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SHORT FORM ORDER

INDEX No. 10-22553

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 6/24/10
ADJ. DATES 7/16/10
Mot. Seq. # 001 - MD
Mot. Seq. # 002 - MG; CDISP

In the Matter of CARLOS RIVERA, JOSEPH DiBELLA and CHRISTOPHER WASHINGTON, Petitioners, -against- GREGORY BLASS, as Commissioner of the Suffolk County Department of Social Services, Respondent.	LINDA R. HASSBERG, ESQ. Atty. For Petitioners Touro Law Center PAC 225 Eastview Dr. Central Islip, NY 11722 CHRISTINE MALAFI, ESQ. Suffolk County Attorney Atty. For Respondent By: Rudolph M. Baptiste Assist. County Atty. PO Box 6100 Hauppauge, NY 11788

Upon the following papers numbered 1 to 14 read on this Article 78 Petition and motion to dismiss; Notice of Petition and supporting papers 1-8; Notice of Motion and supporting papers 9-11; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other 12-13 (memorandum); 14 (memorandum); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by the respondent to dismiss the petition served and filed in this hybrid Article 78 proceeding and declaratory judgment action is considered under CPLR 7804 and 3211(a), and is granted; and it is further

ORDERED that the petitioners' demands for relief pursuant to CPLR Article 7803(1) and pursuant to 42 USC § 1983 are denied and the petition (#001) is dismissed.

The petitioners commenced this hybrid Article 78 proceeding and declaratory judgment action to compel the respondent's compliance with portions of a February 18, 2010 decision of the New York State Office of Temporary and Disability Assistance (hereinafter OTDA). In that decision, the respondent's office was directed to provide shower facilities and sufficient hot water to residents of one of two trailers, situated in the Town of Southampton, which are used by the respondent to house

homeless, registered sex offenders. The petitioners also seek declaratory relief and an award of counsel fees in connection with the respondent's purported violations of 42 USC §1983. The following factual circumstances underlie the petitioners' claims for such relief.

Petitioner, Carlos Rivera, is a registered, Level 3, sex offender who is without permanent housing. For the last two years, the respondent's office has afforded Rivera overnight housing at a temporary shelter known as an Overnight Placement Facility (OPF) which consists of a trailer that is parked on the grounds of the Suffolk County Center in Riverside, New York. The trailer is equipped to house as many as eighteen registered sex offenders from 8:00 p.m. to 7:30 a.m. on weekdays and 8:00 p.m. to 10:00 a.m. on weekends and holidays. Hot water is provided by a six gallon water heater that re-heats its water within one hour. There are no shower facilities and no meals are provided. Occupants are transported to a Department of Social Services Center on weekdays for purposes of searching for permanent housing and work.

In the summer of 2009, petitioner Rivera and three others housed at the Riverside trailer challenged the adequacy of the temporary housing afforded by the County's trailer at Riverside and the level of permanent housing placement services provided to the residents. After conducting an administrative review, the Suffolk County Department of Social Services found that the trailers provided adequate, temporary housing to those housed at the Riverside trailer. The respondent also found that the level of housing and other placement services afforded to the occupants were adequate.

On August 9, 2009, petitioner Rivera and a co-occupant of the Riverside trailer demanded a fair hearing review of the respondent's determination by the New York State Office of Temporary and Disability Assistance (OTDA). The hearing was held on October 15, 2009 before an Administrative Law Judge (ALJ) designated by OTDA's Commissioner. On February 18, 2010, the determination of the Suffolk County Department of Social Services was, in large part, affirmed. However, the ALJ found that the lack of showers and the six gallon water tank at the Riverside trailer were inadequate. In so finding, the ALJ stated on page 10 of his February 18, 2010 determination, that "[W]hile the regulations do not cite specific standards for temporary housing accommodations other than in Part 419 [which the ALJ found were not applicable], the courts have asserted that minimal standards should be met". The respondent was thus directed to "provide showers at the OPF with sufficient hot water for the number of residents". While the ALJ rejected Rivera's and his fellow appellant's claims that the respondent had not provided adequate case services such as, housing assistance, mental health counseling and vocational services, the ALJ concluded that "where appropriate to assist in obtaining permanent housing, should work together with the clients in the development of Independent Living Plans".

On March 1, 2010, the office of counsel for petitioner Rivera filed a compliance complaint with the OTDA pursuant to 18 NYCRR § 358-6.4. Subsection (c) of this regulation provides that "***[U]pon receipt of a complaint that a social services agency has not complied with the fair hearing decision, the commissioner, through action coordinated by OAH,[1] will secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case***" (emphasis added). This regulation is derived from Social Services law § 22(9)(a) which provides that all decisions of the

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[1] OHA is an acronym for the Office of Administrative Hearings, a department of OTDA.

Commissioner of OTDA are binding upon the social services districts involved and shall be complied with by the social services officials thereof. Subsection (9)(c) of SSL § 22 provides that the Commissioner's decision is binding upon the local social services districts once the decision is final and binding, absent a stay of such decision issued by the Appellate Division during the pendency of an Article 78 proceeding, commenced by a local social services official in the Supreme Court, for review of the Commissioner's decision.

