Matter of Zielinski v Fischer
2010 NY Slip Op 30635(U)
March 23, 2010
Supreme Court, Franklin County
Docket Number: 2009-0107
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
JEREMY ZIELINSKI,#06-A-4883,
Petitioner,

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

DECISION, ORDER AND JUDGMENT
RJI #16-1-2009-0041.18
INDEX # 2009-0107
ORI #NY016015J

-against-

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

_____X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Jeremy Zielinski, verified on January 13, 2009, and filed in the Franklin County Clerk's office on January 22, 2009. Petitioner, who is now an inmate at the Riverview Correctional Facility, challenged the October 30, 2008, determination of the Media Review Committee at the Franklin Correctional Facility to deny him access to a publication entitled "The Database Hacker's Handbook," as well as the alleged failure of the Central Office Media Review Committee to issue any decision on his administrative appeal therefrom. The Court issued an Order to Show Cause on February 2, 2009, and received and reviewed respondent's Answer, verified on April 10, 2009, supported by the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated April 10, 2009, as well as by the Affidavits of Carolyn St.Denis (the "St. Denis Affidavit") and Connie Allen, sworn to on April 7, 2009, and April 8, 2009, respectively. The Court also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on June 4, 2009.

By Decision and Judgment dated September 29, 2009, the Court dismissed the petition based upon petitioner's failure to exhaust administrative remedies. By letter

dated October 20, 2009, received in chambers on October 28, 2009, petitioner requested that the Court "reconsider" its Decision and Judgment of September 29, 2009. Chambers subsequently advised both litigants that it intended to treat petitioner's October 20, 2009, letter as a motion for leave to reargue and/or renew argument returnable on December 31, 2009. The Court has since received and reviewed respondent's letter in opposition, dated December 24, 2009. No further communication has been received from petitioner.

On October 25, 2008, a package addressed to the petitioner, containing a book entitled "The Database Hacker's Handbook," arrived at the Franklin Correctional Facility package room. The book in question, however, was not delivered to petitioner at that time. Rather, it was referred to the Facility Media Review Committee (FMRC) pursuant to 7 NYCRR § 712.3(b). By Disposition Notice dated October 30, 2008, the FMRC purported to find the "whole book" unacceptable for the following reasons: "Violates Guideline H(1) of Directive 4572 because it contains informatin [sic] which appears to be written in code. This could the [sic] safety/security of the facility." Petitioner apparently responded by returning the Disposition Notice to the FMRC along with a written memorandum dated November 3, 2008. In that memorandum petitioner took the position that the Disposition Notice violated the provisions of DOCS Directive 4572 in a number of respects and asserted as follows:

> "Please be advised that because the Disposition Notice you sent is not in compliance with Directive 4572 it has been Refused for Cause, Without Dishonor and is deemed Null and Void; and I await a decision on my publication which is in compliance with Directive 4572. Should a proper Disposition Notice not be received by 11/07/08 - 10 working days from the date the publication was received at the facility - I will appeal such lack of decision in writing to C.O.M.R.C. [Central Office Media Review Committee] as provided in Directive 4572 Section III(C)(2) [7 NYCRR §§ 712.3(d)(1) and (e)], unless I have received my publication." (Emphasis in original).

By correspondence dated November 10, 2008, addressed to the DOCS Central Office Media Review Committee (COMRC), 220 Washington Avenue, Building 2, Albany, NY 12226-2050, petitioner reiterated his position that the October 30, 2008, FMRC Disposition Notice was not in compliance with various provisions of DOCS Directive 4572. According to petitioner's November 10, 2008 correspondence:

> "To date I have received no Disposition Notice which complies with Directive 4572, nor have I received my publication, and I am hereby appealing said lack of decision to your office as provided for in Directive 4572 § III(C)(2). I respectfully request you to order the F.M.R.C. to deliver my publication or deliver a Disposition Notice which complies with Directive 4572 immediately, and that you grant such request within 3 weeks as in the nature of an appeal to COMRC pursuant to Directive 4572 § III(C)(2) [7 NYCRR § 712.3(g)(2)]." (Emphasis in original).

Also on November 10, 2008, petitioner apparently provided the FMRC with a copy of his written correspondence/administrative appeal to the COMRC.

On January 22, 2009, having received no response to his November 10, 2008 administrative appeal and allegedly after communicating in writing with the COMRC as well as the office of the New York State Attorney General with respect to the COMRC's failure to issue a decision on administrative appeal within the three-week time frame specified in 7 NYCRR § 712.3(g)(2), the petitioner commenced this proceeding by filing his petition in the Franklin County Clerk's office.

By correspondence dated February 23, 2009 (after the issuance of the Order to Show Cause of February 2, 2009, but before the submission of respondent's Answer), petitioner was notified in writing by Linda Hollman, DOCS Director of Education, that in response to petitioner's November 10, 2008 correspondence with the FMRC he ". . . will be issued a new FMRC disposition sheet which will enumerate the pages that the FMRC has found to violate the guidelines set forth in Directive 4572, Media Review. You are expected to select one of the options available to you and return the disposition

sheet to the FMRC Chairperson . . . If you disagree with the FMRC decision, you have the right to appeal, but your decision to do so must be conveyed to the FMRC by returning the Exhibit 'B' disposition notice to the FMRC."

