SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION : FOURTH JUDICIAL DEPARTMENT

DECISIONS FILED

AUGUST 17, 2012

HON. HENRY J. SCUDDER, PRESIDING JUSTICE

HON. NANCY E. SMITH

HON. JOHN V. CENTRA

HON. EUGENE M. FAHEY

HON. ERIN M. PERADOTTO

HON. EDWARD D. CARNI

HON. STEPHEN K. LINDLEY

HON. ROSE H. SCONIERS

HON. SALVATORE R. MARTOCHE, ASSOCIATE JUSTICES

FRANCES E. CAFARELL, CLERK

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 11-01892

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ.

JAMES K. HEIDT, GUARDIAN AD LITEM OF SETH KELLY, AN INFANT UNDER THE AGE OF 10 YEARS, PLAINTIFF-RESPONDENT,

V ORDER

ROME MEMORIAL HOSPITAL, GARY C. TART, M.D., PEDIATRIC & ADOLESCENT MEDICAL ASSOCIATES, P.C., STEPHEN REICHARD, D.O., ROME RADIOLOGICAL ASSOCIATES, P.C., CROUSE-IRVING MEMORIAL HOSPITAL, ALLAN S. CUNNINGHAM, M.D., NETHI LORLERTRATNA, M.D., KRISTEN M. CHRISTIAN, M.D., H. SHIN, M.D., LOUISE A. PRINCE, M.D., THERESA AMIGO, M.D., MADISON COUNTY MEDICAL CARE, DOING BUSINESS AS CAMDEN MEDICAL CARE, RONALD EDWARD FEMIA, M.D., DEFENDANTS-APPELLANTS, ET AL., DEFENDANT.

BURKE, SCOLAMIERO, MORTATI & HURD, LLP, ALBANY (JEFFREY HURD OF COUNSEL), FOR DEFENDANT-APPELLANT ROME MEMORIAL HOSPITAL.

SMITH, SOVIK, KENDRICK & SUGNET, P.C., SYRACUSE (LAURENCE F. SOVIK OF COUNSEL), FOR DEFENDANTS-APPELLANTS GARY C. TART, M.D. AND PEDIATRIC & ADOLESCENT MEDICAL ASSOCIATES, P.C.

LEVENE, GOULDIN & THOMPSON, LLP, BINGHAMTON (JOHN J. POLLACK OF COUNSEL), FOR DEFENDANTS-APPELLANTS STEPHEN REICHARD, D.O., RONALD EDWARD FEMIA, M.D., AND ROME RADIOLOGICAL ASSOCIATES, P.C.

MACKENZIE HUGHES, LLP, SYRACUSE (STEPHEN T. HELMER OF COUNSEL), FOR DEFENDANTS-APPELLANTS CROUSE-IRVING MEMORIAL HOSPITAL, NETHI LORLERTRATNA, M.D., KRISTEN M. CHRISTIAN, M.D., AND H. SHIN, M.D.

SUGARMAN LAW FIRM, LLP, SYRACUSE (JOSHUA M. GILLETTE OF COUNSEL), FOR DEFENDANT-APPELLANT ALLAN S. CUNNINGHAM, M.D.

GALE GALE & HUNT, LLC, SYRACUSE (MAX D. GALE OF COUNSEL), FOR DEFENDANT-APPELLANT LOUISE A. PRINCE, M.D.

ASWAD & INGRAHAM, BINGHAMTON (JAMES F. MORAN OF COUNSEL), FOR DEFENDANTS-APPELLANTS THERESA AMIGO, M.D. AND MADISON COUNTY MEDICAL CARE, DOING BUSINESS AS CAMDEN MEDICAL CARE.

BOTTAR LEONE, PLLC, SYRACUSE (MICHAEL A. BOTTAR OF COUNSEL), FOR PLAINTIFF-RESPONDENT.

Appeals from an order of the Supreme Court, Onondaga County (James P. Murphy, J.), entered May 2, 2011. The order, inter alia, denied the motions of defendants to dismiss the complaint for failure to prosecute.

