

Matter of Hutzenlaub v Fischer
2007 NY Slip Op 33002(U)
September 24, 2007
Supreme Court, Franklin County
Docket Number: 0000169/2007
Judge: S. Peter Feldstein
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT****COUNTY OF FRANKLIN****X**

In the Matter of the Application of
FRED HUTZENLAUB, #97-A-3919,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #16-1-2007-0065.022
INDEX #2007-0169
ORI #NY016015J

BRIAN FISCHER, Commissioner,
NYS Department of Correctional Services,
Respondent.

X

This proceeding pursuant to Article 78 of the CPLR was originated by the petition of Fred Hutzenlaub, verified on January 10, 2007, and stamped as filed in the Franklin County Clerk's Office on January 29, 2007. Petitioner, who is now an inmate at the Five Points Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility on July 31, 2006. The Court issued an Order to Show Cause on January 31, 2007. Respondent moved to dismiss the proceeding on the basis it was time barred pursuant to the four month statute of limitations set forth in CPLR §217(1). By Decision and Order executed June 19, 2007, this Court denied the motion to dismiss, ordered respondent to serve a copy of his answering papers on petitioner on or before July 13, 2007, and that petitioner mail his original Reply to respondent's answering papers to the Franklin County Clerk on or before August 3, 2007. The Court has received and reviewed respondent's Answer, verified on July 13, 2007, together with his Letter Memorandum of that date. Petitioner filed a Reply sworn to

July 19, 2007, which was stamped as filed in the Franklin County Clerk's Office on July 25, 2007.

While at the Upstate Correctional Facility, petitioner was issued an inmate misbehavior report on July 17, 2006. The inmate misbehavior report by Lt. Vann charged petitioner with violation of inmate rules 103.20 (soliciting), 107.20 (false statements or info), and 180.11 (facility correspondence violation). Lt. Vann alleged that a piece of mail from petitioner addressed to Phil Miller (Family) was returned to the facility; that within this envelope was a letter and another envelope, stamped and addressed to an inmate at Ossining Correctional Facility, which also contained a letter; that the letter to Phil Miller's family requested them to mail the letter to Phil; and that on the envelope to inmate Miller the petitioner put the return address as "Mr. F. Miller."

A Tier III Superintendent's Hearing was held at the Upstate Correctional Facility with respect to these charges on July 31, 2006. Petitioner pled not guilty to rule violations 103.20 (soliciting) and 107.20 (false statements or info). The hearing record sheet indicates petitioner pled guilty to rule violation 180.11 (facility correspondence violation), but petitioner maintains that he pled not guilty but then said that "on the surface I am guilty but I did not realize these rules and there's extenuating and mitigating circumstances" (transcript states "continuating [sic] and litigating [sic] circumstances). At the conclusion of the hearing, the petitioner was found guilty of all charges. A disposition of 90 days confinement in the special housing unit, loss of packages, loss of commissary, loss of phone privileges and a recommended loss of good time of ninety (90) days was imposed (of which, thirty (30) days were suspended). Upon administrative

appeal, the results and disposition of the Tier III Superintendent's Hearing were affirmed on September 12, 2006. This proceeding ensued.

The petitioner asserts several objections: that the disciplinary hearing was not timely commenced and concluded; that he was never advised or instructed with respect to correspondence procedures in violation of Correction Law §138; and that respondent failed to obtain a "mail-watch" from the facility's superintendent prior to reading his incoming mail. Petitioner seeks a judgment vacating and setting aside respondent's determination and directing that all entries made against him as a result of this disciplinary hearing be expunged from his record.

Respondent asserts that since the petitioner was confined on other charges other than those in the subject misbehavior report the hearing was properly commenced and concluded; that there has been no violation of Correction Law §138 in that disciplinary rule 180.11 governs DOCS directive 4422 which requires advance approval to correspond with another inmate; that petitioner did not preserve for review his claim that respondent failed to obtain a "mail-watch" order; and that since it was returned mail, it became subject to inspection pursuant to regulation.

Petitioner in his reply asserts that he did not raise the "mail-watch" issue at the hearing because he did not know of it and, in any event, no objection should be required on this issue; that he did raise the timeliness issue at the hearing; that he did not plead guilty to any of the charges; and that he did not receive the respondent's answer until July 18, 2007, although the Court directed service on or before July 13, 2007.

Petitioner's contention that the hearing was not timely commenced and concluded is without merit. When an inmate is confined on other charges at the time a misbehavior

report is issued, the hearing does not have to be commenced within seven days of the date thereof. *See, Matter of Serrano v. Goord*, 28 AD3d 838 (2006). Although petitioner contends his confinement was concluded between the time of the report and the hearing, the fact remains at the time of the report he was confined on other charges. Assuming, *arguendo*, there was a failure to comply with the time limits for the hearing, which this Court does not find to be the case herein, absent any showing that substantial prejudice flowed from any delay, the regulatory time limits are construed to be directory rather than mandatory. *See, Matter of Frazier v. Artus*, 40 AD3d 1288 (2007).

Disciplinary rule 180.11 is the rule that governs compliance with the directive that outlines the policies and procedures governing inmate correspondence. *See, Allah v. Selsky*, 37 AD3d 960. Petitioner makes no claim that he has never been provided with a rule book in any of the facilities he has been placed. In any event, Petitioner's alleged ignorance cannot be used to excuse his misconduct. *See, Matter of Feliciano v Selsky*, 263 AD2d 810 (1999). Therefore, petitioner's claim that he was unaware of rule 180.11 must also be dismissed.

Petitioner's contention his mail was improperly opened is also without merit. "When the envelope in question was returned for insufficient postage, it became subject to inspection by regulation (see 7 NYCRR 720.4 [k]; see also *Matter of Reid v Coughlin*, 213 AD2d 950, 951 [1995])." *Matter of Tankleff v. Senkowski* 3 AD3d 621, 622, (2004) *lv den* 2NY3d 703.

With respect to the service of answering papers, CPLR 2103 (b)(3) provides that service is complete upon mailing. CPLR §7804(e) provides in part that when an answer

is not served the Court may either issue judgment to the petitioner or order that an answer be submitted.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition herein is dismissed.

DATED: September 24 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice