

<b>Matter of Davis v Fisher</b>
2012 NY Slip Op 31695(U)
June 5, 2012
Sup Ct, Albany County
Docket Number: 7335-11
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 DONNELL E. DAVIS,

Petitioner,

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

-against-

BRIAN FISHER, Commissioner of the New York  
 State Department of Corrections and Community  
 Supervision (DOCCS),

Respondents.

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Supreme Court Albany County Article 78 Term  
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
 RJI No. 01-12-ST3294 Index No.7335-11

Appearances:            Donnell E. Davis  
                               Inmate No. 98-A-1768  
                               Petitioner, Pro Se  
                               Sullivan Correctional Facility  
                               P.O. Box 116  
                               325 Riverside Drive  
                               Fallsburg, NY 12733-0116

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 of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Sullivan Correctional Facility, commenced the instant

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CPLR Article 78 proceeding to review an adverse grievance determination of the Central Office Review Committee (“CORC”)with regard to failure of the respondent DOCCS to permit him to possess a television set. Among the arguments advanced by the petitioner, he maintains that Directive #4921, upon which the respondent relies, constitutes an ineffective and unenforceable rule by reason that it has not been filed with the New York State Secretary of State, in violation of NY Constitution art 4 § 8 and Executive Law § 102 (1).

The Inmate Grievance Resolution Committee (“IGRC”), on April 21, 2011, issued the following determination:

“As DSP Malin states, this is not a ‘TV Facility,’ therefore, vividly showing how the grievant is not affected by the issue he brings before this committee. However, since it is a matter that does have the potential to affect the general population, the IGRC recommends that the grievant contact his ILC block rep. with a brief outline of his concerns and seek to have the needed vote because this is the initial vehicle to bring about televisions.”

The petitioner appealed to the Superintendent, who also denied the grievance in a decision dated May 4, 2011which recited as follows:

“Grievant is requesting to be permitted to purchase a personal television.

“DSP has stated that Directive #4921 governs the acquisition, use, and disposition of inmate television sets. This Directive only applies to facilities designated as a ‘TV Facility’, which Sullivan C.F. is not.

“Action requested in his grievance is denied.”

The petitioner then appealed to CORC, which denied the appeal in a decision dated August 10, 2011,which recited as follows:

“Upon full hearing of the facts and circumstances in the instant

case, the action requested herein is hereby denied. CORC upholds the determination of the Superintendent for the reasons stated.

“CORC asserts that Directive #4921 only applies to those facilities designated as TV facilities. Sullivan CF is not a TV facility. There is no provision in Directive #4911 to allow an inmate to receive a television in a non TV facility. CORC asserts that there is no requirement that Directive #4921 be filed with the NYS Department of State.

“With regard to the Grievant’s appeal, CORC notes that his packages are not restricted by Directive # 4921 because it does not affect Sullivan CF.”

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” (Matter of Hernandez v Fischer, 79 AD3d 1544, 1546 [3d 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 [3rd Dept., 2010]; Matter of Clark v Fischer, 58 AD3d 932 [3rd 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, *supra*; Matter of Frejomil v Fischer, 68 AD3d 1371 [3<sup>rd</sup> Dept., 2009]; Matter of Simmons v New York State Department of Correctional Services, 82 AD3d 1382, 1383 [3d Dept., 2011]).

As stated in Directive # 4921:

- “I. Purpose. This directive governs the acquisition, use and disposition of inmate television sets.
- “II. Policy. Inmates may own and use personal television

sets at facilities which have been approved for such use by the Commissioner, and after a majority of the affected inmate population has voted for that option. []”

Directive # 4911, entitled “Packages & Articles Sent or Brought to Facilities” does not list a television as an allowed item.<sup>1</sup>

On its face, because the petitioner has not demonstrated that he resides at a facility where the possession of televisions is authorized, the Court finds that he has failed to satisfy his burden of demonstrating that the determination of CORC was irrational, arbitrary and capricious, or effected by an error of law. To the contrary, CORC’s determination is consistent with DOCCS policy, as embodied in Directive # 4921.

With regard to petitioner’s argument that Directive #4921 constitutes an unfiled rule in violation of NY Constitution art 4 § 8 and Executive Law § 102, said Directive sets forth a procedure for approval of possession of televisions within correctional facilities. The approval process, which relates to the internal management of DOCCS, is exempt from the filing requirements applicable under Executive Law § 102 (see Executive Law § 102 [b]). Moreover, Directive # 4921 is not a fixed general principal having any direct application to the petitioner. Rather it establishes a routine practice implemented at certain correctional facilities, after a vote by prison inmates, and only as authorized by the Commissioner (see Shabazz v Portuondo, 260 AD2d 733 [3d Dept., 1999]). Apart from the foregoing, as

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<sup>1</sup>The only reference to televisions in Directive #4911 is the following:  
“B. This directive applies to inmates housed in facilities wherein the inmate population has elected under Directive #4921, ‘Inmate Televisions Sets’ to possess personal television sets; however, package privileges for such inmates are restricted (see Directive #4921 for package restrictions).”

pointed out by the respondents, because Sullivan Correctional Facility is not a TV facility, the petitioner has not demonstrated that he has suffered an injury-in-fact, sufficient to acquire standing to challenge the Directive (see NY State Ass'n of Nurse Anesthetists v Novello, 2 NY3d 207, at 211 [2002], which cites Society of Plastics Indus. v County of Suffolk, 77 NY2d 761, 769 [1991 and Matter of Colella v Board of Assessors, 95 NY2d 401, 409-410 [2000]; see also Graziano v County of Albany, 3 NY3d 475, at 479 [2004]).

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

The Court finds that the petitioner failed in his burden to demonstrate that the grievance determination was made in violation of lawful procedure, is affected by an error of law, is irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

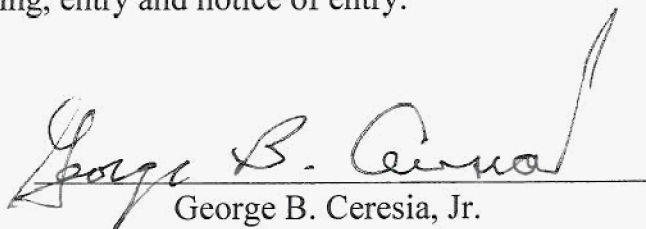
Accordingly, it is

**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 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: June 5, 2012  
Troy, New York

  
George B. Ceresia, Jr.

## Supreme Court Justice

## Papers Considered:

1. Order To Show Cause dated December 12, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated February 10, 2012, Supporting Papers and Exhibits
3. Petitioner's Reply to Respondent's Answer, dated