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| <b>People ex. rel. Kazmirski v Annucci</b>   |
| 2015 NY Slip Op 30056(U)   |
| January 22, 2015   |
| Supreme Court, Seneca County   |
| Docket Number: 48752   |
| Judge: Dennis F. Bender  |
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STATE OF NEW YORK  
 SUPREME COURT                      COUNTY OF SENECA

PEOPLE OF THE STATE OF NEW YORK EX. REL.  
 RALPH KAZMIRSKI  
 DIN # 00-B-1695

Petitioner

DECISION AND  
 JUDGMENT  
 Index No. 48752

-against-

A. ANNUCCI, COMMISSIONER NYS DEPARTMENT  
 OF CORRECTIONS AND COMMUNITY SUPERVISION;  
 M. SHEAHAN, FIVE POINTS CORRECTIONAL FACILITY  
 SUPERINTENDENT; S. PARISH, CORRECTION  
 COUNSELOR

Respondents.

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The petitioner herein filed an Article 78 Petition challenging the respondents' determination denying his application for Limited Credit Time Allowance (herein after LCTA) pursuant to Correction s Law §803-b(c)(iii). Pursuant to Corrections Law §803-b(3);

“No personnel shall have the right to demand or require the credit authorized by this section. The Commissioner may revoke at any time such credit for any disciplinary infraction committed by the inmate or for any failure to continue to participate successfully in any assigned work and treatment program after the certificate of earned eligibility has been awarded. 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.”

In this case, the petitioner alleges he successfully completed service as an “Inmate Program Associate” (herein after IPA) for a period of two or more years. He underwent the IPA training from June 15, 2009 to July 19, 2009 (Petition, Paragraphs 4&5), and petitioner avers the inmates are told

by Deputy Superintendent Zenzen that all prior "Program Aide II" service would count towards LCTA credit criteria.. During the Summer and Fall of 2010, the IPA guidelines were amended to exclude many programs from the LCTA criteria. The petitioner's job title was changed from "Program Aide II" to "Special Assignment" on June 21, 2010. In October, 2011 the petitioner wrote to Sr. Counselor Kennedy and Deputy Commissioner of Programs in Albany asking if his prior Program Aide II job title satisfied the LCTA criteria. Pursuant to a letter from Program Services' Acting Deputy Commissioner, Catherine Jacobsen, dated November 10, 2011, the petitioner was advised that he was eligible for LCTA consideration. He was also told,

"the Law Library Program Aide II job title will be taken into account for the LCTA program criteria."

Per DOCCS own records, the petitioner worked as a Program Aide II from March 6, 2006 to September 3, 2006 (almost 6 months); September 18, 2006 to April 20, 2008 (7 months); February 12, 2007 to January 13, 2008 (11 months); January 28, 2008 to September 28, 2008 (18 months); April 6, 2009 to September 6, 2009 (5 months); November 16, 2009 to December 20, 2009(1 month); May 10, 2010 to June 20, 2010(1 month). Earlier, he was listed as a Program Aide II from March 4, 2002 to June 26, 2005 under Fire and Safety ( 3 years plus). The later years as a Program Aide II were in the law library.

Despite the foregoing, the petitioner received a memo from M. Parish dated June 6, 2014 that he did not meet the criteria for LCTA as he did not have two years as an Inmate Program Associate. The petitioner administratively appealed the determination but the petitioner was told again on August 13, 2014 that he did not meet the program criteria for LCTA. (Exhibit K, Petition).

Per memo from Superintendent M. Sheahan, he was again told that he did not meet the criteria, said memo dated July 31, 2014 (Exhibit L, Petition). The Commissioner thereafter affirmed Superintendent Sheahan's denial per decision dated September 16, 2014.