On March 13, 2009, the FMRC (Franklin Correctional Facility) issued a new Disposition Notice again finding "The Database Hacker's Handbook" to be unacceptable. According to the March 13, 2009 Disposition Notice the book in question ". . . violates Directive #4572, Section II by providing instructions on how to get in and alter computer networks, databases, etc. which is a security risk for the entire DOCS computer system network. In the opinion of Franklin Media Review Committee this would encourage disobedience towards prison personnel." Attached to the March 13, 2009 Disposition Notice was a sheet setting forth eight page-specific examples in support of the FMRC findings. There is nothing in the record to suggest that petitioner ever took an administrative appeal from the March 13, 2009 Disposition Notice.

Respondent asserted, as an Objection Point of Law, that the petition must be dismissed based on petitioner's failure to exhaust administrative remedies with respect to the original FMRC Disposition Notice of October 30, 2008. In this regard the Court noted that the October 30, 2008 FMRC Disposition Notice, in conformity with the relevant provisions of DOCS Directive 4572 and 7 NYCRR Part 712, specifically instructed petitioner that in order to take an administrative appeal to the COMRC he must check the appropriate box on the Disposition Notice, and return the notice, along with an optional letter in support of the administrative appeal, to the FMRC. *See* DOCS Directive 4572(III)(E) and 7 NYCRR § 712.3(e). It appeared from the St. Denis Affidavit, moreover, that after the October 30, 2008 FMRC Disposition Notice was issued, "Inmate Zielinski refused to sign the disposition notice. He returned it to the FMRC, unsigned, without checking any options for appeal. At no time did Inmate Zielinski follow the

guidelines set forth in Directive #4572 for filing an administrative appeal." In its Decision and Judgment of September 29, 2009 the Court found as follows:

> "Respondent may well be technically correct in asserting that petitioner failed to take an administrative appeal, in the proper form, from the October 30, 2008, FMRC Disposition Notice. The Court is not persuaded by the argument advanced in paragraph 27 of petitioner's Reply that he had no duty to check the box indicating a desire to pursue an administrative appeal since '... the October 30, 2008 Disposition Notice form did not constitute a proper decision regarding the denial of access to petitioner's book under the Media Review regulations...' Indeed, the petitioner's remedy for correcting alleged deficiencies/defects in the October 30, 2008 FMRC Disposition Notice, required his pursuit of an administrative appeal. There was simply no basis for petitioner to unilaterally deem the October 30, 2008, Disposition Notice to be 'null and void.'
>
> Notwithstanding the foregoing, this Court would ordinarily be loathe to dismiss, upon failure to exhaust grounds, the petition of a *pro se* inmate petitioner based solely upon his or her technical failure to check a box on a form particularly where, as here, a letter fully explaining the basis of an administrative appeal was timely submitted to the COMRC, with a copy to the FMRC. But even if the Court were to deem petitioner's November 10, 2008, memorandum to the COMRC as constituting a valid administrative appeal from the October 30, 2008, FMRC Disposition Notice, and even if the Court were to ultimately determine that the arguments advanced therein were meritorious, the only forthcoming relief would have been a Court order vacating the October 30, 2008, Disposition Notice and remanding the matter for reconsideration. In the case at bar, DOCS officials have already conceded, at least tacitly, that the October 30, 2008 Disposition Notice was flawed and the deficient notice was replaced by the March 13, 2009, FMRC Disposition Notice. Since petitioner failed to take an administrative appeal from the March 13, 2009, Disposition Notice, there is no basis for any relief at this juncture."

"A motion for leave to reargue . . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court . . ." CPLR §2221(d)(2). Such a motion is directed to the sound discretion of the Court. *See Loris v. S&W Realty Corp*, 16 AD3d 729. Despite the statutory nomenclature, "[r]eargument is not designed to afford the unsuccessful party successive of opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted . . ." *William P. Pahl Equipment Corp v. Kassis*, 182 AD2d 22, 27 (citations omitted).

In petitioner's letter/motion of October 20, 2009 he points out that both the February 23, 2009 correspondence from Linda Hollman, DOCS Director of Education, as well as the March 13, 2009 revised Disposition Notice of the FMRC (Franklin Correction Facility) were issued after this proceeding had been commenced. According to petitioner, the Decision and Judgment of September 29, 2009 ". . . did not address whether the respondent is permitted to engage in administrative proceedings while judicial proceedings are on going regarding the same matter." Although the obvious fact that the February 23, 2009 letter as well as the March 13, 2009 revised Disposition Notice were both issued after this proceeding had been commenced was pointed out as an "OBJECTION IN POINT OF LAW" in paragraphs 12 and 13 of petitioner's Reply, nowhere in petitioner's papers, including the letter/motion of October 20, 2009, does he endeavor to construct any argument as to the legal significance, if any, of that fact. The Court nevertheless finds it appropriate to address petitioner's "argument" on this point in the context of his motion for leave to reargue.

