

**Matter of Ramsey v Fischer**

2011 NY Slip Op 32618(U)

September 13, 2011

Supreme Court, Albany County

Docket Number: 6601-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

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In The Matter of the Application of  
MICHAEL F. RAMSEY,

Petitioner,

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

-against-

BRIAN FISCHER, COMMISSIONER OF THE  
DEPARTMENT OF CORRECTIONAL SERVICES;  
AND KAREN BELLAMY, DIRECTOR OF THE  
INMATE GRIEVANCE PROGRAM,

Respondents.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-10-ST1989 Index No. 6601-10

Appearances:            Michael F. Ramsey  
                                  Inmate No. 91-B-2334  
                                  Petitioner, Pro Se  
                                  Green Haven Correctional Facility  
                                  594 Route 216  
                                  Stormville, NY 12582

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State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Adam W. Silverman,  
Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Green Haven Correctional Facility, commenced the instant CPLR Article 78 proceeding to review two separate, but related, administrative determinations. On April 27, 2010 the petitioner filed a grievance in which he complained that the Superintendent of Shawangunk Correctional Facility was causing correction officers to conduct cell searches for gang-related materials, specifically with respect to gang signs and symbols in photographs. He requested a copy of Rule 105.13 of the Rules of the Department of Correctional Services (“DOCS”, see 7 NYCRR 270.2).<sup>1</sup> He requested that the respondent publish a notice depicting all of the known gang signs and symbols, so that he would know what was prohibited; and that two specifically identified officers review the photographs in his possession to determine which, if any, are deemed “inappropriate”, so that he could send them home. Lastly, he requested that there be no retaliation against him by reason of the filing of the grievance. The grievance was ultimately denied by the Central Office Review Committee (“CORC”) on August 4, 2010 (after review by the Inmate Grievance Resolution Committee [“IGRC”] and the Superintendent of the facility). In the meantime, as a result of a cell search conducted on May 28, 2010, the petitioner was charged

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<sup>1</sup>Rule 105.13 recites as follows: “An inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten gang or gang related material. Note: For purposes of this rule, a gang is a group of individuals, having a common identifying name, sign, symbol or colors, who have individually or collectively engaged in a pattern of lawlessness (e.g., violence, property destruction, threats of harm, intimidation, extortion, or drug smuggling) in one or more correctional facilities or that are generally recognized as having engaged in a pattern of lawlessness in the community as a whole. For purposes of this rule, printed or handwritten gang or gang related material is written material that, if observed in the inmate's possession, could result in an inference being drawn about the inmate's gang affiliation, but excludes published material that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process.” (see 7 NYCRR 270.2)

with a violation of Rule 105.13 and Rule 113.23<sup>2</sup> by reason of his alleged possession of gang-related photographs, and other unauthorized items. On June 15, 2010, after conclusion of a disciplinary hearing, the petitioner was found not guilty of possession of contraband (Rule 113.23), but found guilty of possession of gang-related photographs (Rule 105.13). In the instant CPLR Article 78 proceeding the petitioner seeks review of both the disciplinary determination and the denial of his grievance. The Court, in a decision-order dated June 30, 2011, found that the portion of the petition which seeks review of the disciplinary determination raises an issue of substantial evidence, which requires transfer to the Appellate Division pursuant to CPLR 7804 (g). The Court also found however, that prior to transfer to the Appellate Division, the Court must decide that portion of the petition which seeks review of the grievance determination. The Court will proceed to do so.

The Inmate Grievance Resolution Committee (“IGRC”) issued the following decision on May 10, 2010:

“Some sort of example should be displayed, or posted in order to afford grievant the opportunity to become in compliance with the standards of inmate behavior, rule violation 105.13, gang related material. Grievant is also advised to address his concerns with the I.L.C. However, Grievant asserts that he never signed for rule 105.13. Gang related material is covered under contraband and is covered under the Tier III system. All inmates were given the new rule 105.13 when the standards of behavior changed.”

The petitioner appealed to the Superintendent, who denied the grievance in a decision dated

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<sup>2</sup>Rule 113.23 recites: “In addition to those items of contraband specifically identified by this rule series, an inmate shall not possess any item unless it has been specifically authorized by the superintendent or designee, the rules of the department or the local rules of the facility.” (see 7 NYCRR 270.2).

May 14, 2010, which recited as follows:

“Grievant complains that personal photographs taken during cell searches are the subject of misbehavior reports for gang related material. Additionally, grievant claims he never received rule 105.13. Cell searches are vital to maintaining a safe and secure environment for staff and inmates. All gang related material is contraband and will be dealt with via the disciplinary system. As a note, grievant has never received a misbehavior report for possessing gang related materials. As such, according to Directive #4040A, grievant is not personally affected by policy or issue he is grieving. A copy of rule 105.13 is available in the Law Library. Grievance is denied.”

Upon further appeal, CORC denied the grievance in the following decision:

“Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby accepted in part. CORC concurs with the Superintendent in that cell searches are vital in the maintenance of a safe and secure environment for staff and inmates. Further, all gang related material is contraband and will be dealt with via the disciplinary system. CORC notes that Rule 105.13 is posted in the general library, law library, and the grievant’s housing unit. CORC upholds the discretion of the facility administration to post memoranda or policy, and of the IGRC to conduct interviews when deemed necessary. CORC notes that Directive #4040, Section 701.6 (b) states, in part, that no reprisals of any kind shall be taken against an inmate or employee for good faith utilization of this grievance procedure. An inmate may pursue a complaint that a reprisal occurred through the grievance mechanism. With respect to the grievant’s appeal, CORC notes that he has access to the requested information. Contrary to grievant’s assertions, CORC has not been presented with sufficient evidence to substantiate any discrimination or malfeasance by staff.”

Judicial review of administrative decisions denying inmate grievances is limited to whether the determination is “‘irrational, arbitrary or capricious or affected by an error of law’” (see Matter of Hernandez v Fischer, 79 AD3d 1544, 1546 [3<sup>rd</sup> Dept., 2010], quoting Matter of Bermudez v Fischer, 71 AD3d 1361, 1362 [2010] lv denied 15 NY3d 702, 2010);

see also Matter of Green v Bradt, 69 AD3d 1269 [3<sup>rd</sup> Dept., 2010]; Matter of Clark v Fischer, 58 AD3d 932 [3<sup>rd</sup> Dept., 2009]).

The Court finds that CORC properly determined that all gang-related material is contraband and must be dealt with through the disciplinary process. CORC appropriately noted that Rule 105.13 was available for petitioner's review within the prison facility; and made reference to DOCS' policy that there be no reprisals for the filing of a grievance. The petitioner failed in his burden of demonstrating any right to a penalty-free pre-screening for contraband and/or gang-related materials, and/or a right to receive a compilation of all known gang-signs, arguably the very material prohibited by Rule 105.13.

The Court finds that the grievance 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 portion of the petition which seeks review of petitioner's grievance must be dismissed. The Court will transfer the remaining portion of the petition, which seeks review of the disciplinary determination dated June 15, 2010, to the Appellate Division.

Accordingly, it is

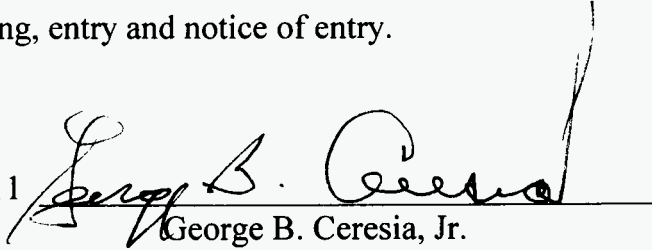
**ORDERED and ADJUDGED**, that the portion of the petition which seeks to vacate the determination of CORC dated August 4, 2010 be and hereby is denied and dismissed; and it is

**ORDERED**, that the portion of the petition which seeks review of the disciplinary determination dated June 15, 2010 be and hereby is transferred to the Appellate Division pursuant to CPLR § 7804 (g).

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the Respondent. 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 13, 2011  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

**Papers Considered:**

1. Order To Show Cause dated October 10, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 23, 2010, Supporting Papers and Exhibits
3. Petitioner's Reply Dated March 15, 2011
4. Supplemental Affirmation of Adam W. Silverman, Assistant Attorney General dated July 15, 2011 and Exhibits
5. Petitioner's Letter dated July 22, 2011