

Matter of Guillory v Fischer

2013 NY Slip Op 33595(U)

November 21, 2013

Supreme Court, Albany County

Docket Number: 6714-12

Judge: Jr., George B. Ceresia

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of PATRICK GUILLORY,

Petitioner,

-against-

BRIAN FISCHER,

Respondent,

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 # 01-13-ST4287 Index No. 6714-12

Appearances: Patrick Guillory
Inmate No. 09-B-0714
Petitioner, Pro Se
Wyoming Correctional Facility
PO Box 501
Attica, NY 14011-0501

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Keith A. Muse,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wyoming Correctional Facility, commenced the instant
CPLR Article 78 proceeding to review two determinations, each dated November 30, 2012.

In one, he was denied a certificate of earned eligibility under Correction Law § 805. In the other, he was denied presumptive release under Correction Law § 806. The respondent made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that the petitioner failed to timely serve the order to show cause and petition. The Court, in a decision-order dated September 16, 2013, denied the motion and directed the petitioner to re-serve the papers on or before October 15, 2013. The Court further directed the respondent to serve an answer within twenty days of receipt of petitioner's papers, and re-notice the proceeding pursuant to CPLR 7804 (f), all of which has been done. The Court will now proceed to the merits of the petition.

In support of his application, the petitioner maintains that he has a "very good" disciplinary record. He indicates that he has had only two recent disciplinary determinations, both of which he describes as "bogus". At the time he commenced the instant proceeding, both misbehavior determinations were apparently under review in State Supreme Court in separate, unrelated CPLR Article 78 proceedings. He mentions that he has filed grievances against two correction officers. He maintains that the underlying reason for the denial of an earned eligibility certificate and presumptive release is retaliation on the part of the Department of Corrections and Community Supervision ("DOCCS") for his having filed the grievances. The petitioner indicates that he has completed thirteen institutional programs while incarcerated; has received his New York State Department of Labor certificate; and has obtained a paralegal degree. He indicates that he has maintained strong ties with his

family, and that his mother and father have provided financial and emotional support during his incarceration.

The respondent, in opposition to the petition, maintains that the determinations are justified due to petitioner's poor disciplinary record. The respondent has submitted documentary evidence to demonstrate that he was found guilty of violating prison rules on July 16, 2012 and on November 8, 2012. In the July 16, 2012 disciplinary determination he was found guilty of violating Rule 113.22, using or possessing an article in an area where its use or possession is prohibited (see 7 NYCRR 270.2). He was also found guilty of violating Rule 114.10, smuggling. He received a penalty of three months in the special housing unit ("SHU"). In the November 8, 2012 disciplinary determination, he was found guilty of violating Rule 102.10, making threats. He received a penalty of two months in SHU, and three months loss of good time.

The earned eligibility determination dated November 30, 2012 recites as follows:

"This is to notify you that pursuant to Section 805 of the Correctional Law your record of program attendance, participation and progress has been reviewed with regard to the earned eligibility program. The commissioner of the Department of Correctional Services has reached the following determination, which has been provided to the Division of Parole. Any questions regarding this decision should be addressed to your correction counselor immediately.

Certification of earned eligibility denied.

Reason(s): Poor institutional behavior as it has impacted on your progress and participation and/or that of other inmates in programs."

Correction Law § 805 recites as follows:

“Persons committed to the custody of the department under an indeterminate or determinate sentence of imprisonment shall be assigned a work and treatment program as soon as practicable. No earlier than two months prior to the inmate's eligibility to be paroled pursuant to subdivision one of section 70.40 of the penal law, the commissioner shall review the inmate's institutional record to determine whether he has complied with the assigned program. If the commissioner determines that the inmate has successfully participated in the program he may issue the inmate a certificate of earned eligibility. Notwithstanding any other provision of law, an inmate who is serving a sentence with a minimum term of not more than eight years and who has been issued a certificate of earned eligibility, shall be granted parole release at the expiration of his minimum term or as authorized by subdivision four of section eight hundred sixty-seven of this chapter unless the board of parole determines that there is a reasonable probability that, if such inmate is released, he will not live and remain at liberty without violating the law and that his release is not compatible with the welfare of society. Any action by the commissioner pursuant to this section shall be deemed a judicial function and shall not be reviewable if done in accordance with law.” (Correction Law § 805)

DOCCS has construed Correction Law § 805 to require review and consideration of the inmate's disciplinary record.

As set forth in Directive 4401, Article VI, C, 2, a:

“a. For Earned Eligibility purposes, the record of each inmate who has an indeterminate sentence with a minimum term of eight years or less shall be evaluated by his or her Correction Counselor two months prior to the inmate's scheduled Parole Board Hearing. The Counselor shall consider the inmate's overall attendance, participation, and progress in the programs identified in his/her Program/Earned Eligibility Plan. Each

evaluation will then be reviewed by a Supervising Correction Counselor and the Deputy Superintendent for Programs and a recommendation forwarded to the Central Office Earned Eligibility staff who will make the final determination as the Commissioner's designee. Thereafter, the inmate will either be issued a certificate of Earned Eligibility for successful participation in appropriate programs, denied a certificate because of unsatisfactory participation in appropriate programs or *unsatisfactory behavior*,¹ or assigned to non-certifiable status because the inmate has not been able to participate in programs, through no fault of his or her own, for most or all of the period of incarceration." (Directive 4401, Article VI, C, 2, a, emphasis supplied).