Now, upon the stipulation of discontinuance signed by the attorneys for the parties, and filed in the Onondaga County Clerk's Office on June 8, 2012,

It is hereby ORDERED that said appeals are unanimously dismissed without costs upon stipulation.

Entered: August 17, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

519

CA 11-02468

PRESENT: SCUDDER, P.J., SMITH, FAHEY, CARNI, AND SCONIERS, JJ.

IN THE MATTER OF GREGORY LORENC,
PETITIONER-RESPONDENT,

V ORDER

CITY OF BUFFALO AND CITY OF BUFFALO DEPARTMENT
OF HUMAN RESOURCES, CIVIL SERVICE DIVISION,
RESPONDENTS-APPELLANTS.

HODGSON RUSS LLP, BUFFALO (JOSEPH S. BROWN OF COUNSEL), FOR RESPONDENTS-APPELLANTS.

CHIACCHIA & FLEMING, LLP, HAMBURG (CHRISTEN ARCHER PIERROT OF COUNSEL), FOR PETITIONER-RESPONDENT.

Appeal from a judgment (denominated order and judgment) of the Supreme Court, Erie County (Gerald J. Whalen, J.), entered March 1, 2011 in a proceeding pursuant to CPLR article 78. The judgment, among other things, directed respondent City of Buffalo to return petitioner to the eligible list of firefighters.

Now, upon reading and filing the stipulation withdrawing appeal signed by the attorneys for the parties on July 25 and 27, 2012,

It is hereby ORDERED that said appeal is unanimously dismissed without costs upon stipulation.

Entered: August 17, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

765

CA 12-00226

PRESENT: SMITH, J.P., FAHEY, CARNI, SCONIERS, AND MARTOCHE, JJ.

IN THE MATTER OF KAREEM MURPHY,
PETITIONER-RESPONDENT,

V MEMORANDUM AND ORDER

HAROLD D. GRAHAM, SUPERINTENDENT, AUBURN
CORRECTIONAL FACILITY, RESPONDENT-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARTIN A. HOTVET OF COUNSEL), FOR RESPONDENT-APPELLANT.

KAREEM MURPHY, PETITIONER-RESPONDENT PRO SE.

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered September 2, 2011 in a proceeding pursuant to CPLR article 78. The judgment granted the petition and vacated the determination of respondent.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determination is modified on the law and the petition is granted in part by vacating the penalty imposed and as modified the determination is confirmed without costs and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Respondent appeals from a judgment that granted the petition, vacated respondent's determination finding petitioner guilty of violating inmate rule 113.25 (7 NYCRR 270.2 [B] [14] [xv] [prohibiting possession of, inter alia, marihuana]), and ordered the expungement of the determination from petitioner's institutional record. We note at the outset that Supreme Court erred in failing to transfer this proceeding to this Court pursuant to CPLR 7804 (g). That section provides in relevant part that, where a substantial evidence issue is raised, "the court shall first dispose of such other objections as could terminate the proceeding, . . . [but i]f the determination of the other objections does not terminate the proceeding," the court shall transfer the proceeding to this Court (*id.*). The court granted the petition based on respondent's violation of its own directive, i.e., Department of Correctional Services Directive No. 4910 (V) (C) (1), that petitioner had the right to be present during the search of his cell. Respondent's contention that prison officials properly invoked the security exception contained in that directive is raised for the first time on appeal, and thus it is not properly before us (*see Ciesinski v Town of Aurora*, 202 AD2d 984, 985; *cf. Matter of Patterson v Coughlin*, 198 AD2d 899, 900). In any event, that contention lacks merit because the record is devoid of

evidence that "allow[ing] petitioner to observe the search would 'presen[t] a danger to the safety and security of the facility' " (*Patterson*, 198 AD2d at 900; *see Matter of Johnson v Goord*, 288 AD2d 525, 526; *Matter of Gonzalez v Wronski*, 247 AD2d 767, 768). Moreover, there is no indication that petitioner waived his right to observe the search of his cell (*see Matter of Vines v Goord*, 19 AD3d 951, 952; *Matter of Mitchell v Goord*, 266 AD2d 614, 615; *see generally Patterson*, 198 AD2d at 900).

