

Cain v New York State Dept. of Corr. & Community Supervision
2024 NY Slip Op 35401(U)
March 6, 2024
Supreme Court, Albany County
Docket Number: Index No. 904890-23
Judge: Sharon A. Graff
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STATE OF NEW YORK

SUPREME COURT

ALBANY COUNTY

MONIQUE CAIN, MARQUELL ANTHONY-
EFREM BOUTWELL, and MIKEHI JAMES
BOUTWELL

Petitioners,

Decision & Order**Index No.: 904890-23**NEW YORK STATE DEPARTMENT OF
CORRECTIONS AND COMMUNITY
SUPERVISION and SUPERINTENDENT
JOSEPH E. COREY,

Respondents.

Supreme Court, Albany County, Special Term
Final Submission Date: October 11, 2023

Present: Hon. Sharon A. Graff, JSC

Appearances: Beldock Levine & Hoffman LLP
Attorneys for Petitioners
99 Park Avenue, PH/26th Floor
New York, New York 10016
By: Marc A. Cannan, Esq.Hon. Letitia A. James
Attorney General of New York State
Attorney for Respondent
Department of Law
The Capitol
Albany, New York 12224-0341
By: Jennifer J. Corcoran, Esq.**Graff, J.:**

Petitioners commenced this Article 78 proceeding seeking an order to annul respondents' determination rendered on December 21, 2022, and restore their visitation rights to DOCCS' correctional facilities on the grounds that, *inter alia*, respondents' decision was arbitrary, in violation of its own rules and procedures, and violated petitioners' rights under the United States and New York constitutions. Respondents moved pre-answer to dismiss the petition for failure to

exhaust administrative remedies. Petitioners oppose. For the reasons discussed herein, respondents' motion is denied.

Background

Mykell Ross ("I/I") has been in the custody of DOCCS since 2017. Monique Cain is the mother of the I/I and Marquell Boutwell and Mikehi Boutwell are his brothers. The morning of December 16, 2022, petitioners attempted to visit the I/I at Auburn Correctional Facility ("Auburn"), were denied access and compelled to leave the facility ("incident"). Their account of the incident is as follows.

In their verified petition, petitioners attest that while waiting to be processed for admission to Auburn, they were advised by Corrections Officer Malone ("CO Malone") they would not be allowed to enter the facility because they "smelled like weed." Despite being advised by petitioner Cain that neither she nor her sons had used marijuana or been in the vicinity of anyone else using marijuana that day, and that it was imperative they be allowed to visit the I/I because he was experiencing a health crisis, CO Malone refused petitioners' entry into Auburn. In response to petitioner Cain's request to speak with a supervisor, petitioners were asked to wait outside.

As petitioners proceeded towards the exit of the building, they overheard a woman, (who was also waiting to be processed for admission for a visit), advise CO Malone that she was the person who smelled like marijuana because she had been smoking it in her car prior to entering the building. She told CO Malone she did not wish petitioners to lose their visitation right because of her conduct. The woman was then allowed to enter the facility.

When petitioners inquired of CO Malone whether he would now allow their admission based on the woman's statement, CO Malone told them to leave the building, which they did. Thereafter, while in the parking lot, petitioner Cain witnessed CO Malone speaking to another corrections officer who she later learned was Sargent Sprague ("Sgt. Sprague"). Sgt. Sprague

exited the building and told petitioners to get off the property because they smelled like marijuana. In response to petitioner Cain's attempts to contact the Superintendent by telephone, she was advised to leave Auburn and write a letter to the Superintendent. A police car from the Auburn Police Department ("APD") then arrived. Petitioner Cain asked the police officer to smell her and her sons to verify they did not smell like marijuana. The police officer declined, and the petitioners then departed from Auburn. The following day, petitioner Cain wrote a letter to Superintendent Corey explaining her version of the incident and expressed her concern and frustration.

When petitioners returned to Auburn on December 24, 2022, they were denied visitation with the I/I, and each petitioner was handed an unsigned letter dated December 21, 2022 ("Suspension Letter") from the Superintendent of DOCCS which advised that pursuant to Title 7 NYCRR Part 201, Visitation, their visitation privileges at all DOCCS facilities were being indefinitely suspended because:

"While attempting to visit an incarcerated individual at Auburn Correctional Facility you were denied entry to the facility because the processing staff could smell marijuana on your clothing. You became belligerent and shouted obscenities at staff. You refused to leave when directed to do so and it was not until the Police responded to the facility that you left facility grounds. *Copies of the documentation supporting this determination are enclosed herewith* [emphasis added].

Based on your behavior, I have determined that to allow your presence in Auburn Correctional Facility or any other New York State Correctional Facility would be a serious threat to the safety, security and good order of any correctional facility."

The Suspension Letter advised the petitioners of their right to appeal the decision within 60 days of receipt of the notice by writing to the Commissioner of DOCCS, or, in the alternative, by requesting a hearing. If petitioners chose to appeal in writing, a decision would be provided within 45 days of receipt of the appeal. If they instead chose a hearing, a hearing officer from outside the correctional facility would be appointed to conduct the proceeding, they could be

represented by counsel, present evidence and call witnesses. The written decision would be provided within 60 days from conclusion of the hearing ("Determination").

Petitioners aver no documentation was included with the Suspension Letter, which fact is not disputed by respondents. On January 10, 2023, petitioners' counsel wrote to DOCCS requesting the missing documentation. He advised that his clients requested a hearing on January 3, 2023, and requested the surveillance footage of the incident, the logbook containing the names of the visitors at the time of the incident, and any documentation concerning APD's response to petitioners' visit to Auburn.

On January 11, 2023, DOCCS Counsel's Office informed petitioners' counsel that a request for a hearing had not been received from petitioners, but as a courtesy his letter would be considered as a preservation of their right to have a hearing. Petitioners' counsel was referred to the Records Access Officer of DOCCS for his "records" request. By letter dated January 12, 2023, petitioners' counsel made a FOIL request to the Records Access Officer for a certified copy of the same records previously requested. By letter dated January 17, 2023, a person with the title "OA1/FOIL IRC" at Auburn acknowledged the FOIL request, assigned a reference number, and stated a response could be anticipated within 20 days. On May 16, 2023, petitioners' counsel wrote to the Auburn FOIL Records Appeals Officer stating his letter would be considered an appeal of the constructive denial of his FOIL request because no records had been provided.

By letter dated May 19, 2023, petitioners' counsel was advised a hearing was scheduled to occur by telephone on Tuesday June 13, 2021 [sic] at 10:00 a.m. to assess the imposition of the suspension of visiting privileges and listed 15 exhibits to be introduced at the hearing and the names of 4 potential witnesses. Among those exhibits were four memorandums allegedly dated December 16, 2022, from Lt. Longyear to Superintendent Corey, from Sgt. J. Carhart to Lt.

Longyear, from Sgt. Sprague to Lt. Longyear, and from CO Malone to Sgt. Sprague, and a report from APD.

In his memorandum to Sgt. Sprague, CO Malone recounted the incident as follows: when petitioners entered the front door lobby of Auburn the morning of December 16, 2022, there was a strong odor of marijuana (one other person was present in the lobby who did not smell of marijuana). CO Malone asked to speak to petitioners privately to explain DOCCS' policy prohibiting anyone intoxicated or under the influence of drugs from being admitted to the facility. Petitioner Cain became agitated, used vulgar language, repeatedly called her a racist, swore and issued threats.

In the memorandum of Sgt. Sprague to Lt. Longyear re: the OSI (Office of Special Investigations) complaint 304935, she described the incident as follows: when she went outside the Auburn building at approximately 9:45 a.m. on December 16, 2022, she noticed petitioners had a strong marijuana odor. She explained to petitioner Cain that even though marijuana is legal in the state of New York, visitors were not allowed to enter the facility smelling of marijuana, at which point petitioner Cain became irate, demanded to see her son, stepped very close to her in a threatening manner and stated vulgarities. When Sgt. Sprague attempted to depart, petitioner Cain blocked her path and yelled profanities until her son Mikehi Boutwell told his mother to back away, which she did, all the while continuing to call Sgt. Sprague a "racist white bitch". When Sgt. Sprague attempted to return to the lobby, Marquell Boutwell grabbed the door and refused to let her close it. Petitioners refused to depart the Auburn premises until the APD arrived.

The memorandum of Sgt. Carhart recounts an interview with the I/I on December 16, 2022, in which he confirmed he was harassed while incarcerated at Attica Correctional Facility, but not while at Auburn. The memorandum of Lt. Longyear re: the OSI complaint, summarizes the three memorandums of CO Malone, and Sgts. Sprague and Carhart.