OTDA responded to the compliance complaint interposed by Rivera's counsel on March 5, 2010. By telephone, a member of the compliance unit of OTDA advised that she had been advised by a representative of respondent Blass, that preparations for the installation of showers and a more adequate hot water supply were underway at the Riverside trailer site. However, petitioner Rivera reported, upon inquiry of his counsel, that no such undertaking had begun. Counsel's office directly contacted counsel for the respondent, who advised, by e-mail on March 15, 2010, that residents wanting showers would be transported by van from the Riverside trailer to nearby shower facilities on four nights during the week. No further complaints or inquiries to OTDA were posited by Rivera's legal team until the events, detailed below, transpired.

The record reflects that in 2009, a separate action had been commenced by the Town of Southampton, the municipality in which both trailers are situated, against the County of Suffolk and others, including Rivera and others occupying the trailers. On May 4, 2010, the Town obtained a temporary restraining order issued therein (Gazillo, J), which prohibited the County and the respondent and his office from altering, modifying or otherwise changing the physical structures of the trailer at Riverside and those comprising a second trailer situated elsewhere in the Town of Westhampton. The May 4, 2010 order was issued in conjunction with the Town's application for a preliminary injunction imposing the same restraints during the pendency of the Town's underlying action for declaratory and permanent injunctive relief, which if granted, would forever preclude the respondent from using the trailers at Riverside and Westhampton as temporary housing for homeless, registered, sex offenders.

Underlying interposition of the Town's motion was news that the County was implementing plans to substitute a new trailer containing shower facilities for the one located on the Westhampton site. On June 8, 2010, this court granted the Town's application for preliminary injunctive relief and thereby restrained the respondent from "constructing, placing, altering, expanding, moving, replacing or in any way changing the physical structure of the trailers currently situated on the County's Riverside and Westhamtpon parcels" during the pendency of the Town's action (*see* June 8, 2010 Short Form Order [Whelan, J.], issued in ***Town of Southampton v County of Suffolk, et. al.***, Index No. 19533/2009).

On May 11, 2010, some seven days after the issuance of the temporary restraining order by Acting Justice Gazillo, counsel for petitioner Rivera contacted the compliance unit of OTDA and complained that there was no literal compliance with the February 18, 2010 directives of the ALJ regarding on-site showers and the installation of a larger capacity hot water heater. Counsel further complained that there was no improvement in the permanent housing services the respondent was providing to trailer occupants. The paralegal who interposed this second, compliance complaint with OTDA asserts, in her June 16, 2010 affidavit in support of the petition, that no one at OTDA responded to this complaint.

By order to show cause dated, June 17, 2010, and an attached pleading denominated as a petition, the petitioners commenced this proceeding for relief pursuant to Article 78 and 42 USC § 1983. Therein, the petitioners demand a judgment granting relief in the nature of mandamus to compel directing the respondent to forthwith comply with the February 18, 2010 decision of OTDA's ALJ, wherein the respondent was directed to "provide shower facilities at the OPF with sufficient hot water for the number of residents" and "where appropriate to assist in obtaining permanent housing, should work together with the clients in the development of Independent Living Plans". The petitioners further demand a judicial declaration that the respondent has violated the due process rights of the petitioners and an award of counsel fees pursuant to 42 USC § 1983 by reason of such violations. Underlying these demands for relief are claims that the respondent is required by SSL § 22(9) and the regulations at 18 NYCRR § 358-4 to comply with the decision of the ALJ. Petitioners thus ask this court to issue a judgment compelling the respondent to forthwith comply with the directives contained in the decision of the ALJ and declare that the respondent's non-compliance constitutes an unconstitutional deprivation of the petitioners' due process rights, for which damages are available.

In lieu of answering, the respondent interposed a motion (#002) to dismiss the petition on various grounds, including that the petitioners failed to exhaust their administrative remedies and have sued the wrong parties. The respondent also contends that a real impossibility of literal compliance exists due to the existing judicial restraint issued by this court in the related case commenced by the Town of Southampton. For the reasons set forth below, the respondent's motion is granted.

By statutory fiat, an Article 78 proceeding may not be maintained where the challenged action or determination is "not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed" (*see* CPLR 7801[1]). Agency action is final when the decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury which could not have been prevented, significantly ameliorated, or rendered moot by further administrative action or by steps available to the complaining party (*see* ***Matter of Essex County v Zagata***, 91 NY2d 447, 672 NYS2d 281 [1996]); ***Aliano v Oliva***, 72 AD3d 944, 899 NYS2d 330 [2d Dept 2010]; ***Level 3 Communications, LLC v Debellis***, 72 AD3d 164, 895 NYS2d 110 [2d Dept 2010]; ***McHenry v Bittner***, 70 AD3d 699, 892 NYS2d 873 [2d Dept 2010]; ***Jones v Amicone***, 27 AD3d 465, 812 NYS2d 111 [2d Dept 2006]).

