

Matter of O'Kane v Fischer

2012 NY Slip Op 30896(U)

March 22, 2012

Supreme Court, Franklin County

Docket Number: 2011-810

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
DAVID O'KANE, #04-A-3962, a/k/a
MARK BLACK

Petitioner,

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

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision, and **DAVID**
ROCK, Superintendent, Upstate
Correctional Facility,

Respondents.

DECISION AND JUDGMENT
RJI #16-1-2011-0354.75
INDEX # 2011-810
ORI #NY016015J

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of David O'Kane, a/k/a Mark Black, verified on August 8, 2011 and filed in the Franklin County Clerk's office on August 10, 2011. Petitioner, who was an inmate at the Upstate Correctional Facility but is now confined at the Great Meadow Correctional Facility, is challenging the adequacy of the medical care he has received at Upstate. The Court issued an Order to Show Cause on August 16, 2011 and has received and reviewed respondents' Answer, verified on December 8, 2011 and supported by the Affirmation of William J. McCarthy, Esq., Assistant Attorney General, dated December 8, 2011, as well as by the Affidavit of Karen Bellamy, DOCCS Director of Inmate Grievance Program, sworn to on December 7, 2011. The Court has also received and reviewed petitioner's undated Reply (denominated Petitioner Response to Respondent(s) Answer), filed in the Franklin County Clerk's office on January 17, 2012.

Petitioner alleges that both of his legs were severely injured as the result of a February 22, 1989 assault. According to petitioner, reconstructive surgery was performed at Harlem Hospital with alloy pins and plates inserted in both legs. Petitioner goes on to allege that after his bones healed the pin(s) (but not the plate) was removed from his right leg and that neither the pin(s) nor the plate was removed from his left leg. Thus, petitioner maintains that he currently has an alloy plate in his right leg as well as a pin(s) and plate in his left leg.

Petitioner next alleges that when he was confined at the Attica Correctional Facility in 1990 - one year removed from the surgery described in the preceding paragraph - DOCCS officials received copies of the Harlem Hospital medical records, provided petitioner with "special medical boots" and directed him not to play any sports or engage in any workouts. Petitioner also alleges that when he arrived at the Clinton Correctional Facility in June of 2005 he again signed a release form for the Harlem Hospital medical records and DOCCS officials ordered that he be placed in a bottom bunk.

This litigation stems from events that occurred after petitioner arrived at the Upstate Correctional Facility in March of 2010. Although petitioner acknowledges that Upstate officials issued a temporary bottom bunk permit, he asserts that x-rays taken of his knees, lower legs and right ankle in March 2010 did not cover the parts of his legs where the remaining pin(s) and plates are allegedly affixed. In an effort to shed some light on the issues surrounding the conditions of his legs, petitioner requested additional copies of his medical records from Harlem Hospital. There is no dispute that 68 pages of such records were received at Upstate on an unspecified date. There also appears to be no dispute that all 68 pages were turned over to petitioner on or about February 7, 2011, apparently without an additional photocopy of such records first being produced. While petitioner claims that he returned all 68 pages to Upstate medical staff several days later,

the staff contends that only 51 pages were returned. According to petitioner, the missing 17 pages of medical records consist “. . .of the doctor(s) report of what type of (Pens [pins?] & Plates) are in my legs . . .”

On March 15, 2011 petitioner filed an inmate grievance complaint (UST-45558-11) requesting that a complete 68-page set of the Harlem Hospital medical records be turned over to him. On April 19, 2011 the Superintendent of the Upstate Correctional Facility issued his determination in grievance UST-45558-11, as follows:

“This grievance was reinvestigated by Acting N.A., K. Rabideau and completed by chart review.

Investigation reflects that grievant signed for and was issued 68 pages of medical records from Harlem Hospital on 02/07/11 by the 12 block nurse. He returned the copies of medical records to the 12 block nurse on 02/10/11. The 12 block nurse returned the packet of copies to the medical records clerk. The nurse administrator determined that grievant was entitled to these records at no charge. The packet was then given to the nurse administrator who opened it and counted 51 pages of returned copies. These were copied, placed in a packet, and issued to grievant on 03/01/11 by the 12 block nurse. Copies of these were also placed in grievant’s medical folder.

Nurse administrator Smith denies removing any pages from the packet that grievant returned containing Harlem Hospital documents.

R. N. Mullen denies removing any pages of medical records from the packet containing Harlem Hospital documents either given to or received from grievant. M. Jarvis, MRC denies removing any pages of medical records from the packets containing Harlem Hospital documents either given to or received from grievant.

Action Requested - Grievant received all medical records from Harlem Hospital that he returned to the medical department. As only 51 pages were returned by grievant he only received 51 pages back from the medical department.

Grievant is instructed to check his cell to see if he inadvertently kept the 17 pages in question that were not returned to medical. If he does not have them, he is instructed to request them from Harlem Hospital.”

Upon administrative appeal the Inmate Grievance Program Central Office Review Committee (CORC), upon recommendation of the DOCCS Division of Health Services, issued a decision dated June 29, 2011 upholding the April 19, 2011 determination of the facility superintendent for the reasons stated by the superintendent. In its decision the CORC advised petitioner to address ongoing medical concerns “. . . via sick call for the most expeditious means of resolution.”

In the meantime, on May 3, 2010 petitioner filed a separate inmate grievance complaint (UST-46045-11) seeking a bottom bunk permit. On June 8, 2011 the facility superintendent issued the following determination with respect to inmate grievance UST-46045-11:

“This grievance was reinvestigated by Acting N.A., K. Rabideau and completed by chart review.

Investigation reflects that grievant was ordered and completed x-rays of his lower legs on 03/31/10 and 04/27/11. On both dates the x-rays were performed correctly by a trained certified x-ray tech. Both sets of x-rays showed healed fractures with no internal hardware present.

On 04/27/11 grievant was seen by his provider. Grievant insisted he had internal fixation hardware in his legs. Both sets of lower leg x-rays show no internal fixation present in his legs. He was issued a permit for no prolonged standing greater than [sic] 2 hours due to his complaints of pain. He was ordered Ibuprofen as needed for pain control. On 06/01/11 he was seen again by his provider for complaints of foot and hand pain. He made no further mention of leg pain. He was ordered an x-ray of his right thumb and Motrin 600mg every evening for pain as needed. He was advised to report any worsening of systems. No bottom bunk was indicated or ordered by provider.

Action Requested - Grievant has been seen and treatment has been provided. He is receiving appropriate medical care for his issues. Per grievant’s provider, he does not meet the criteria for a bottom bunk.”

Upon administrative appeal the CORC, upon recommendation of the DOCCS Division of Health Services, issued a decision dated August 24, 2011 accepting the action requested

by petitioner with the notation “. . . that the grievant was seen by his primary care provider on 6/29/11 and was issued a bottom bunk permit. There is no medical indication for grievant to have an MRI or specialist consultation at this time.”

The petition contains no “WHEREFORE” clause setting forth specific requests for judicial relief. Nevertheless, the last five pages of the nine-page “Statement of Facts” annexed to the petition include requests for judicial relief interspersed with arguments in support of such requests.

To the extent petitioner purports to challenge the final decision of the CORC in UST-45558-11, the Court notes that in order to prevail on a challenge to the final results of a grievance proceeding an inmate “. . . must carry the heavy burden of demonstrating that the determination by CORC was irrational or arbitrary and capricious.” *Frejomil v. Fischer*, 68 AD3d 1371, 1372 (citations omitted). *See Williams v. Goord*, 41 AD3d 1118, *lv den* 9 NY3d 812 and *Winkler v. New York State Department of Correctional Services*, 34 AD3d 993. This Court finds that the petitioner has failed to carry such burden. There is nothing in the record to suggest that any DOCCS employee deliberately destroyed or is otherwise withholding the 17 “missing” pages of medical records. This is not to suggest, however, that there is any evidence that petitioner destroyed or is otherwise withholding the 17 pages in question. Simply put, there is nothing in the record to indicate that anyone (DOCCS staff or the petitioner) knows what happened to the 17 “missing” pages. It does appear, however, that these 17 additional pages of records were obtained by the petitioner from Harlem Hospital and, presumably, can be re-obtained. Given the state of the law with respect to the privacy of medical records, moreover, any additional request for the release of medical records from Harlem Hospital must be based upon a release signed by the petitioner. This Court thus finds nothing irrational, arbitrary or capricious in the final CORC determination with respect to inmate grievance UST-45558-11.

As far as inmate grievance UST-46045-11 is concerned, the Court finds that the June 29, 2011 issuance of the bottom bunk permit provided petitioner with the precise relief sought in the grievance (“to be given bottom bunk permit”). Thus, the Court finds no basis for petitioner to challenge the final CORC decision in UST-46045-11.

To the extent petitioner requests that the Court order Harlem Hospital to turn over his medical records and doctor’s report, the Court notes that Harlem Hospital is not a party to this proceeding and, therefore, the Court is without jurisdiction to direct the hospital to take any action.

To the extent petitioner requests a stay directing respondents not to transfer him to another DOCCS facility pending the outcome of this proceeding, the Court finds that he has failed articulate any basis for the issuance of such a stay and, therefore, such request is denied.

To the extent petitioner requests, in effect, the issuance of a Court order directing that he be seen by a “bone & leg specialist,” that a video review with the operating surgeon from Harlem Hospital be ordered, that DOCCS medical records be corrected to show that there are pins and plates in his legs and that he be fitted for medical boots and sneakers, the Court agrees with respondent that petitioner has failed to exhaust administrative remedies through the inmate grievance program with respect to these matters. Similarly, although petitioner has, successfully, exhausted administrative remedies with respect to his request for a bottom bunk permit, the Court agrees with respondents that petitioner failed to exhaust administrative remedies with respect to his request that DOCCS officials never place him in a top bunk again.

Petitioner’s request for the assignment of counsel was addressed in the Order to Show Cause of August 16, 2011.

Finally, to the extent petitioner requests an order directing respondents to turn over copies of DOCCS records with respect to inmate grievances UST-45558-11 and UST-46045-11, the Court notes that such records have been made available to petitioner as part of the record in this proceeding (see Exhibits A through F, annexed to the respondents' Answer). To the extent petitioner requests an order directing respondents to turn over DOCCS records with respect to inmate grievances UST-45673-11 and UST-45242-11, the Court finds that petitioner has failed to articulate any basis to conclude that such records are relevant to this proceeding.

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

ADJUDGED, that the petition is dismissed.

Dated: March 22, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice