonstrating that there is any justiciable controversy concerning the hand signal commonly known in this Country as the sign for “Peace” (see Police Benevolent Association of the New York State Troopers, Inc. v New York State Division of State Police, 40 AD3d 1350, 1352-1353 [3rd Dept., 2007]). By virtue of all of the foregoing, the Court finds that the allegations set forth in the petition are non-factual and conclusory. Under all of the circumstances, the Court finds that the remainder of the petition fails to state a cause of action upon which relief could be granted.

In view of the foregoing, the Court concludes that the motion must be granted and the petition dismissed.

Accordingly, it is

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

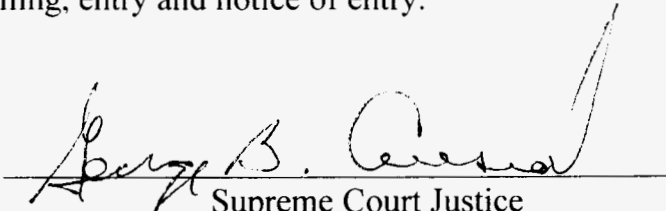
This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are

²The sole exception to the foregoing is a grievance and Superintendent’s determination dated October 12, 2010, which relate to petitioner’s grievance with regard to the timeliness of review of the Five Percenter newspaper. These papers are annexed to petitioner’s reply. As noted, the Court finds herein that this issue is now moot.

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: March 31, 2011
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated July 2, 2010, Petition, Supporting Papers and Exhibits
2. Respondents' Motion To Dismiss dated October 21, 2010, Supporting Papers and Exhibits
3. Petitioner's Opposition to Respondents' Motion, sworn to November 1, 2010
4. Petitioner's Letter Dated December 20, 2010