When a CPLR Article 78 proceeding has been commenced following final administrative action, the administrative agency is ordinarily ". . . not at liberty, unilaterally and without court sanction, to reconvene the matter administratively for the purpose of considering anew the questions raised in the court proceeding . . ." *Rahman*

v. Coughlin, 112 AD2d 591, 592 (citations omitted). The key distinction in the case at bar, however, is that final administrative action had not been completed at the time petitioner commenced this proceeding. The *Rahman* petitioner commenced a CPLR Article 78 proceeding challenging the results of a prison disciplinary proceeding, on procedural and constitutional grounds, only after the results of the disciplinary proceeding had been affirmed on administrative appeal. After the Article 78 proceeding had been commenced DOCS officials purported to administratively reverse the results of the disciplinary proceeding, on procedural grounds only, and order that a new hearing be conducted. In the case at bar, however, even with petitioner's November 10, 2008 memorandum to the COMRC construed as a valid administrative appeal from the October 30, 2008 FMRC Disposition Notice, this proceeding was commenced before the COMRC issued a final determination with respect to the administrative appeal. Despite the fact that the COMRC may have failed to issue a final determination on administrative appeal within the three-week time frame set forth in 7 NYCRR §712.3(g)(2), the Court perceives no lawful basis for the petitioner to unilaterally construe such failure as a "constructive denial" of his administrative appeal.[1] Although petitioner was free to commence an Article 78 proceeding in the nature of mandamus to compel the COMRC to issue a final determination with respect to his administrative appeal (*see Cortlandt Nursing Home v. Axelrod*, 66 NY2d 169 at 180), he could not foreclose the issuance of a belated final determination by commencing a premature Article 78 proceeding

[1] By the way of contrast, the Court notes that under the provisions of Public Officers Law §89(4)(b), the failure of an administrative agency to timely respond to an administrative appeal from a Freedom of Information Law denial determination is deemed to constitute a denial. Also, under the provision of 9 NYCRR §8006.4(c) the failure of New York State Division of Parole Appeals Unit to timely issue findings and recommendations with respect to an administrative appeal entitles the administrative appellant to deem his/her administrative remedy to be exhausted and seek judicial review of the underlying determination without the Division raising an exhaustion defense. No similar statutory or regulatory provision, however, is applicable in the case at bar.

purporting to challenge the October 30, 2008 Disposition Notice on the merits. The Court therefore finds that the October 30, 2008 Disposition Notice was, in effect, properly vacated and the revised Disposition Notice of March 13, 2009 properly issued.

Before considering the other issue raised in petitioner's letter/motion of October 20, 2009, the Court notes that at some point prior to the issuance of the revised Disposition Notice of March 13, 2009 petitioner was transferred from the Franklin Correctional Facility to the Mid-State Correctional Facility. In paragraph 21 of the affidavit accompanying his Reply petitioner asserts that he never received a copy of the revised Disposition Notice of March 13, 2009 and only learned of its existence when he received respondent's Answer. The petitioner does acknowledge, however, receipt of a second revised Disposition Notice, dated March 18, 2009, issued by the FMRC at the Mid-State Correctional Facility. The revised notice of March 18, 2009 was similar to the revised notice of March 13, 2009, in that it found "The Database Hackers Handbook" to be unacceptable because it provided ". . . instructions on how to get in and alter computer data bases." The March 18, 2009 revised notice, however, only referenced some of the pages referenced in the March 13, 2009 revised notice and did not include an attachment setting forth specific examples in support of its findings.

Petitioner asserts in his letter/motion of October 20, 2009 that, as stated in his Reply, he ". . . never received the March 13, 2009, Disposition Notice . . . All I received was the March 18, 2009 Disposition Notice issued by Mid-State C.F. annexed to my Reply as Exhibit B. That Disposition Notice neither included a copy of the March 13, 2009 Disposition Notice nor was it specific enough for me to formulate a proper administrative appeal." Respondent does not contradict petitioner's assertion that he never received a copy of the March 13, 2009 revised Disposition Notice.

Since the Decision and Judgment of September 29, 2009, failed to address petitioner's non-receipt of the revised Disposition Notice of March 13, 2009, the Court finds it appropriate to grant petitioner's application for leave to reargue and address the non-receipt issue at this juncture. Although petitioner certainly cannot be faulted for not taking an administrative appeal from the revised Disposition Notice of March 13, 2009 that he never received, his failure to take an administrative appeal from the revised Disposition Notice of March 18, 2009, receipt of which he acknowledges, precludes judicial review of the underlying determination denying him access to "The Database Hackers Handbook." Petitioner's conclusory assertion that the March 18, 2009 Disposition Notice was not "specific enough" for him to "formulate a proper administrative appeal," is not persuasive. The alleged non-specificity of the disposition notice, in and of itself, could have served as the basis for petitioner's administrative appeal.

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

ORDERED, that petitioner's motion for leave to reargue with respect to the Decision and Judgment of September 29, 2009, is granted; and it is further

ADJUDGED, that upon reargument the petition is dismissed.

Dated: March 23, 2010, at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice