

**Matter of Rodriguez v New York State Dept. of Corr.  
& Community Supervision**

2016 NY Slip Op 31478(U)

August 2, 2016

Supreme Court, Clinton County

Docket Number: 2016-287

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT****COUNTY OF CLINTON****X**

In the Matter of the Application of  
**CARLOS RODRIGUEZ, #13-A-0021,**  
Petitioner,

for Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION AND JUDGMENT  
RJI #09-1-2016-0103.12  
INDEX #2016-287**

-against-

**NEW YORK STATE DEPARTMENT  
OF CORRECTIONS AND COMMUNITY  
SUPERVISION,**

Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Carlos Rodriguez, verified on February 20, 2016 and filed in the Clinton County Clerk's office on March 7, 2016. Petitioner, who is an inmate at the Eastern Correctional Facility, is challenging the results and dispositions of a Tier II Disciplinary Hearing and a Tier III Superintendent's Hearing held at the Clinton Correctional Facility Annex and concluded on December 30, 2015 and December 31, 2015, respectively.

The Court issued an Order to Show Cause on March 14, 2016. In response thereto, the Court has received and reviewed the respondent's answer and return, together with exhibits, as well as a letter memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated May 4, 2016. No reply was received from petitioner.

Petitioner challenges the determinations of two (2) separate Tier hearings. On December 17, 2015, random urinalysis testing was directed for the entire dorm in which the petitioner resided. Petitioner alerted the Correction Officers on duty that he was having difficulty producing a specimen, which he attributes to a "shy bladder", and the petitioner requested water as is allowed pursuant to Directive 4937. After three (3) separate eight (8)

ounce servings of water over a three (3) hour period, the petitioner was unable to produce a specimen and the petitioner was placed in keeplock status. Petitioner was charged with 180.14 (failure to follow guidelines and instructions given by staff regarding urinalysis testing program pursuant with requirements of Directive 4937) and 106.10 (an inmate shall obey all orders of department personnel). Later on the same day, the petitioner was charged with 122.10 (an inmate may only smoke outdoors in designated areas) and 106.10.

Preliminarily, petitioner argues that the officers did not follow the requirements of Directive 4937 as pertains to inmates with a “shy bladder”. Specifically, the petitioner asserts that upon notification of his condition, the correction officers should have immediately provided him with eight (8) ounces of water and exactly every hour thereafter until he was able to urinate or he had received three (3) eight (8) ounce servings of water. The petitioner alleges that although he requested water, he was not provided with his first serving of water until 6:50 a.m. The petitioner alleges that the next two servings were provided at 8:00 a.m. and 8:45 a.m. As a result of the lateness of the last serving, the petitioner claims that he was unable to comply with the urinalysis testing. Insofar as the petitioner was then placed into keeplock status as a result of the inability to comply with the urinalysis testing, the petitioner was cited with his second misbehavior report on December 17, 2015 for smoking. The petitioner appealed claiming that the hearing officer’s determination was not based upon substantial evidence. The petitioner specifically challenged that the hearing officer failed to consider the medication the petitioner was prescribed but also allegedly referred to the petitioner’s medical history or lack thereof as related to a prior diagnosis of “shy bladder”. In addition, the petitioner asserted that “the water was not made available until about 50 minutes into the urinalysis testing denying me water when the test began immediately.” Resp. Ex. I. The disposition of the Superintendent’s Hearing was upheld on appeal.

The Tier II Superintendent's Disciplinary hearing based upon the second misbehavior report issued was conducted on December 30, 2015. Petitioner was found guilty of violating inmate rule 122.10 (smoking) for which the penalty was ten (10) days loss of recreation, packages, commissary and phone privileges starting December 30, 2015.<sup>1</sup> Petitioner was also sanctioned ten (10) days loss of recreation, packages, commissary and phone privileges which were suspended and deferred for a period of ninety (90) days. The Tier III Superintendent's Disciplinary hearing was concluded on December 31, 2015 and the petitioner was found guilty of violating inmate rules 106.10 (refusing a direct order) and 180.14 (urinalysis testing violation). Petitioner was sanctioned with thirty (30) days keeplock, loss of commissary, packages, phone and recreation privileges.

Petitioner alleges that the penalties imposed as a result of the two Tier hearings were supposed to be imposed concurrently, as indicated on the disposition sheets. However, the petitioner indicates that he was advised that the penalties should have been ordered to be served consecutively. As a result, the petitioner filed an Inmate Grievance Complaint on January 25, 2016 challenging that the sanctions were to be served concurrently as indicated on the disposition sheets as opposed to consecutively. By determination dated February 2, 2016, the Inmate Grievance Resolution Committee (hereinafter referred to as the "IGRC") advised the petitioner that the hearing officer had discretion as to whether to impose the sanctions concurrently or consecutively and that the petitioner had received credit for the prehearing confinement time. The petitioner appealed the IGRC's determination which was upheld on March 9, 2016, two days after the filing of this instant petition.