By letter dated June 2, 2023, a DOCCS FOIL Appeals Officer denied and granted in part petitioners' appeal. First, the officer advised that no video or audio footage was found because:

"Videos depicting significant security incidents are preserved in accordance with Departmental Directive 4942. In some cases, incidents do not rise to the seriousness of incidents where video/audio is preserved as a matter of policy. Videos in that category may be preserved upon request from facility FOIL only if the facility is capable of reviewing video without disruption to safety, security and smooth operation of the facility, and the request is made within the timeframe of the video/audio storage capabilities. In this particular incident, when your request was received ... on January 17, 2023, the video/audio you requested from December 16, 2022, was outside the timeframe of video storage capabilities in that area."

Second, the request for logbook entries of visitors the morning of December 16, 2022, was denied as:

"exempt from disclosure pursuant to Public Officers Law §87(2)(b) where, if disclosed, would constitute an unwarranted invasion of personal privacy. Disclosing through FOIL who an incarcerated individual associates with through a facility visit would violate both their privacy and the visitor's privacy."

Lastly, with respect to petitioners' FOIL request for the supporting documentation referred to in the Suspension Letter and the APD documents, the officer advised this was provided in the 15 pages attached to the letter dated May 19, 2023 from Counsel's Office, and an additional 6 pages were located and attached to the response.

On June 6, 2023, petitioners commenced this Article 78 proceeding by Order to Show Cause. The same day, by email, petitioners' counsel advised respondents the hearing scheduled to occur on June 13, 2023 should be adjourned pending the Court's decision.

Discussion

Petitioners readily acknowledge the rule that exhaustion of administrative remedies is a necessary pre-requisite to commencement of an article 78 proceeding (CPLR § 7801 [1]). The requirement should not be set aside lightly, because among other things, it prevents "premature judicial interference with the administrators' efforts to develop ... a co-ordinated, consistent and

legally enforceable scheme of regulation and afford[s] the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its own ‘expertise and judgment’” (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] [internal citations omitted]). Both sides likewise acknowledge that the exhaustion rule “is not an inflexible one” (*Id.*) To the contrary, it is “subject to important qualifications” and “need not be followed ... when an agency’s action is challenged as ... wholly beyond its grant of power[,] ... when resort to an administrative remedy would be futile[,] ... or when its pursuit would cause irreparable injury” (*Id.*)

Here, petitioners argue that they fall within this exception for several reasons. Their first and most compelling argument is that exhaustion of administrative remedies would be futile because the decision to impose the penalty was legally inadequate. More specifically, petitioners argue that respondents failed to follow their own regulation and procedures and acted beyond their authority by imposing an indefinite suspension of their visitation rights.

There is no question that respondents have the authority to impose visitation penalties including the indefinite suspension of visitation (7 NYCRR § 201.4 [c]). “A superintendent may... indefinitely suspend a visitor’s visitation privileges (subject to reinstatement under 201.6 of this Part), for misconduct that represents a serious threat to the safety, security and good order of the facility as specified in subdivision (e) of this section[.]” (*Id.*) Upon imposition of the penalty, respondent Corey was required to, among other things, provide petitioners with written notice setting forth the reasons for the indefinite suspension and provide them with “copies of all charges and reports of misconduct relating to the charges” (§ 201.4 [c] [1] [i] [a], [c]). Here, it is undisputed that respondents did not provide petitioners with any reports related to the alleged misconduct until months after issuing the Suspension Letter, despite petitioners having requested the materials in connection with their hearing requests and by separate FOIL requests. Plainly, respondents failed to follow their own procedures in this respect.

Next, and more importantly, the penalties authorized for enumerated categories of visit related misconduct are set forth in 7 NYCRR 201.4 [e] [3]. They range from denial or termination of a visit to suspension of visitation privileges for up to six months and, at the higher end to indefinite suspension or revocation of visitation privileges. The Suspension Letter at issue identifies petitioners' misconduct as (1) having the smell of marijuana on their clothing, (2) becoming belligerent after being denied entry due to the foregoing, and (3) refusing to leave the facility grounds when directed to do so. Petitioners adamantly deny the foregoing and, generally, on a motion to dismiss, the allegations in the petition must be taken as true (*Skibinsky v State Farm Fire & Cas. Co.*, 6 AD3d 975, 976 [3d Dept 2004]). However, petitioners persuasively argue that even if respondent's allegations are accepted as true, it is highly unlikely that any of the alleged misconduct fits into the categories of more serious violations for which indefinite suspension of visitation may be imposed.

With respect to the alleged odor of marijuana, the Court observes that petitioners were not accused of attempting to smuggle in the drug. Thus, the only category of violation the alleged odor of marijuana could fit into would be "[v]isitor apparently under influence of alcohol or drugs" for which the authorized penalty is denial of the visit (7 NYCRR § 201.4 [e] [3]). With respect to allegedly becoming belligerent, the Court observes that petitioners were not accused of assault on the staff.¹ The closest category of misconduct within which petitioners' alleged belligerence could fall is "[v]isitor fails to follow instructions of facility staff and facility rules" (*Id.*) The maximum authorized penalty for this misconduct is a three-month suspension of privileges (*Id.*) The same

¹ The Court further notes that per the incident reports, petitioner Mikehi Boutwell did not become belligerent, did not block the door, and did not employ any vulgarity. Rather, per the incident reports, petitioner Mikehi Boutwell actually de-escalated the situation by entreating his mother to back away from Sgt. Sprague. As such, his alleged misconduct is even harder to square with respondents' decision to indefinitely suspend his visitation privileges.

is true of petitioners' alleged refusal to leave the facility after being instructed to do so. Stated differently, petitioners have made a compelling argument that respondents failed to follow their own regulations which, if sustained after submission and consideration of the answer and return, would render the visitation sanction legally inadequate. In this regard petitioners have sufficiently demonstrated that exhaustion of their administrative remedies would have been futile and thus defeated respondents' pre-answer motion to dismiss.²

Having concluded that petitioners fall within the exception to the exhaustion requirement, it is unnecessary to address the parties' remaining arguments on the issue (*Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]). However, two additional arguments bear discussion. First, it is noteworthy that neither 7 NYCRR 201.4 nor 7 NYCRR 201.5, (which govern visitor appeal hearings), contain a timeframe dictating the date by which a hearing must be scheduled by DOCCS once an appeal has been received, thus supporting petitioners' argument that requiring them to pursue administrative remedies would cause them to suffer irreparable harm.³

Next, the Court does not in the context of this motion decide as to the propriety of respondents' alleged "spoliation" of the surveillance footage of the incident and refusal to provide logbook entries. However, it can be inferred that without this evidence, the hearing would consist only of the testimony of petitioners versus the testimony of the correction officers. It is undisputed that objectively neutral video evidence which might corroborate or refute either sides' testimony would be missing. This point is particularly salient where petitioners' indefinite suspension is

² The parties should not construe the Court's determination that petitioner's demonstration regarding the futility of exhausting administrative remedies as a final determination on the merits of the legal adequacy of the sanction.

³ The fact that inmate visitation is not a constitutionally "protected interest" (*Matter of Victory v Coughlin*, 165 AD2d 402, 404-405 [3d Dept 1991]) does not mean that the loss of visiting privileges produces no harm.

based upon allegedly serious safety and security threats petitioners pose when juxtaposed against DOCCS' policy of retaining video of "significant security incidents[.]"

The Court rejects the general premise that the visitation hearings would be futile regardless of the circumstances. Indeed, the regulations required that a hearing officer from outside the correctional facility conduct the hearing. There is no basis to indicate that the hearing officer would be anything but neutral, impartial, and able to fairly hear and determine the evidence. Nevertheless, in this matter, the absence of the video footage combined with petitioners' inability to identify and call the woman they attest admitted to smoking marijuana just before entering the facility - whose identity was known to respondents - could certainly leave them at a disadvantage. In sum, the record here corroborates petitioners' argument of the futility of pursuing administrative remedies.

Accordingly, it is hereby

ORDERED that respondents' motion to dismiss is denied; and it is further

ORDERED that respondents are directed to answer the petition within thirty (30) days from the date of entry of this decision and order.

This shall constitute the Decision and Order of the Court. The original Decision and Order is being filed with the Albany County Clerk's Office via NYSCEF. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: March 6, 2024
Albany, New York

ENTER,


SHARON A. GRAFF, JSC

Papers considered: Verified Petition dated June 6, 2023, with Exhibits A-K; Order to Show Cause signed on June 13, 2023; Memorandum of Law in Support of Petition dated June 6, 2023; Notice of Motion dated July 7, 2023; Attorney Affirmation of Jennifer J. Corcoran, Esq. dated July 7, 2023, with Exhibits A-C; Memorandum of Law in Support of Respondent's Motion to Dismiss dated July 7, 2023; Petitioners' Memorandum of Law in Opposition to Respondents' Motion to Dismiss dated July 13, 2023; Respondents' Reply to Memorandum of Law dated July 21, 2023; Petitioners' Memorandum of Law in Support of Their Request for leave to File a Sur Reply dated July 24, 2023; and Petitioners' Sur Reply Memorandum of Law in Opposition to Respondents' Motion to Dismiss dated October 11, 2023.