Although we conclude that the court properly determined that respondent violated its own directive and thus that the marihuana found during the improper search of petitioner's cell could not form the basis for the finding that petitioner violated the inmate rule in question, we nevertheless agree with respondent that there is substantial evidence to support the Hearing Officer's finding of guilt with respect to petitioner's violation of the inmate rule. Thus, respondent's violation of its own directive "does not terminate the proceeding" (CPLR 7804 [g]), and the court therefore should have transferred the proceeding to this Court. The misbehavior report set forth that a correction officer had asked petitioner to exit his cell, whereupon he conducted a pat frisk of petitioner and discovered a cellophane bag containing suspected contraband drugs in petitioner's right sock. It is undisputed that the frisk was conducted before the search of petitioner's cell. Subsequent testing revealed that the bag contained 4.1 grams of marihuana. It is well established that a written misbehavior report may constitute substantial evidence of an inmate's misconduct (*see Matter of Perez v Wilmot*, 67 NY2d 615, 616; *People ex rel. Vega v Smith*, 66 NY2d 130, 140). Although petitioner denied that drugs were found on his person, that denial served only to create a credibility issue that the Hearing Officer was entitled to resolve against petitioner (*see Perez*, 67 NY2d at 617; *see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966).

Based on the violation of the inmate rule, the Hearing Officer imposed a penalty that included a loss of good time of 12 months. The penalty imposed, however, took into account the total quantity of drugs, i.e., the 4.1 grams of marihuana discovered on petitioner's person and the 29.8 grams recovered during the search of petitioner's cell. The Hearing Officer expressly found that the total quantity demonstrated an intent to distribute, which constituted "an aggravating factor." Insofar as the record fails to specify what penalty may have been imposed based solely upon the much smaller quantity of marihuana found on petitioner's person, we modify the determination by vacating the penalty imposed. Although there is no need to remit the matter to respondent for the imposition of a new penalty to the extent that petitioner has already served the penalty, it is unclear from the record what portions of the penalty have been served. We therefore remit the matter to respondent for reconsideration of that part of the penalty that has not already been served, including reconsideration of the recommended loss of good time (*see generally Matter of McFadden v Prack*, 93 AD3d 1268; *Matter of*

Monroe v Fischer, 87 AD3d 1300, 1301; *Matter of Gonzalez v Goord*, 8 AD3d 970, 971).

Entered: August 17, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

830

KA 09-02641

PRESENT: SMITH, J.P., FAHEY, PERADOTTO, LINDLEY, AND MARTOCHE, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V MEMORANDUM AND ORDER

PATRICK GUILLORY, ALSO KNOWN AS TIMOTHY HUNTER, DEFENDANT-APPELLANT.

FRANK H. HISCOCK LEGAL AID SOCIETY, SYRACUSE (KRISTEN MCDERMOTT OF COUNSEL), FOR DEFENDANT-APPELLANT.

WILLIAM J. FITZPATRICK, DISTRICT ATTORNEY, SYRACUSE (JAMES P. MAXWELL OF COUNSEL), FOR RESPONDENT.

Appeal from a judgment of the Supreme Court, Onondaga County (John J. Brunetti, A.J.), rendered February 27, 2009. The judgment convicted defendant, upon his plea of guilty, of burglary in the third degree.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed.

Memorandum: On appeal from a judgment convicting him, upon his guilty plea, of burglary in the third degree (Penal Law § 140.20), defendant contends that his sentence must be vacated because he was sentenced as a second felony offender and the People did not file a predicate felony offender statement, as required by CPL 400.21. Defendant failed to preserve that contention for our review (*see People v Pellegrino*, 60 NY2d 636, 637; *People v Butler*, 96 AD3d 1367, 1368; *People v Mateo*, 53 AD3d 1111, 1112, *lv denied* 11 NY3d 791). In any event, by admitting in open court that he had been convicted of a prior felony offense in New York within the past 10 years, defendant waived strict compliance with CPL 400.21 (*see People v Perez*, 85 AD3d 1538, 1541; *People v Vega*, 49 AD3d 1185, 1186, *lv denied* 10 NY3d 965).

Entered: August 17, 2012

Frances E. Cafarell
Clerk of the Court

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CAE 12-01454

PRESENT: SCUDDER, P.J., PERADOTTO, LINDLEY, AND SCONIERS, JJ.

IN THE MATTER OF STEPHANIE PAROBEK AND SEAN M. RYAN, PETITIONERS-APPELLANTS,

V MEMORANDUM AND ORDER

JOSEPH A. MASCIA AND COMMISSIONERS DENNIS E. WARD AND RALPH M. MOHR, CONSTITUTING THE BOARD OF ELECTIONS OF THE COUNTY OF ERIE, RESPONDENTS-RESPONDENTS.

CANTOR, DOLCE & PANEPINTO, P.C., BUFFALO (SEAN E. COONEY OF COUNSEL), FOR PETITIONERS-APPELLANTS.

LAW OFFICE OF JOSEPH G. MAKOWSKI, BUFFALO (JOSEPH G. MAKOWSKI OF COUNSEL), FOR RESPONDENT JOSEPH A. MASCIA.

Appeal from an order of the Supreme Court, Erie County (John F. O'Donnell, J.), entered August 8, 2012 in a proceeding pursuant to the Election Law. The order dismissed the petition.

It is hereby ORDERED that the order so appealed from is unanimously affirmed without costs.

Memorandum: Petitioners commenced this proceeding seeking, inter alia, to invalidate the designating petitions of Joseph A. Mascia (respondent) nominating him as a candidate for the office of New York State Assembly Member, District 149, in the Democratic primary election to be held on September 13, 2012. Petitioners contend that respondent's designating petitions should be invalidated because he is "simultaneously running" for two offices, only one of which he may hold if elected. We reject that contention.

We note at the outset that petitioners' contention is based on their erroneous assertion that respondent is "simultaneously running" for two offices. The record establishes that respondent was elected to the position of Tenant Member of the Board of Commissioners of the Buffalo Municipal Housing Authority in an election that took place in June, while the Democratic primary election for the New York State Assembly is, as noted, scheduled for September 13, with the general election to occur in November. We thus conclude that the cases relied upon by petitioners in support of their contention are distinguishable, inasmuch as the challenged candidates therein were seeking two or more offices on the same ballot at the same time (*see e.g. Matter of Lufty v Gangemi*, 35 NY2d 179, 181; *Matter of Burns v*

Wiltse, 303 NY 319, 322-323; *Matter of Lawrence v Spelman*, 264 AD2d 455, 455-456, *lv denied* 93 NY2d 813; *see also Matter of Phillips v Suffolk County Bd. of Elections*, 21 AD3d 509, 510).

In any event, even assuming, arguendo, that respondent is simultaneously running for two offices, we conclude that there is no constitutional or statutory provision preventing him from serving in both offices if he is elected to the State Assembly. Petitioners' reliance on NY Constitution, art III, § 7, is misplaced. Pursuant to that constitutional provision, members of the Legislature may not be "*appointed* to any office . . . under the government of the . . . state of New York, or under any city government" in which they shall receive compensation (emphasis added). Here, however, the Tenant Member office in question is an *elected* position, not an appointed position. We reject petitioners' contention that the two offices in question are incompatible and that the "spirit and intent of the Election Law" therefore prohibits such a dual nomination (*Burns*, 303 NY at 323). In our view, there is no conflict preventing respondent from fully executing the duties of the two positions sought, because a Member of the State Assembly has neither direct authority over nor involvement with the Buffalo Municipal Housing Authority (*see* 1976 Ops Atty Gen No. 338; *see generally People ex rel. Ryan v Green*, 58 NY 295, 304-305; *Matter of Smith v Dillon*, 267 App Div 39, 43).

In light of our determination, we do not address petitioners' remaining contentions.

Entered: August 17, 2012

Frances E. Cafarell
Clerk of the Court