

**Matter of Kroeger v Fischer**

2012 NY Slip Op 32978(U)

December 4, 2012

Sup Ct, Albany County

Docket Number: 3990-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
 SUPREME COURT                      COUNTY OF ALBANY

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In The Matter of ANTHONY P. KROEGER,  
Petitioner,  
-against-

BRIAN FISCHER, COMMISSIONER, NYSDOCS,  
Respondent,

For A Judgment Pursuant to Article 78  
 of the Civil Practice Law and Rules.

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Supreme Court Albany County Article 78 Term  
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
 RJJ # 01-11-ST2958 Index No. 3990-11

Appearances:            Anthony P. Kroeger  
                               Inmate No. 08-B-1220  
                               Petitioner, Pro Se  
                               Coxsackie Correctional Facility  
                               11260 Route 9W  
                               P.O. Box 999  
                               Coxsackie, New York 12051-0999

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 State of New York  
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 (William McCarthy,  
 Assistant Attorney General  
 of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of

Corrections and Community Supervision (“DOCCS”) at Cossackie Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a determination denying a grievance in which he complained that his legal mail was improperly opened on November 9, 2010 in violation of DOCCS Directive 4421.

The grievance was denied “with clarification” by the Inmate Grievance Resolution Committee (“IGRC”) on November 23, 2010. The determination recited as follows:

“All grievances are processed in accordance with Directive #4040. All relevant information must be presented at the time of filing in order for a proper investigation to be conducted at the facility level. Staff needs to see the envelope [to which] grievant refers to determine if the mail was properly addressed. Grievant has not presented any evidence to substantiate his claim that his mail was not properly processed.”

The petitioner appealed to the Superintendent, who also denied the grievance in a decision dated December 3, 2010 which recited as follows:

“Superintendent concurs with the decision of the IGRC. Action requested by grievant is denied with clarification. All grievances are processed in accordance with Directive #4040. All relevant information must be presented at the time of filing in order for a proper investigation to be conducted at the facility level. Staff needs to see the envelope [to which] grievant refers to determine if the mail was properly addressed. Grievant has not presented any evidence to substantiate his claim that his mail was not properly processed.”

The petitioner then appealed to CORC, which accepted the appeal in part in the following decision dated February 10, 2011:

“Upon full hearing of the facts and circumstances in the instant

case, the action requested herein is hereby accepted in part.

“CORC notes that the mail from Northcare Regional Mental Health Services was improperly processed as regular correspondence when it should have been handled as privileged correspondence. Appropriate action has been taken in that staff have been advised that it was entitled to privileged handling. CORC notes, however, that the grievant does not identify what other mail he alleges was not handled as privileged correspondence. Future incidents should be addressed at that time.

“Directive #4040 Section 701.6 (k) (1) states in part:...no copies of the grievance documents may go into an employee’s file without the direct written consent of the employee.

“With regard to the grievant’s appeal, CORC asserts that it is not necessary to submit a copy of the envelope with the grievance if the sender and date are identified. However, it may be necessary for investigating staff to see the envelope to confirm the allegations. CORC advises him to address any future similar concerns regarding the investigation of his grievances to the IGP Supervisor for any remedial action deemed appropriate.

“CORC notes that Directive #4040, Section 701.1, states, in part, that the grievance program is not intended to support an adversary process.

“CORC notes that the grievant has been transferred.”

Judicial review of administrative decisions denying inmate grievances is limited to whether the determination is irrational, arbitrary or capricious or affected by an error of law (Matter of Ramsey v Fischer, 93AD3d 1000, 1001 [3d Dept., 2012]; Matter of Pride v New York State Department of Correctional Services, 91 AD3d 1003, 1004 [3d Dept., 2012]; Matter of Hernandez v Fischer, 79 AD3d 1544, 1546 [3d Dept., 2010]; see also Matter of



Green v Bradt, 69 AD3d 1269 [3rd Dept., 2010]; Matter of Clark v Fischer, 58 AD3d 932 [3rd Dept., 2009]). Phrased differently, “[t]o prevail, petitioner must demonstrate that [the Central Office Review Committee's] determination was arbitrary and capricious or without a rational basis” (Matter of Green v Bradt, 91 AD3d 1235, 1237 [3d Dept., 2012; Matter of Frejomil v Fischer, 68 AD3d 1371 [3<sup>rd</sup> Dept., 2009]; Matter of Simmons v New York State Department of Correctional Services, 82 AD3d 1382, 1383 [3d Dept., 2011]).

In this instance, CORC accepted the grievance in part, and took corrective action by instructing staff with regard to the proper handling of privileged correspondence. At the same time, it also pointed out that where it is claimed that mail was not properly handled, it is helpful to produce the subject envelope for examination, so that the allegations can be confirmed by the investigating officer. The Court is of the view that this constitutes a reasonable and respectful resolution of the grievance.

The Court finds that the petitioner failed in his burden to demonstrate that the grievance determination was made in violation of lawful procedure, is affected by an error of law, is irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly, it is

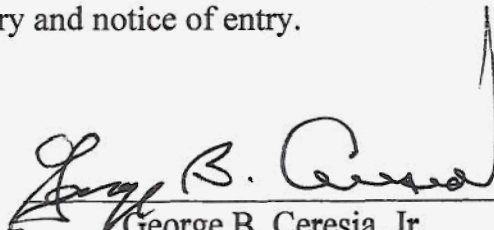
**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the Respondent. 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: December 4, 2012  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause Dated June 24, 2011, Amended Order To Show Cause dated August 15, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated April 10, 2012
3. Petitioner's Reply Dated September 10, 2012