It is not disputed that Social Services Law § 22 and the regulations at 18 NYCRR § 358-4 require prompt compliance with OTDA determinations aimed at a local social services district. Nor is it disputed that a claimant aggrieved by a default in compliance on the part of a local social services district is afforded the administrative remedy of filing a complaint with OTDA, who is then charged with responsibility of securing "compliance by whatever means is deemed necessary and appropriate under the circumstances of the case" (*see* 18 NYCRR § 358-4[c]). It is clear that under this statutory framework, OTDA is charged with responsibility for assuring that the local social services district complies with any mandate or directive contained in a decision of its Commissioner and that OTDA is afforded discretion with respect to dictating the necessary and appropriate level of compliance having due regard for the circumstances of the case.

Here, the record reflects that petitioner Rivera's legal team filed a compliance complaint pursuant 18 NYCRR § 358-4 in March of 2010 and another in May of 2010. The record further reflects that OTDA responded to such complaints by forwarding inquiries to the respondent with respect to its implementation of the remedies mandated by the February 18, 2010 decision of the ALJ. The respondent's written response to the May 18, 2010 OTDA inquiry is posted on a log of OTDA's compliance complaint file as of May 25, 2010. Therein, the respondent advised, as previously reported to Rivera's counsel, that as of March 15, 2010, van service to off-site shower facilities was available to trailer occupants. The respondent further detailed the permanent housing counseling services provided to such occupants. The last entry on OTDA's log of the compliance complaint file is dated June 21 2010. It reveals that OTDA requested that the respondent's office update the status of its compliance at the Riverside trailer site. The log ends with the following notation: "INTERIM REPORT RECEIVED. AWAITING FINAL REPORT".

It is clearly apparent from this record that, at the time of the commencement of this action, OTDA had made no final determination as to the appropriateness of the respondent's compliance or the necessity of imposing strict and literal compliance with the mandates for installation of on-site showers, a larger hot water supply and more permanent housing services under the circumstances of this case. Notably, such circumstances include the issuance of judicial restraints against alteration of the trailers located at both sites and the apparent failure of OTDA to promulgate and implement the regulations contemplated by a recent amendment to SSL §20 (8) that pertain to conditions determinative of the placement of homeless, registered sex offenders (*see* Laws of 2008 Ch. 568). The compliance process contemplated by the statutory and regulatory framework, which vests discretion in OTDA with respect to securing the level of compliance it deems necessary and appropriate, apparently remains ongoing and incomplete. Petitioner Rivera's administrative remedies have not been exhausted. The court thus finds that the remedy of mandamus to compel is not available to petitioner Rivera nor to his fellow petitioners (*see* CPLR 7801[1]; ***Aliano v Oliva***, 72 AD3d 944, *supra*).

Equally apparent is that the petitioners are not entitled to the declaratory and other relief set forth in the second cause of action of their complaint. It is well established that a petitioner seeking to compel prompt compliance with a fair hearing determination advances no bona fide civil rights claims that are actionable under 42 USC § 1983 (*see* ***Matter of Riley v Dowling***, 221 AD2d 446, 633 NYS2d 554 [2d Dept 1995]; ***Matter of Cuevas v Perales***, 183 AD2d 715, 583 NYS2d 293 [2d Dept 1992]). The statutory and case authorities relied upon by the petitioners (*see e.g.,* SSL §§ 61; 65; 22; ***Cantanzano v Wing,*** 103 F23d 233 [2d Circuit 1996]; ***Koster v Perales***, 903 F2d 131 [2d Circuit 1996]) are inapposite and provide no basis for a finding that the respondent violated petitioner Rivera's or his co-petitioners' due process rights and are thus liable to the petitioners for damages pursuant to 42 USC § 1983 for damages. The petitioners' claims for the relief set forth in their second cause of action are thus not actionable under 42 USC §1983, *et. seq*.

In any event, the record is replete with evidence of the respondent's good faith attempts to comply with the mandates contained in the February 18, 2010 order and that literal compliance has been continually precluded by restraining orders issued by this court since May 4, 2010. There is no evidence that the respondent has formulated any custom, policy or practice and employed it so at to deprive the petitioners of their due process rights (*see* ***Monell v Department of Social Serv.***, 436 US 658 [1978]; ***Jones v Westchester County Dept. of Correctional Med. Dept.***, 557 F.Supp2d 408 [SDNY 2008]; ***Kissane v Wing***, 277 AD2d 125, 717 NYS2d 45 [1st Dept 2000]). The petitioners' demands

for a judicial declaration that the respondent violated the petitioners' civil rights and for an award of damages, including counsel fees pursuant to USC §§ 1983 and 1988, are, for these reasons and those stated above, rejected as unmeritorious.

In view of the foregoing, the respondent's motion (#002) to dismiss the petition is granted. The petitioners' demands for relief under CPLR 78 and under 42 USC § 1983 *et. seq*. are thus denied and the petition (#001) is dismissed.

Settle Judgment, upon a copy of this order.

DATED: 8/17/10

THOMAS F. WHELAN, J.S.C.