Here, at the time the determination with regard to an earned eligibility certificate was made, the petitioner had recently been found guilty of rules violations in two separate disciplinary proceedings. This, in the Court's view, provided a rational basis to deny a certificate of earned eligibility. Under these circumstances, Court finds that the determination to deny an earned eligibility certificate was not made in violation of lawful procedure, was not affected by an error of law, and was not irrational, arbitrary and capricious, or constitute an abuse of discretion. For this reason, the Court finds that the petition as it relates to denial of an earned eligibility certificate, has no merit.

Turning to the denial of presumptive release, the determination recites as follows:

"This is to notify you that pursuant to Section 806 of the Correctional Law, your record of program attendance,

¹This comports with DOCCS Rule 2100.4 (c), which indicates that in evaluating inmates for a certificate of earned eligibility "correction counselors shall consider all available program attendance, participation and progress information as well as *appropriate institutional behavior information* in conducting evaluations." (7 NYCRR 2100.4 [c], emphasis supplied).

participation, and progress has been reviewed with regard to presumptive release eligibility. Your welfare and the safety of the community have also been considered.

The commissioner of the Department of Correctional Services has reached the following determination. Any questions regarding this decision should be addressed to your correction counselor immediately.

Presumptive Release Ineligible.

Reason(s): Disciplinary record prohibits presumptive release.”

Correction 806 recites as follows:

1. Notwithstanding any other provision of law to the contrary and except as provided in subdivision two of this section, an inmate who has been awarded a certificate of earned eligibility by the commissioner as set forth in section eight hundred five of this article may be entitled to presumptive release at the expiration of the minimum or aggregate minimum period of his or her indeterminate term of imprisonment, provided that:

(i) the inmate has not been convicted previously of, nor is presently serving a sentence imposed for a class A-I felony, a violent felony offense as defined in section 70.02 of the penal law, manslaughter in the second degree, vehicular manslaughter in the second degree, vehicular manslaughter in the first degree, criminally negligent homicide, an offense defined in article one hundred thirty of the penal law, incest, or an offense defined in article two hundred sixty-three of the penal law,

(ii) the inmate has not committed any serious disciplinary infraction, and

(iii) there has been no judicial determination that the person while an inmate commenced or continued a civil action, proceeding or claim that was found to be frivolous as defined in subdivision (c) of section eight thousand three hundred three-a of the civil practice law and rules, or an order has not been issued by a federal court pursuant to rule 11 of the federal rules of civil procedure imposing sanctions in an action commenced by the inmate against a state agency, officer or employee.

hearing which includes 60 or more days of SHU and/or keeplock if the time actually served was 60 days or more on the particular penalty; or

4 Receipt of any recommended loss of good time as a disciplinary sanction as a result of a Tier III hearing.” []

“F. Program criteria:

1. An inmate must successfully participate in all assigned program(s) and /or work assignment(s) and be awarded a certificate of earned eligibility pursuant to 7 NYCRR Part 2100.” (DOCCS Directive 4791, III, C, 3,4 and III, F, 1)²

As noted, the Hearing Officer, who presided at the July 16, 2012 disciplinary determination, imposed a penalty of three months SHU. The Hearing Officer who presided at the November 8, 2012 disciplinary determination imposed a penalty of two months in SHU and three months loss of good time.

Here, because under Directive 4791 the petitioner did not satisfy either the disciplinary record criteria (by reason of committing serious disciplinary infractions), or the program criteria (in not having an earned eligibility certificate), he was not eligible for presumptive release. In this respect, the determination to deny presumptive release was not made in violation of lawful procedure, was not affected by an error of law, and was not irrational, arbitrary and capricious, or an abuse of discretion. For this reason, the Court finds that the petition, as it relates to denial of presumptive release, has no merit.

²DOCCS Directive 4791, III, C, 3, 4 and F, 1 closely follows the language set forth in DOCCS Rule 7 NYCRR 2200.3, (c) (3) (4) & (f) (1).

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

In view of all of the foregoing the Court concludes that the petition must be dismissed.

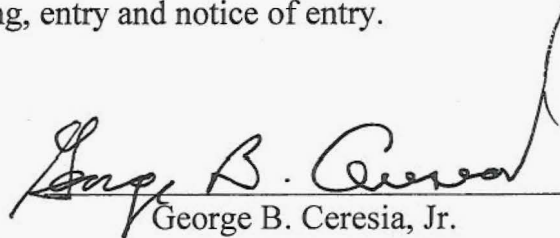
Accordingly it is

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 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: November 21, 2013
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Re-Notice of Return Date dated October 8, 2013
3. Respondent's Answer dated October 8, 2013, Supporting Papers and Exhibits
4. Petitioner's Letter Memorandum dated September 4, 2013