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<sup>1</sup>It is noted that the petitioner was found not guilty of violating a direct order (106.10).

Respondent objects, as a matter of law, to the petitioner's failure to exhaust administrative remedies prior to commencing this action. It is noted that the petitioner conceded in the petition that the appeal of the IGRC's determination was still pending. While the Superintendent's determination was received following the filing of the petition, the respondent asserts that the petitioner failed to appeal the Superintendent's decision to the Central Office Review Committee ("CORC"). See 7 NYCRR §701.5(d).

Furthermore, the respondent argues that the petitioner's claim that he has a "shy bladder" was not substantiated by the petitioner and is belied by the petitioner's institutional file. The respondent argues that the petitioner had not indicated that he had a "shy bladder" during his previous two urinalysis tests and, as such, the correction officers were not required to utilize the "shy bladder" protocol as contained in Directive 4937(IV)(E). Nonetheless, the correction officers did comply with the protocol for an inmate who is unable to provide a specimen pursuant to Directive 4937(IV)(D)(4) as the petitioner was provided with three (3) eight (8) ounce servings of water during the three (3) hour period of the test. The respondent notes that the correction officers are afforded reasonable discretion as to when to provide the water and, in this instance, the petitioner was provided eight (8) ounces of water in each of the three hours of the testing.

"A petitioner must exhaust all administrative remedies before seeking judicial review unless he or she is challenging an agency's action as unconstitutional or beyond its grant of power, or if resort to the available administrative remedies would be futile or would cause the petitioner irreparable harm." *Abdullah v. Girdich*, 297 A.D.2d 844, 845. Insofar as the petitioner admittedly filed the petition prior to exhausting the administrative remedies, the portion of the petition that challenges the sanctions being imposed consecutively must be dismissed.

As relates to the petitioner's complaints regarding the urinalysis testing, Directive 4937 addresses when an inmate is unable to provide a urine specimen:

“(4) If the inmate is unable to provide a urine specimen immediately, he or she shall be detained until he or she is able to provide a urine specimen. Drinking water should be available in an amount not to exceed eight ounces per hour. An inmate who is unable to provide a urine specimen within three hours of being ordered to do so shall be considered to be refusing to submit the specimen. The inmate shall be informed that this refusal constitutes a violation of facility rules and he or she may incur the same disciplinary disposition that a positive urinalysis result could have supported. The resultant Misbehavior Report shall indicate that the inmate was informed of the above.

5. . . . If the inmate is unable within three hours of being ordered or if the inmate refuses to submit a urine specimen, this fact shall be noted on Form #2082.”

Petitioner asserts that he should have been provided the considerations as described in Directive #4937(IV)(E). It is noted, however, that the petitioner was not previously designated as an inmate with “shy bladder.”

“E. Procedure for Inmates Claiming to be Unable to Urinate in Presence of Others: The following procedures shall be employed when there is reasonable belief that the inmate is unable to provide a urine specimen due to an alleged inability to urinate in the presence of others (shy bladder). Reasonable belief is based upon the following criteria, including, but not limited to:

- A review of the Statewide Special Accommodation list by the Superintendent, Deputy Superintendent for Security (DSS), Captain, or Lieutenant to ascertain whether the particular inmate is listed on the “I-M\_Spec\_urinalysis\_Accom” list in the shared drive folder.
- Prior disciplinary (FIDS) data indicating a history of urinalysis testing violation, if applicable, and/or computerized urinalysis testing (KDTS) data indicating if the inmate has provided a urine sample with or without the use of alternate processes.

- Any medical or mental health records supporting the inmate's claim (records to be reviewed by Health Services and/or OMH staff (see Form #4937D, Medical/Mental Health Records Review for Inmates Claiming to be Unable to Provide a Urine Sample Under Staff Observation”).
- The inmate' behavior and demeanor at the time of request for the urine sample.”

While the petitioner argues that the Hearing Officer did not consider that the Correction Officers failed to follow the directives regarding “shy bladder”, the petitioner has not previously been labeled as an inmate with a shy bladder. In fact, the petitioner has not previously had difficulty providing a urine sample and therefore, the petitioner was not specified for the accommodations indicated pursuant to Directive #4937(IV)(E). Instead, the petitioner was afforded the accommodations indicated pursuant to Directive #4937(IV)(D)(4). As such, the petitioner admitted that he was provided with three (3) eight (8) ounce servings of water in each of the three (3) hours during the testing period. “Petitioner's defense that he was unable to provide the specimen because he suffered from shy bladder syndrome was not substantiated by his medical records or the testimony of the physician or social worker who examined him.” *Becker v. Goord*, 13 A.D.3d 947, 948; *see also Redmond v. Fischer*, 116 A.D.3d 1304. Inasmuch as the petitioner was afforded the opportunity to produce a urine specimen in accordance with Directive #4937(IV)(D)(4) and did not comply, the petition must be dismissed.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED**, that the petition is dismissed.

**Dated:** August 2, 2016 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice