

**Matter of Dallio v New York State Department of  
Correctional Services**

2007 NY Slip Op 34354(U)

December 31, 2007

Supreme Court, Franklin County

Docket Number: 0000504/2007

Judge: S. Peter Feldstein

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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**  
**X**

In the Matter of the Application of  
**THOMAS DALLIO, #88-T-2364,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #16-1-2007-0206.049**  
**INDEX # 2007-0504**  
**ORI # NY016015J**

-against-

**NEW YORK STATE DEPARTMENT  
OF CORRECTIONAL SERVICES, and  
IGP CENTRAL OFFICE REVIEW  
COMMITTEE,**

Respondents.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Thomas Dallio, verified on March ?, 2007, and stamped as filed in the Franklin County Clerk's office on April 11, 2007. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the adequacy of medical care he has received in DOCS custody. The Court issued an Order to Show Cause on April 13, 2007, and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on May 25, 2007, as well as respondents' Letter Memorandum of May 25, 2007. The court has received no Reply thereto from the petitioner.

The petitioner alleges that on July 27, 2006, he "... wrote a Grievance Complaint against the infliction of unnecessary suffering by failure to treat medical needs, against deliberate indifference to serious medical needs ...". The grievance complaint in question (UST-27647-06) states, in relevant part, as follows:

"For over a month, I [petitioner] have suffered every night by experiencing swollen carotid [presumably, carotid] artery pain, severe headache pain, arthritis pain, chest pain, facial numbness to temple, cheek, jaw and eye

areas, and difficulty breathing while lying down at night which causes me to have to sit up suddenly gasping for air and subject to arterial spasms (sudden constriction of arteries in chest, heart and neck areas). This occurs every night making it impossible to sleep at night and forcing me to have to sit up to breathe and walk around to try to prevent total heart failure, stroke, and/or heart attack. Every day I submit sick call requests about these matters and the nurses offer no more than a tylenol for these serious medical needs which fails to treat the medical problem and deprives me of necessary medical care. Higher ranking medical staff and administrators at Upstate and DOCS Albany have been notified yet they have inflicted unnecessary suffering by failing to treat these medical needs.”

A decision on grievance UST-27647-06 was issued by the Superintendent of the Upstate Correctional Facility on October 10, 2006. That decision reads, in relevant part, as follows:

“This grievance was reinvestigated by NA Smith by a chart/FHS1 review. The grievant was seen by the Nurse Practitioner on 8/29/06. Consults were submitted for cardiology and ultrasound of his carotids, he refused both consults. He is non compliant with his medical treatment plan. He does not allow testing to be completed to determine the nature of his complaints. Without that diagnostic information, medication can not be safely administered. He has access to OTC pain medication daily as needed; he does not request it through sick call; there is no evidence of malfeasance. The grievant must take a proactive role in his own health care to achieve optimal results.”

The petitioner appealed to the Inmate Grievance Program Central Office Review Committee (CORC) on October 15, 2006. His appeal statement reads as follows:

“Medical facility and staff have conspired to commit attempted murder. Superintendent’s response is false. No consult was ever made for my carotids. Medical treatment plan is for stress echo at Albany Medical Center. Consent signed July 6, 2006, what happened to appointments. Per R. Gagnier, KBSI, the two 8/29/06 consults are signed are missing from my medical chart. Medical staff R. Gagnier and N. A. Smith stole all kinds of evidence out of my medical chart. 9/17/06 ECG results are missing. 6/21/06 thorasic echocardiograms are missing etc, because medical staff tampered with medical records resulting in false chart review and inadequate medical care. My daily sick call requests prove I am very proactive about my health and 8<sup>th</sup> Amendment.”

By decision dated November 15, 2006, the CORC upheld the determination of the facility superintendent for the reasons stated by the superintendent. The CORC also noted as follows:

“CORC notes that the grievant had a chest x-ray completed on 10/30/06 which was normal and a stress echocardiogram completed on 11/8/06 to further evaluate his complaints. CORC notes that the grievant has been noncompliant with medical staff in the past with respect to the symptoms expressed in the instant case. Nevertheless, when the grievant allows medical staff to assist him, services are provided in a timely fashion.

Contrary to grievant’s assertions, CORC has not been presented with sufficient evidence to substantiate any malfeasance by medical staff.

CORC notes that the grievant has raised a separate issue in his appeal statement that was not addressed in his original complaint. This issue could be the subject of a separate grievance.

CORC advises the grievant that he may review and challenge the accuracy of his medical records in accordance with Health Services Policy Manual . . .”

In his petition, filed in the Franklin County Clerk’s office on April 11, 2007, the petitioner specifically states that he is challenging the CORC decision of November 15, 2006, allegedly received by him on December 13, 2006. Grievance UST-27647-06 is identified in the body of the petition, either by date of filing or grievance number, at least seven times. In paragraph 19 of the petition the cause of action asserted is specifically described as follows: “CORC Decision and Superintendent’s decision and IGRC Decision on UST #27647-06 is arbitrary and capricious, dishonest, a coverup of medical staff misconduct, and inadequate, along with affected by an error of law, and the abuse of discretion, and failure to perform with integrity all duties medical staff are ethically and legally obligated to for my health and safety.” Also, in his “WHEREFORE” clause the petitioner requests a judgment of this Court “[r]eversing and vacating the inadequate

CORC Decision of UST #27647-06 . . .” No other inmate grievance proceeding is mentioned in the petition. Notwithstanding all of the above, in parts of the petition reference is made to medical issues outside the scope of grievance UST-27647-06. Counsel for the respondents has supplied detailed information with respect to additional grievances filed by the petitioner on November 16, 2006 (UST-28854-06) and February 6, 2007 (UST-29951-07), which appear to relate to the additional medical issues mentioned in the petition. Petitioner’s repeated, specific references to challenging the final results of grievance UST-27647-06, however, coupled with his failure to specifically challenge the results of any other inmate grievance proceeding, leads the Court to conclude that the challenge to the results of inmate grievance UST-27647-06 is the only challenge subject to judicial review in this proceeding. *See Foreman v. Goord*, 302 AD2d 817. *See also Ek v. Travis*, 20 AD3d 667, *lv den* 5 NY3d 862.

There is no doubt that “deliberate indifference to serious medical needs of prisoners” constitutes a violation of the Eighth Amendment proscription against the infliction of cruel and unusual punishment. *Estelle v. Gamble*, 429 US 97 at 104. *See Shomo v. Zon*, 35 AD3d 1227. “. . . [T]he deliberate indifference standard embodies both an objective and a subjective prong. Objectively, the alleged deprivation must be ‘sufficiently serious,’ in the sense that ‘a condition of urgency, one that may produce death, degeneration, or extreme pain’ exists. Subjectively, the charged official must act with a sufficiently culpable state of mind . . . [T]he subjective element of deliberate indifference ‘entails something more than mere negligence . . . [but] something less than acts or admissions for the very purpose of causing harm or with knowledge that harm will result.’ The subjective element requires a state of mind that is the equivalent of criminal

recklessness; namely, that the prison official ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” *Hathaway v. Coughlin*, 99 F3d 550 at 553, *cert den sub nom, Foote v. Hathaway*, 513 US 1154 (citations omitted). The inadvertent failure to provide proper medical care or negligence in the diagnosis and/or treatment by a prison physician or other medical personnel are insufficient to support an eighth amendment claim. *See Ronson v. Commissioner of Correction*, 112 AD2d 488.

The Court has reviewed petitioner’s DOCS ambulatory health records for the two-month period (June and July of 2006) immediately preceding petitioner’s July 27, 2006, filing of his inmate grievance complaint in UST-27647-06. The petitioner had been in regular, although not daily, contact with DOCS medical staff during that two-month time frame. On at least five occasions (June 20, July 14, July 17, July 18 and July 20, 2006) the petitioner related symptoms similar, and whole in part, to those described in his inmate grievance complaint.

On June 20, 2006, despite complaining of numbness to the right side of his face, temple, scalp and cheek, as well as chest pain, the petitioner was observed to be in no apparent distress, with his skin warm and dry, speaking in full sentences, smiling symmetrically, raising both eyebrows equally and speaking without slurring. On July 14, 2006, the petitioner requested treatment or testing for paroxysmal nocturnal dyspnea as well as heart failure. At that time he was observed without signs or symptoms of acute distress, without dyspnea, speaking in sentences, denying chest pain and showing no shortness of breath, pallor or diaphoresis. On July 17, 2006, at approximately 6:30 am,

the petitioner reported that he experienced “severe headaches at night and chest pains, SOB [shortness of breath] that wakes me up at night.” At that time the petitioner appeared at his cell door in no apparent distress being “rude & argumentative.” On July 18, 2006, at 5:10 am, the petitioner apparently stated to DOCS personnel that he was having a stroke. The petitioner reportedly stated that “[a]ll night long I’ve been having numbness to my [right or left?] side . . .” Although he was observed at that time standing at his cell door with his speech clear and fluent and with no facial droop, he was brought to the infirmary emergency room by wheel chair. At the emergency room he apparently complained of a headache in his right temple, soreness in his jaw and numbness in his cheek. The emergency room medical records, however, reflect as follows: “[G]rip equal - good eye movement - equal smile. SaO<sub>2</sub> [oxygen saturation] 99% P [pulse] - 61 - B/P [blood pressure] 138/90 T [temperature] - 98.5. PERLA [pupils equal reactive to light and accommodation]; grips =, smile & facial muscles symmetrical. Skin warm, dry. Denies any visual disturbance. Alert and oriented. Denies any numbness or weakness in extremities.” On July 20, 2006, the petitioner was seen in emergency sick call complaining of intermittent chest pains and “loudly” stating that he had a thoracic aneurysm. Despite the following, he was observed in no apparent distress, alert, without dyspnea, diaphoresis or edema. In addition, the following entries appear in petitioner’s ambulatory health record for that date: “Cardiac RRR [regular rate and rhythm], S1 S2 [without] murmur, rub or gallop. No bruits. No Pedal/Tibial edema. Inmate requesting an immediate cardiac work-up. This was not an emergency. Inmate became belligerent/demanding.”

In addition to all of the above, the petitioner's ambulatory health record during June and July of 2006 contained references to a March 15, 2006, ultrasound and June 21, 2006 echocardiogram as well as a consult for a stress echo done on July 3, 2006. It is further noted that a stress echocardiogram was apparently conducted at the Albany Medical Center on November 8, 2006. Finally, on July 13, 2006, petitioner refused to be escorted from his cell to the nurses' station for vital signs assessment and to gather information for a EKG.

In view of all of the above, the Court finds no basis to conclude that petitioner had "serious medical needs" and/or that DOCS officials were deliberately indifferent to such needs. *See People ex rel Sandson v. Duncan*, 306 AD2d 716, *lv den* 1 NY3d 501, *Moore v. Leonardo*, 185 AD2d 489 and *Ronson v. Commissioner of Correction*, 112 AD2d 488. Accordingly, the final results of inmate grievance UST-27647-06 will not be disturbed.

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

**ADJUDGED**, that the petition is dismissed.

**DATED:** December 31, 2007, at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Supreme Court Judge