

Matter of Himko v Fischer
2014 NY Slip Op 30849(U)
March 10, 2014
Supreme Court, Albany County
Docket Number: 4881-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

In The Matter of ANDREW HIMKO,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER
OF CORRECTIONAL,

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
RJ# 01-13-ST5273 Index No. 4881-13

Appearances: Andrew Himko
Inmate No. 94-B-2663
Petitioner, Pro Se
Clinton Correctional Facility
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Dannemora, NY 12929-2001

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Clinton Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated April 10, 2013 in

which he was found guilty of violating prison rules (see generally 7 NYCRR § 270.2). Specifically, he was found guilty of Rule 106.10, refusing a direct order¹, and Rule 180.14, violation of urinalysis testing violation². The misbehavior report dated April 4, 2013 recites as follows:

“On the above date & time I C.O. M Kuhl was collecting urine from inmates for E.MIT testing. I gave inmate Himko 94B2663 a direct order to produce urine sample. He stated ‘I refuse.’ I told the inmate that this refusal constitutes a violation of Facility rules & that he may incur the same disciplinary disposition that a positive result would have. The inmate was asked if he understood and he answered ‘yes’. I then told the inmate that a misbehavior report will follow.”

The petitioner alleges that he was unable to provide a urine sample by reason of eleven medications which he was then taking, which have a side effect of decreased urine production, coupled with dehydration caused by diarrhea. The petitioner maintains that the Hearing Officer violated his right to present evidence to explain why he was unable to produce a urine sample. He asserts that one of the medications he was taking was Flomax, prescribed to treat an enlarged prostate gland. He also mentions a second medication, hydrochlorothiazide. In addition, the petitioner maintains that the Hearing Officer improperly turned off the tape recorder during the hearing.

DOCCS Directive 4937 recites as follows:

¹Rule 106.10 recites “[a]n inmate shall obey all orders of department personnel promptly and without argument.” (see 7 NYCRR 270.2)

² Rule 180.14 recites “An inmate shall comply with and follow the guidelines and instructions given by staff regarding facility visiting procedures pursuant to the requirements of departmental Directive No. 4403 (7 NYCRR Part 200)” (see 7 NYCRR 270.2).

"If the inmate is unable to provide a urine specimen immediately, (s)he shall be detained until (s)he 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 that (s)he 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. []"³" (see DOCCS Directive 4937 IV D 4)

The relevant testimony with regard to petitioner's alleged medical inability to produce a urine specimen is the following:

"Himko: There is a medical reason why I could not urinate there. I want to call witnesses on my behalf, I have statements from the ____ drugs ____ I got from the[m] stating the side effects and interactions of the medication that I am taking causes unable to urinate or lack of urination. All the meds I take causes diarrhea or lack of water or body fluids. I cannot pee or tinkle for some reason, I don't

The only testimony given with respect to the alleged effect of medication on petitioner's failure to produce a urine specimen is the following:

"Himko: Yes. The thing is here I am 66 years old 67 in June, ____ but I want to get out in five years spend time with my kids and my grandkids. I don't want to stay here. I'm not going to do no drugs only what is prescribed to me.

H.O. Sperl: Okay. So the time now is 9:59 A.M. I am going to adjourn this. Okay can you hear me?

Himko: Yes.

³Omitted language relates to religious fasts, which has not been shown to have any application to the case at bar.

H.O. Sperl: Okay this is a continuation of a tier III hearing the time now is 10:22 this is a hearing for a Mr. Himko, Andrew 94B2663. Could you please tell me if he is taking any medications that would have anything to do with him not being able to provide a urine sample?

Nesmith: He is not taking any such medications that would do that.

H.O. Sperl: Okay, alright, very good thank you very much.

Nesmith: Thank you goodbye.

Himko: I'll ____ myself and get Kinney Drugs paperwork.

H.O. Sperl: Okay, right now its 10:23 I am going to adjourn this and make my decision ["]

H.O. Sperl's determination recites, in part, as follows:

"I also relied up[on] the testimony from P.A. T. Nesmith stating that inmate Himko, Andrew 94B2663 does not have any medication that would prohibit him from urinating."

In this instance, there is no foundation for witness Nesmith's testimony, including the witness's qualifications. It is only in H.O. Sperl's decision that it is revealed that witness Nesmith was a "P.A." (presumably, a physician's assistant). However even then, there is no factual basis to conclude that this witness had the qualifications to provide an opinion. Nor does the testimony reveal what specific medications were reviewed by the witness, and/or whether the witness had personal knowledge of petitioner's medical condition and/or the medications which he was taking (and their side effects). The instant matter has close similarities to that found in Matter of Barone v Prack (92AD3d 999, 999-1000 [3d Dept., 2012]), where the Appellate Division rejected testimony of a nurse administrator, who had no personal knowledge of the inmate's medical condition, the medications he was taking, or

their side effects.

Under all of the circumstances, the Court finds that the determination must be annulled and the matter remitted to the respondent for a new hearing in keeping with this decision.

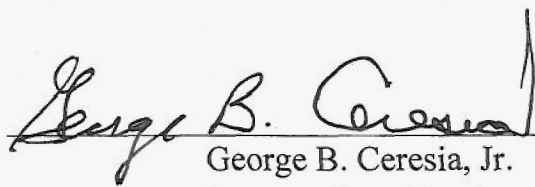
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is granted, the determination annulled, and the matter remitted to the respondent for further proceedings not inconsistent with this Court's decision.

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 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: March 10, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 18, 2013, Petition, Supporting Papers and Exhibits
2. Amended Order to Show Cause dated November 7, 2013
3. Respondent's Answer Dated January 16, 2014, Supporting Papers and Exhibits