

<b>Matter of Hernandez v Fischer</b>
2011 NY Slip Op 31111(U)
April 8, 2011
Supreme Court, Albany County
Docket Number: 6085-10
Judge: Jr., George B. Ceresia
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determination. The two grievances generally relate to petitioner's complaints concerning being charged shipping fees for the transport of his personal property upon being transferred from one correctional facility to another. The disciplinary determination relates to an incident which occurred in a facility classroom in which the petitioner was charged with creating a disturbance, disobeying a direct order, and interference.

#### Grievance Number AUB-54845-09

The petitioner alleges that on September 4, 2009, in connection with his transfer from Eastern Correctional Facility to Auburn Correctional Facility, he was improperly charged for the shipping of two draft bags of personal property containing legal documents of active cases. He maintains that the shipping of these draft bags should have been at respondent's expense. He also complains that of four draft bags containing non-legal personal property, one of the bags was lost. He requests compensation for the lost bag. The respondent argues that the instant proceeding is untimely with respect to this grievance.

The Court notes the burden of proof with respect to an affirmative defense is with the proponent (see Green v William Penn Life Ins. Co. of N.Y., 74 AD3d 570 [1<sup>st</sup> Dept., 2010], citing 57 NY Jur2d, Evidence § 164, at 400). 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]). The grievance determination at issue here is dated December

9, 2009. Respondent has submitted the affidavits of Jeffery Hale and Cheryl Parmiter who describe the general office procedures undertaken when a grievance determination is issued. Mr. Hale, Assistant Director of the Inmate Grievance Program, indicated that according to respondent's records, the decision of the Central Office Review Committee ("CORC") was mailed to the Inmate Grievance Supervisor of Auburn Correctional Facility on December 14, 2009. Ms. Parmiter, the Inmate Grievance Program Supervisor at Auburn Correctional Facility, indicates that according to records maintained at Auburn Correctional Facility, the CORC decision was received there on December 16, 2009. She indicates that upon receipt of the CORC decision, her usual procedure was to make two copies, one of which she would forward to the inmate via facility mail; and that it was her experience that the inmate would receive it within the week. The Court finds that this evidence was sufficient to establish that the petitioner, in the ordinary course of business, would have received the grievance during the week of December 16, 2009 (see Spangenberg v Chaloupka, 229 AD2d 482, 483 [2d Dept., 1996]). As such the Court finds that the respondent met its burden of proof in finding that the instant proceeding, was untimely, as not being commenced within four months of the determination (see CPLR 217).

Moreover, and apart from the foregoing the Court finds that the proceeding, as it relates to this grievance, must also be dismissed on the merits. The Inmate Grievance Resolution Committee deadlocked with respect to the grievance, with the security/civilian staff finding that he was not overcharged for his bags. The Superintendent's determination recited as follows:

"I agree with the findings of the IGRC security/civilian staff."

“Form #2076, (1) states in part, ‘A fifth bag of verified active legal documents may be transferred AT THE INMATE’S EXPENSE as per the provisions of Directive # 4913, Inmate Property.’

“The fifth and sixth bags were shipped at the inmate’s expense in accordance with the provisions of Directive # 4917 [sic].

“Grievance denied.”

The decision of CORC recited as follows:

“Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby denied. CORC upholds the determination of the Superintendent for the reasons stated.

“CORC asserts that the grievant authorized disbursements to mail his property to his current facility on 9/14/09. Contrary to the grievant’s claims, CORC asserts that sufficient evidence has not been presented that the grievant was overcharged for postage. CORC asserts that the grievant is not entitled to reimbursement for postage costs. However, the grievant has the right to proceed with a claim for any lost or stolen items in accordance with Directive #2733 INMATE PERSONAL PROPERTY CLAIM.

“CORC advises the grievant that he may initiate a Freedom of Information Law Request (FOIL) for consideration to obtain the documents he is requesting in accordance with Facility procedures.

“In regard to the grievant’s appeal, CORC asserts that all relevant information must be presented at the time of filing in order for a proper investigation to be conducted at the facility level.”

Judicial review of administrative decisions denying inmate grievances is limited to whether the determination is “irrational, arbitrary or capricious or affected by an error of law” (see Matter of Hernandez v Fischer, 79 AD3d 1544, 1546 quoting Matter of Bermudez v Fischer, 71 AD3d 1361, 1362 [2010] lv denied 15 NY3d 702, 2010]; see also Matter of Green v Bradt, 69 AD3d 1269 [3rd Dept., 2010]; Matter of Clark v Fischer, 58 AD3d 932 [3rd Dept., 2009]). Phrased differently, “[t]o prevail, petitioner must demonstrate that the

Central Office Review Committee's determination was arbitrary and capricious or without a rational basis” (Matter of Patel v Fischer, 67 AD3d 1193 [3rd Dept., 2009] citing Matter of Keesh v Smith, 59 AD3d 798, 798 [2009]; Matter of Green v Bradt, *supra*; Matter of Frejomil v Fischer, 68 AD3d 1371 [3<sup>rd</sup> Dept., 2009]; Matter of Simmons v New York State Department of Correctional Services, \_\_\_ AD3d \_\_\_ [3d Dept., March 10, 2011]).

The Department of Correctional Services (“DOCS”) has adopted a series of policies and procedures which govern items of personal property which an inmate may accumulate and store during the inmate’s incarceration. These policies are set forth in DOCS Directive 4913. Under paragraph III thereof an inmate is generally allowed to possess only four bags of personal property. An exception to the four–bag limit is included in the Directive, to permit possession of one additional bag of active legal material. Paragraph III E of the Directive authorizes shipment, at state expense, of four inmate draft bags. It provides that an additional bag of active legal material must be shipped at the inmate’s expense. In a Memorandum to the Inmate Population dated October 23, 2008, Commissioner Brian Fischer indicated that DOCS Directive 4913 would be implemented in phases, with full implementation to be effective on July 1, 2010. Under *Phase II*, effective July 1, 2009, inmates having DIN numbers beginning with 08 or earlier would be permitted to possess up to six bags. However upon transfer to a different facility, four bags would be shipped at the state’s expense, and two additional bags would be shipped at the inmate’s expense. The petitioner was charged for shipment of the two extra draft bags in September 2009.

In accordance with DOCS Directive 4913, and Commissioner Fischer’s Memorandum, it appears that the petitioner was properly charged for transport of two

additional bags of active legal materials. The Court discerns nothing unreasonable in directing the petitioner to file an inmate personal property claim for missing property; or to file a FOIL request for documents. As such, the Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion.

The Court concludes that with respect to Grievance Number AUB-54845-09 the petition must be dismissed.

#### Grievance Number AUB 56561-10

In this grievance, the petitioner argues that Directive 4913 is in violation of the state and federal constitutions because it limits petitioner's access to the courts, by reason that it limits inmates to one additional draft bag for active legal cases. In his view, an inmate should be permitted to possess an unlimited quantity of draft bags if they contain active legal documents. He points out that as of June 6, 2010, he had three active cases pending, and legal material sufficient to fill three draft bags. He further argues that the requirement that an inmate pay for the shipping of the additional draft bag improperly constitutes the imposition of an unlawful tax.

Turning first to respondent's objection in point of law, the respondent argues that the proceeding is premature, as petitioner failed to exhaust his administrative remedies. It is well settled that before an issue may be considered in a CPLR Article 78 proceeding, it is necessary for the petitioner to exhaust all available administrative remedies (see Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester

Pure Waters Dist., 37 NY2d 371, 375; see also Matter of East Lake George House Marina v Lake George Park Commission, 69AD3d 1069 [3<sup>rd</sup> Dept., 2010]). This includes seeking review of all issues within the context of an administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3<sup>rd</sup> Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3<sup>rd</sup> Dept., 1996]; Matter of Tafari v Artus, 79 AD3d 1468, 1468-1469 [3<sup>rd</sup> Dept., 2010]).

In this instance, the petitioner's appeal from the Superintendent's decision was mailed to CORC on August 24, 2010. CORC had thirty days from the date or receipt of the appeal to render a decision (see 7 NYCRR 701.5 [d] [3] [ii]). CORC issued its decision on September 22, 2010, within the thirty day period. The petition was filed on September 1, 2010. The order to show cause is dated September 21, 2010. The Court finds that the petitioner failed to exhaust his administrative remedies, and that the petition, to the extent it seeks a review of Grievance Number 56561-10 must be dismissed.

In addition, as was the case with Grievance 54845-09 (supra), the Court finds that this claim must be dismissed on the merits. The Court observes that the argument advanced here, that Directive 4913 deprives inmates access to the Courts, was the precise issue raised in Matter of Green v Selsky (77 AD3d 1011 [3d Dept., 2010]). The Court in the Green found that the argument was conclusory in that the petitioner there failed to present specific facts in support of his claim. The instant petition suffers from the same deficiency. In addition, the Court in Green (supra) found that the Memorandum of Brian Fischer (supra), which

explains the necessity for imposing a limitation on inmate personal property<sup>1</sup>, provides a rational basis for adoption of the Directive. This Court agrees, and finds that the CORC determination here has a rational basis and was not made in violation of lawful procedure, is not affected by an error of law, and is not arbitrary and capricious, or constitute an abuse of discretion.

#### Disciplinary Determination Dated July 12, 2010

Respondent's answer alleges that the petition raises issues requiring transfer to the Appellate Division, Third Department pursuant to CPLR 7804 § (g). The Court finds that the petition states a cause of action. There are no dispositive issues raised in respondent's answer.

The Court finds that this proceeding, which seeks review of actions taken by the hearing officer at the hearing, raises issues of substantial evidence which requires transfer to the Appellate Division pursuant to CPLR §7804 (g) (see, Matter of Thibodeau v Northeastern Clinton Central School Board of Education, 39 AD3d 940, 941 [3<sup>rd</sup> Dept., 2007]; Matter of Somma v Jackson, 268 AD2d 763, 763-764 [3d Dept., 2000]; Matter of Bevacqua v Sobol, 176 AD2d 1, 3 [3d Dept., 1992]; Matter of Department of Env'tl. Protection v Department of Env'tl. Conservation, 120 AD2d 166, 169 [3d Dept., 1986] lv denied, 69 NY2d 921).

Accordingly, it is

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<sup>1</sup>The Court mentioned "fire and safety hazards, sanitation and hygiene issues and the escalating cost of storage areas" among the reasons cited by Commissioner Fischer (id., at 1012).

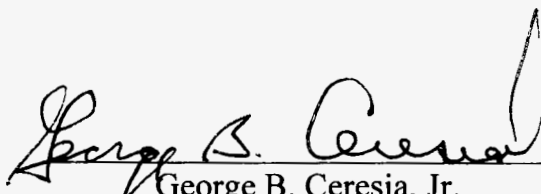
**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed with respect to grievances AUB-54845-09 and AUB 56561-10; and it is

**ORDERED**, that the remaining portion of the petition, as it relates to the disciplinary determination dated July 12, 2010, be and hereby is transferred to the Appellate Division pursuant to CPLR § 7804 (g).

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the Respondent. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

**ENTER**

Dated: April 8, 2011  
Troy, New York

  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 21, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer filed January 11, 2011, Supporting Papers and Exhibits