The respondents deny they have been arbitrary and capricious in their ruling denying the petitioner LCTA credit based upon his failure to have sufficient years of work experience as a Program Aide II. The respondents acknowledge a Program Aide II is indeed an IPA position (Exhibit B, page 12) but that a Library Clerk is not. Ms. Jacobsen acknowledges that when the LCTA legislation was implemented in November of 2009, the historical records for inmate program associates were very difficult to verify. This should not be held against the petitioner whose own records show he had more than two years of Program Aide II experience. There was no clarification of these job titles until 2011 (Paragraph 15, Jacobsen's affidavit). Indeed, the petitioner was assured by DOCCS' personnel his prior experience would qualify him and would be given consideration. The respondents now say that the petitioner was promoted to a higher pay grade and was designated as being on special assignment in the law library. She states her letter of November 10, 2011, (Exhibit B, Petition) should not have been sent as "Library Clerks" are not IPA positions/assignments. The DOCCS own records, however, repeatedly referred to the petitioner as working as a Program Aide II. Indeed, the respondents never listed the petitioner's job as "Library Clerk". (Exhibit A, Petition). Rather, he is listed as working as a "Program Aide II" in the Law Library. (Exhibit A, Petition)

The decision denying the petitioner LCTA credit based upon the finding the petitioner herein lacked necessary work experience as a Program Aide II is annulled and vacated. It is noted the denial of his eligibility was very general and did not state this was the reason for the denial, but the answer herein relies upon the basis being a purported lack of Program Aide II experience. Further, nothing in Directive 4792 states the Program Aide II positions only qualify in certain areas. In

DOCCS “Supervisor of Volunteer Tutors and Inmate Program Associates Policy and Procedure Handbook”, however, it does state on page 12 that a Library Clerk is not an IPA position, but that a Program Aide II position is. As noted, however, there is never a designation that the petitioner was a Library Clerk, but there are repeated designations in his work history per the DOCCS computer print out that he worked as a Program Aide II in an excess of two years. (Exhibit B, Answer; Exhibit A, Petition). There is also nothing listed on page 12 of the hand book that Fire Safety is not an IPA position. Further, the respondents did not rebut the petitioner’s presentation that another inmate, George VanSchenck, received credit under similar circumstances as his. (Paragraph 27, Petition).

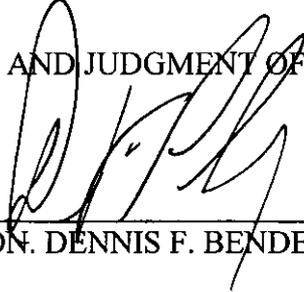
Cases cited by the respondents are distinguishable. In Abreu v Fischer, 87 A.D.3d, 1213 (3d Dept, 2011), the Court upheld the petitioner’s denial of LCTA, where it was clear he worked as a Law Clerk. Here, the petitioner’s work history shows he worked in the library, but as a “Program Aide II” in the law library, until his job was switched to “Special Assignment”. Secondly, the petitioner herein was specifically told his work experience in the various Program Aide II positions he held, qualified him for LCTA consideration. In Ciaprazi v Fischer, 95A.D.3d 1567 (3d Dept, 2012) that case also involved a Law Clerk position. Further, the Court found the IPA training was never required for the Law Clerk position. Mr. Kazmirski specifically avers he was mandated to take the training. (Paragraphs 26-30, Petition). Based upon the specific circumstances this petitioner’s case, including but not limited to, the representations the respondents made to him and the lack of clarification by the respondents as to which job titles qualified for the LCTA consideration, this Court finds the respondents’ determination herein to be arbitrary and capricious, and the same is vacated and annulled.

This Decision and Judgment simply directs that the respondents consider the petitioner again for LCTA credit and that the respondents cannot use the criteria that the petitioner lacked sufficient work experience as a Program Aide II as a basis for a denial of such credit. Whether the respondents would find the petitioner otherwise qualifies for such credit is left to their determination.

Accordingly, since that review still needs to be conducted, the petitioner is not eligible for immediate release and is thus, not entitled to a conversion of his petition to one for habeas corpus relief. In light of his situation, however, the Court directs that the respondents immediately conduct a new LCTA review for this petitioner, and render a final determination within two(2) weeks of the date of this Decision and Judgment.

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

DATED: January 22, 2015

  
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HON. DENNIS F. BENDER