

Matter of Davenport v Fisher

2011 NY Slip Op 31109(U)

April 13, 2011

Supreme Court, Albany County

Docket Number: 4284-10

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of TUCKER DAVENPORT,

Petitioner,

-against-

BRIAN FISHER, COMMISSIONER; EDWARD
 PEARLMAN, DEPUTY COMMISSIONER OF
 PROGRAMS, NYSDOCS; DALE ARTUS, SUPER-
 INTENDENT, GOWANDA CORRECTIONAL
 FACILITY,

Respondents,

For A Judgment Pursuant to Article 78
 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
 RJI # 01-10-ST1794 Index No. 4284-10

Appearances: Tucker Davenport
 Inmate No. 98-A-4144
 Petitioner, Pro Se
 Gowanda Correctional Facility
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 Assistant Attorney General
 of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Gowanda Correctional Facility, commenced the instant

CPLR Article 78 proceeding to review actions of the respondents in delaying and/or denying his entry into the Alcohol and Substance Abuse Treatment (“ASAT”) Program. As a part of his argument, the petitioner maintains that the respondents improperly directed that he could not be admitted to the ASAT Program until ninety days after he was released from the Special Housing Unit, and improperly directed that his name would then be placed at the bottom of the ASAT Program waiting list. In addition, he asserts that he has not received proper credit for past participation in the ASAT Program from May 11, 2009 to November 2009. The foregoing allegedly resulted in a denial of good time credit by the Gowanda Correctional Facility Time Allowance Committee (“TAC”) (see Correction Law § 803).

The respondents made a motion to dismiss on grounds that the petitioner failed to exhaust his administrative remedies. The Court, by decision-order dated December 3, 2010 granted the motion with respect to that portion of the petition which sought review of his removal from the ASAT program and/or review of the conditions imposed with respect to his re-admission to the program. With respect to the foregoing claims, the Court found that the petitioner had not filed administrative appeals of the grievances. The Court denied the balance of respondents’ motion, finding that the respondents had not satisfied their burden of demonstrating that the petitioner failed to exhaust his administrative remedies as they relate to the determination of TAC. Incidental to the foregoing, the Court found that determinations of a time allowance committee are not subject to the grievance process (see 7 NYCRR 701.3 [e] [2]). The Court then directed the respondents to serve and file an answer within twenty (20) days.

The respondents elected, instead, to make a second motion for dismissal of the petition

on grounds that the statute of limitations with respect to the determination of the TAC, dated April 8, 2009, had expired before commencement of the instant proceeding. The Court notes that “when a party moves pursuant to CPLR 3211 (a) (5) for a judgment dismissing a claim on the ground that it is barred by the statute of limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed” (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept., 1990]; see also Elia v Highland Central School District, 78 AD3d 1265 [3rd Dept., 2010]; Matter of Estate of Rodken [Gordon], 270 AD2d 784, 785 [3d Dept., 2000]). In addition, the four month statute of limitations under CPLR 217 does not commence until the petitioner receives notice of the determination (see Singer v New York State and Local Employees' Retirement System, 69 AD3d 1037, [3d Dept., 2010]). Until then, the petitioner is not aggrieved (see Matter of Biondo v. New York State Board of Parole, 60 NY2d 832 [1983]; see also: Matter of Hawking v. Russi, 193 AD2d 1032 [3d Dept., 1993]).

In this instance, respondents have not presented an affidavit by a person with knowledge to establish precisely when the Commissioner's decision with respect to review of the TAC determination was served upon the petitioner. Nor have they presented other proof in this regard (Matter of Jackson v Fischer, 67 AD3d 1207, 1208 [3rd Dept., 2009]). Thus, the respondents have not established when the statute of limitations commenced to run. The Court finds that the motion must be denied, subject to respondents' right to raise the issue in their answer.

One further point must be made. The petitioner has raised a point which he argued in respondents' prior motion to dismiss. In that motion, as noted, respondents argued that

the petitioner had failed to exhaust his administrative remedies. The petitioner maintains that Inmate Grievance Program Supervisor, on June 17, 2010, directed that he could not take an appeal of his determination, thus precluding any further administrative action. Under § 701.5 of the Rules of the Department of Correctional Services, grievances, in general, must follow the following procedure: filing with the inmate grievance review committee (IGRC), appeal to the superintendent of the facility, and then appeal to the Central Office Review Committee (see 7 NYCRR § 701.5). Notably however, under certain circumstances, the IGRC may dismiss the grievance complaint without making an adjudication on the merits (see 7 NYCRR § 701.5 [b] [4] [i]). Where the grievance is dismissed, the inmate may appeal the dismissal to the facility IGP supervisor (see 7 NYCRR § 701.5 [b] [4] [iii]). As stated in § 701.5 (b) (4) (iii):

(iii) If a grievant believes that a dismissal in his/her case is not authorized by this directive, he/she may apply directly to the facility IGP supervisor for review within seven (7) calendar days after receipt of the IGRC's decision to dismiss the grievance. If the supervisor determines that the grievance does not fall into one of the categories cited in this section, then the grievance will be returned to the IGRC for a hearing and recommendation. The supervisor's written response shall be forwarded to the grievant within seven (7) calendar days of receipt. An inmate may pursue a complaint that the IGP supervisor failed to reinstate an improperly dismissed grievance by filing a separate grievance. (see 7 NYCRR § 701.5 [b] [4] [iii])

Thus, unless the IGP Supervisor reinstates the grievance and returns it to the IGRC, the inmate's only alternative is to file a second grievance with respect to the IGP Supervisor's failure to reinstate the first one. In this instance, the IGP Supervisor, in his decision dated June 16, 2010, upheld the determination of the IGRC, which dismissed the grievance. In addition the IGP Supervisor correctly directed that the matter not be forwarded to the

Superintendent for appeal. On the prior motion, the petitioner submitted no evidence that he ever filed a grievance with respect to the determination of the IGP Supervisor. The Court concludes that in its decision-order dated December 2, 2010 it correctly found that the petitioner had not demonstrated that he had exhausted his administrative remedies with regard to the grievances.

Accordingly it is

ORDERED, that the respondent's motion to dismiss the petition be and hereby is denied; and it is further

ORDERED, that the respondents be and hereby are directed to serve and file an answer within twenty (20) days of the date hereof; and it is further

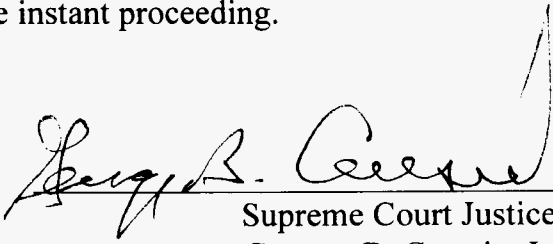
ORDERED, that the respondents re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding be referred to the undersigned for disposition.

This will constitute the decision and order of the Court. The Court will retain all papers until final disposition of the instant proceeding.

ENTER

Dated: April 13, 2011
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated July 29, 2010, Petition, Supporting Papers and Exhibits
2. Notice of Motion dated October 6, 2010, Supporting Papers and Exhibit
3. Petitioner's Affidavit in Opposition sworn to October 15, 2010
4. Respondents' Notice of Motion dated December 9, 2010 and Supporting Papers
5. Petitioner's Affidavit in Opposition dated December 21, 2010