

**Matter of Hurd v New York State Dept. of
Corrections & Community Serv.**

2015 NY Slip Op 30784(U)

April 21, 2015

Supreme Court, Albany County

Docket Number: 4738-14

Judge: Jr., George B. Ceresia

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of LEON HURD,

Petitioner,

-against-

NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SERVICE,

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 # 01-14-ST6138 Index No. 4738-14

Appearances: Leon Hurd
 Inmate No. 91-A-3813
 Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently housed at Marcy Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated April

11, 2014 in which he was found guilty of violating Rule 103.20, Soliciting (see 7 NYCRR 270.2). The petitioner alleges that on March 26, 2014, while incarcerated in Woodbourne Correctional Facility Special Housing Unit, he requested Social Worker Herbert to contact two of his friends outside the institution to ask them visit him. Because his friends work during the day, he requested that Social Worker Herbert contact them from home, after 6:00 p.m. The petitioner alleges that Social Worker Herbert indicated that the petitioner would have to sign an Authorized Disclosure Form, which he allegedly delivered to Social Worker Herbert on March 27, 2014. The petitioner alleges that on March 31, 2014 Social Worker Herbert informed him that she had been reprimanded by her supervisor, and that his request was denied. The petitioner indicates that although he was never been warned that his request was a rules violation, Social Worker Herbert, on April 1, 2014, issued a misbehavior report for violating Rule 103.20.

The petitioner argues that the misbehavior report was untimely, that Rule 103.20 does not apply to the incident, and that Social Worker Herbert gave conflicting testimony at the hearing,

The Court must first observe that the petition does not raise an issue of substantial evidence under CPLR 7803 (4). For this reason, the proceeding was not transferred to the Appellate Division pursuant to CPLR 7804 (g). The Court's role in reviewing an administrative determination is not to substitute its judgment for that of the agency, but simply to ensure that it is not made in violation of lawful procedure or affected by an error of law, and was not irrational, arbitrary and capricious or an abuse of discretion (see CPLR 7803 [3]; Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009]; In the Matter of Terrace

Court, LLC v. New York State Division of Housing and Community Renewal, 18 NY3d 446, 454 [2012]; Matter of Warder v Board of Regents, 53 NY2d 186, 194; Matter of Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (In the Matter of Murphy v New York State Division of Housing and Community Renewal, 21 NY3d 649, [2013], quoting Peckham v Calogero, 12 NY3d 424 [2009] at 431, which cited Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

The misbehavior report recites as follows:

"Inmate Hurd, DIN #91A3813 requested that myself, Social Worker Herbert, make person phone calls for him from my home phone to a friend named Cynthia and a friend named Sharon to let them know of his SHU placement and request visits. When informed that his request was a violation of the rules of the facility and a ticketable offense inmate Hurd continued to ask myself, Social Worker Herbert, to make phone calls to his identified friends (Sharon & Cynthia) but additionally requested that myself, Social Worker Herbert, contact a specific, but unidentified female person for him from I.G. before coming into work"

The Hearing Officer, in his disposition finding the petitioner guilty, indicated that he relied upon petitioner's own admission that he had requested Social Worker Herbert to place the calls after working hours; the testimony of Social Worker Herbert that he made the request on two occasions; and that the misbehavior report was only written after the petitioner's second request. The Hearing Officer indicated that it was the petitioner's responsibility to obtain permission to make the calls from DOCCS. He also commented:

"Inmate Hurd has been incarcerated since 1991. He has an in

depth knowledge of what the policy and procedures are for DOCCS. I feel he manipulated his mental health provider to try to get her (Ms. Herbert) to provide a service that was illegal. There were other ways to find out what he could not do without incurring an infraction on DOCCS policy.

With regard to petitioner's claim that the misbehavior report was untimely, "[t]here is no requirement that the misbehavior report be prepared the same day of the incident; all that is required is that the report be prepared 'as soon as practicable'" (Matter of McAllister v Fisher, 51 AD3d 1159, 1160 [3rd Dept., 2008] quoting 7 NYCRR 251-3.1 [a] and citing Matter of Greene v Coombe, 242 AD2d 796, 797 [1997], lv denied 91 NY2d 803 [1997]; see also Matter of Al-Matin v Brown, 86 AD3d 902, 902 [3d Dept., 2011]). According to the Social Worker Herbert, the petitioner delivered the authorization form to her on March 28, 2014. At that time she informed the petitioner that she would need to check with her supervisor about this. Thereafter, on March 31, 2014 she informed the petitioner that this was a violation of prison rules and was a "ticketable" offense. Notwithstanding what she had just told him, he again asked Social Worker Herbert to contact his friends after hours. In explanation for why she did not issue a misbehavior report on March 28, 2014 she testified that she was not aware at that time that this was a violation of prison rules; and she needed to speak to her supervisor. She testified that she delayed writing the misbehavior report until April 1, 2014 because she wanted to speak to her supervisor a second time. She further indicated that she was uncomfortable by reason that the petitioner had made the request during a confidential session. She pointed out that the making of phone calls to individuals outside the prison facility was not, in and of itself, a problem. Rather, it was petitioner's specific request that she make the phone calls after hours, from her home. She also

mentioned that she had never previously been requested to make such a telephone call. She indicated that the misbehavior report was written within 24 hours of her March 31, 2014 meeting with the petitioner. Under all of the circumstances, the Court finds that the misbehavior report was written “as soon as practicable”, and is therefore timely.

To the extent that the petitioner maintains that Social Worker Herbert gave conflicting testimony, without necessarily agreeing with his contention, the Court notes that conflicting testimony gives rise to credibility issue to be resolved by the hearing officer as a question of fact (see generally 627 NY Jur Evidence and Witnesses §§ 971, 975).

Turning to the issue of the applicability of Rule 103.20, said rules recites:

“An inmate shall not request or solicit goods or services from any business or any person other than an immediate family member without the consent and approval of the facility superintendent or designee.” (7 NYCRR § 270.2).

In this instance, the individuals which the petitioner wished Social Worker Herbert to contact have not been shown to be immediate members of his family. Thus, the request required the approval of the facility superintendent or his designee. The Court finds that the rule is applicable to the incident in question.

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 constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

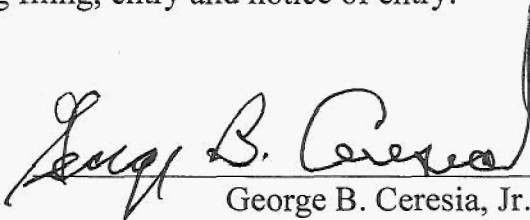
Accordingly it is

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 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: April 21, 2015
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 26, 2014, Petition, Supporting Papers and Exhibits
2. Answer Dated January 30, 2015, Supporting Papers and Exhibits
3. Transcript of Petitioner's Disciplinary Hearing Certified on February 4, 2015