Matter of Tafari v Artus
2009 NY Slip Op 30682(U)
March 23, 2009
Supreme Court, Clinton County
Docket Number: 08-1524
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF CLINTON**

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In the Matter of the Application of
INJAH TAFARI, #89-A-4807,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

DECISION AND JUDGMENT
RJI #09-1-2008-00574.73
INDEX # 08-1524
ORI #NY009013J

DALE ARTUS, Superintendent,
Clinton Correctional Facility,
Respondent.

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of InJah Tafari, verified on September 9, 2008, and filed in the Clinton County Clerk's office on September 19, 2008. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the results of two separate Tier II Disciplinary Hearings held at the Clinton Correctional Facility and concluded on March 20, 2008, and April 25, 2008, respectively. The Court issued and Order to Show Cause on September 29, 2008, and has received and reviewed respondent's Notice of Motion to Dismiss, supported by the affirmation of Robert C. Glennon, Esq., Assistant Attorney General, dated November 7, 2008, as well as by the affidavit of Deborah L. Jarvis, Inmate Records Coordinator II, Clinton Correctional Facility, with exhibits, sworn to on November 7, 2008 (the "Jarvis Affidavit"), and the affidavit of Karen A. Thornton, Legal Assistant I, Plattsburgh Regional Office of the New York State Attorney General, with exhibits, also sworn to on November 7, 2008 (the "Thornton Affidavit"). Petitioner's

opposing papers (Reply Memorandum of Law) were filed in the Clinton County Clerk's office on November 20, 2008.

On March 7, 2008, petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 114.10 (smuggling). A Tier II Disciplinary Hearing was held at the Clinton Correctional Facility on March 20, 2008, at the conclusion of which petitioner was found guilty as charged and a disposition was imposed directing the loss of earphone privileges for a period of 30 days. Although petitioner alleges that an administrative appeal was submitted to the respondent on March 20, 2008, nothing in the record suggests that respondent ever issued a decision on administrative appeal.

With respect to the Tier II Disciplinary Hearing of March 20, 2008, respondent's motion papers allege, without contradiction, that on October 23, 2008, after this proceeding had been commenced, the results and disposition of that disciplinary hearing were administratively reversed. The administrative reversal was apparently necessitated by DOCS' inability to provide counsel with a transcript of the underlying hearing. Respondent's motion papers, as supplemented by the Thornton Affidavit, further reflect that reference to the Tier II Disciplinary Hearing of March 20, 2008, has been expunged from petitioner's institutional records and that the $5.00 mandatory surcharge imposed upon disposition has been refunded to petitioner's inmate account. Accordingly, respondent requests that with respect to the March 20, 2008, hearing, the petition be dismissed as moot. Petitioner's opposing papers do not address this request.

Under the circumstances of this case, where the administrative reversal was necessitated by an underlying flaw in DOCS records, the petitioner, and/or the Franklin County Clerk must be made whole by the respondent with respect to the reduced filing

fee. Once that is accomplished, the petitioner will have received all of the relief this court could grant and therefore, the proceeding must be dismissed as moot. *See Cooper v. Selsky*, 29 AD3d 1104 and *Simmonds v. Selsky*, 21 AD3d 1166.

On April 14, 2008, petitioner was issued an additional inmate misbehavior report charging him with a violation of inmate rule 180.11 ("An inmate shall comply with and follow the guidelines and instructions given by staff regarding facility correspondence procedures pursuant to requirements of departmental Directive Nos. 4422 and 4421 (7 NYCRR Parts 720 and 721).") The inmate misbehavior report, authored by Lt. Allan, alleged, in relevant part, as follows:

> "Inmate Tafari has repeatedly sent a large manilla envelope to the Correspondence Department with an authorized advance request for postage. This parcel is addressed to Sylvia Honig, Esq. c/o The Disability of Prisoners . . . The parcel is also marked 'legal mail.' This outgoing parcel does not meet the definition of legal mail or privileged correspondence as outlined in directive 4421 Sec 721.2 as Sylvia Honig is not an attorney. Inmate Tafari was informed of this by the correspondence department on 4-11-08 yet he continues to attempt to violate correspondence procedures . . ."

A Tier II Disciplinary Hearing was held at the Clinton Correctional Facility on April 25, 2008, at the conclusion of which the petitioner was found guilty as charged and a disposition of "counsel/reprimand" was imposed. Petitioner alleges that on April 25, 2008, he "submitted" an administrative appeal to the respondent.

With respect to the Tier II Disciplinary Hearing of April 25, 2008, respondent's motion to dismiss is premised upon the following assertion set forth in paragraph three of the Jarvis Affidavit:

> "Records of administrative appeals of Tier II disciplinary dispositions are kept in Superintendent Artus's files. At the request of the Attorney General's Office, I searched those files for an administrative appeal relating

> to the April 25, 2008, Tier II hearing held at Clinton Correctional Facility challenged herein . . . I found no such appeal."

Accordingly, respondent cites CPLR §7801(1) and asserts, in effect, that petitioner failed to exhaust administrative remedies with respect to the Tier II Disciplinary Hearing of April 25, 2008.

Notwithstanding petitioner's repeated assertions that he "submitted" the administrative appeal to the respondent on April 25, 2008, the record is devoid of any proof of service executed contemporaneously with the alleged service. In view of the detailed allegations of non-receipt set forth in the Jarvis Affidavit, the Court finds that respondent's motion to dismiss with respect to the April 25, 2008, hearing must be granted.

In any event, the Court has reviewed the two-page document purporting to be petitioner's administrative appeal, annexed to petitioner's opposing papers, and finds the argument asserted therein to be without merit. According to petitioner, the presiding hearing officer improperly denied his requests that Sylvia Honig and the mail and supply senior clerk from the Clinton Correctional Facility mailroom be called as witnesses. At the hearing petitioner insisted that Sylvia Honig was, in fact, an attorney notwithstanding his acknowledgment that her name did not appear in the "Lawyers Directory Manual." Petitioner also acknowledged that officials at the Clinton Correctional Facility mailroom had notified him prior to the April 14, 2008, incident that Sylvia Honig was not a lawyer and that he needed to provide the mailroom with proof to the contrary before legal correspondence addressed to her would be processed as such. According to petitioner's

testimony he sent a note back to the mailroom requesting that they contact Ms. Honig to confirm her status an attorney.

Petitioner was not charged with attempting to send "legal mail" to a non-attorney. Rather, he was charged with failure to comply with a staff instruction not to submit "legal mail" addressed to Ms. Honig without first documenting that she was, in fact, an attorney. In this regard the Court finds it appropriate to draw an analogy with case law addressing an inmate's failure to follow a direct order. Viewed from this perspective the issue of whether or not Ms. Honig was, in fact, an attorney is irrelevant to the disposition of this proceeding as was the issue of whose responsibility it was to confirm Ms. Honig's status as an attorney. Although petitioner was free to initiate an inmate grievance proceeding challenging the legality of the staff instruction that he not submit "legal mail" addressed to Ms. Honig until first documenting her status as an attorney, he acted at his peril in failing to first comply with such instruction. *See Davis v. Goord*, 301 AD2d 1002, *app dis* 100 NY2d 534 and *Ali v. Senkowski*, 270 AD2d 542, *app dis* 95 NY2d 886. *See also Rivera v. Smith*, 63 NY2d 501, wherein the New York Court of Appeals gave the following admonition:

> "In view of the characteristics of the correctional system and the compelling interests of the State in the preservation of security and order within correctional facilities, the recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy. There must, in most instances . . . be compliance with the orders of the correctional personnel, or acceptance of the penalties properly applicable to noncompliance. The risks inescapably attendant on the refusal of an inmate to carry out even an illegal order of a correction officer or such as to require compliance at the time

> with the right of retrospective administrative or judicial determination as to the legality of the order." *Id* at 515.

In view of the foregoing, even if the Court were to consider the merits of the issue raised by the petitioner in his alleged administrative appeal it would conclude that the hearing officer properly denied the requested witnesses.

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

ORDERED, that respondent's motion to dismiss is granted; and it is further

ORDERED, that respondent reimburse petitioner's inmate account for any portion of the $15.00 reduced filing fee that was paid from said account; and it is further

ORDERED, that the respondent remove from petitioner's inmate account any encumbrance for any portion of the $15.00 reduced filing fee that has not yet been paid from said inmate account; and it is further

ORDERED, that the respondent pay to the Clinton County Clerk any portion of the $15.00 reduced filing fee that has not yet been paid from the petitioner's inmate account; and it is further

ADJUDGED, that the petition is dismissed.

Dated: March 23 , 2009, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice