

Matter of Green v Uhler
2015 NY Slip Op 31290(U)
May 20, 2015
Supreme Court, Franklin County
Docket Number: 2014-304
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
SHAWN GREEN, #97-A-0801,
Petitioner,

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

-against-

DONALD UHLER, Acting Superintendent,
VIJAYKUMAR MANDALAYWAMA,
Facility Health Service Director,
SCOTT WOODWARD, Inmate Grievance
Program Supervisor at Upstate Correctional
Facility, Department of Corrections and
Community Supervision,

Respondents.

DECISION AND JUDGMENT
RJI # 16-1-2014-0146.29
INDEX # 2014-304
ORI # NY016015J

X

This is a proceeding for judgment pursuant to Article 78 of the Civil Practice Law and Rules commenced upon the Petition of Shawn Green, verified on April 9, 2014 and filed in the Franklin County Clerk's office on April 18, 2014. Petitioner was previously an inmate at Upstate Correctional Facility ("Upstate") and is currently being confined at Elmira Correctional Facility. The record reflects that petitioner is challenging the results of various inmate grievance proceedings as well as the results and disposition of a tier III Superintendent's disciplinary hearing that was conducted on April 1, 2014. Petitioner has also moved this Court for the issuance of a Preliminary injunction and Temporary restraining order pursuant to the provisions of CPLR §§6311 and 6313.

The Court issued an Order To Show Cause on May 2, 2014. The Court has since received and reviewed respondents' Answer and Return, verified on August 14, 2014 and supported by the August 14, 2014 Letter Memorandum of Glen Francis Michaels, Esq.,

Assistant Attorney General. The Court is also in receipt of petitioner's Reply thereto, which was filed with the office of the Franklin County Clerk on August 26, 2014.

In addition, the Court has also received and duly considered petitioner's Third Amended Petition, along with timely proof of service thereof, which was filed with the Franklin County Clerk on November 20, 2014. In response thereto, counsel for respondents has submitted a supplemental Answer and Return, verified on December 15, 2014, along with the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General. Petitioner's Reply thereto was filed with the office of the Franklin County Clerk on December 26, 2014.

Furthermore, in light of petitioner's recent transfer to Elmira Correctional Facility, the Court issued a Letter Order, dated March 17, 2015, requesting submission of memoranda setting forth the parties' respective positions on the issue of mootness. The Court is in timely receipt of letter memoranda from both petitioner and respondents' counsel and has duly considered the assertions contained therein.

In relation to petitioner's April 1, 2014, tier III Superintendent's disciplinary hearing, respondents' counsel acknowledges that the disposition and the penalties imposed as a result of petitioner being found guilty shall remain on petitioner's institutional record, even after his transfer out of Upstate. As such, respondents assert that the claims set forth in the Third Amended Petition, relative to petitioner's disciplinary proceeding, have not been rendered moot by his relocation to Elmira Correctional Facility. The Court concurs and shall address the outcome of petitioner's disciplinary hearing below.

With regard to his grievance proceedings, petitioner argues that the issues raised

therein fall within the exception to the mootness doctrine, based upon the likelihood that Upstate will continue the conduct for which petitioner claims to be aggrieved, that his claims raise novel legal issues and that, if the Court refuses to entertain the merits of his claims, they will likely evade judicial review. In contrast, respondents assert that “each complained of grievance is specific to Upstate Correctional Facility”, and that petitioner’s claims do not relate to a State-wide policy of the New York State Department of Corrections and Community Supervision (“DOCCS”). As such, it is counsel’s position that the portions of the Third Amended Petition relating to petitioner’s grievances should be dismissed as moot.

Having thoroughly reviewed the Third Amended Petition and the relief requested therein, in tandem with the exhibits annexed to respondents’ supplemental Answer and return, the Court finds that all but one of petitioner’s grievances complains exclusively of Upstate staff or policies. In the Grievance Complaint No.: UST-53564-14, petitioner asserts that he is unable to properly maintain a regimen of oral hygiene, unless DOCCS permits Special Housing Unit (“SHU”) inmates to possess standard toothbrushes, dental floss and mouthwash, with provision of the same being at either the State’s expense, or that SHU inmates be permitted to buy such items themselves at the commissary. *See* Respondents’ supplemental Answer and Return at Exhibit “H”. Accordingly, this grievance arguably raises State-wide DOCCS policies, which would survive a claim of mootness based upon petitioner’s transfer out of Upstate.

Nevertheless, the record reflects that petitioner failed to exhaust his administrative remedies by appealing the March 4, 2014 determination of the Inmate Grievance Resolution Committee (“IGRC”) to the Superintendent and ultimately to the

Central Office Review Committee (“CORC”). As such, petitioner’s failure to exhaust his administrative remedies, relative to Grievance Complaint No.: UST-53564-14, precludes judicial review of the determination made by the IGRC. *See Fulton v. Reynolds*, 83 AD3d 1308 and *Torres v. Fischer*, 73 AD3d 1355, 1356.

Relative to the remaining grievances, the Court finds that petitioner has failed to demonstrate that his grievance claims fall within an exception to the mootness doctrine, such that the Court should render a formal determination on the merits of his claims. Additionally, with the exception of the single grievance discussed above, the Court is persuaded by counsel’s contention that petitioner’s grievances were made against Upstate directly and not DOCCS as a whole. Accordingly, as a result of his transfer, petitioner is no longer aggrieved by Upstate’s policies and, therefore, any challenge to such policies is rendered moot. *See Dawes v. Annucci*, 125 AD3d 1035, *Sylvester v. Fischer*, 124 AD3d 1411 and *Ortiz v. Simmons*, 67 AD3d 1208. Therefore, those portions of the Third Amended Petition which relate to petitioner’s grievance proceedings are hereby dismissed as moot.

Petitioner also challenges the outcome of a tier III Superintendent’s disciplinary hearing that was held on April 1, 2014. *See* 7 NYCRR Part 254. Annexed to respondents’ supplemental Answer and Return as Exhibit “N”, is a copy of an Inmate Misbehavior Report, dated March 21, 2014, in which petitioner is charged with violating inmate rule 106.10, for disobeying a direct order, and 107.10, for physically or verbally obstructing or interfering with an employee. *See* 7 NYCRR § 270.2 (B)(7)(i) and (8)(i).

As is asserted by Officer R. Richards, on the 21st of March, 2014, at approximately 9:10 a.m., while being housed at “Clinic Emergency Room”, petitioner is

alleged to have done the following:

“On the above date and approx. time I, Officer Richards, and Officer Rondo was escorting inmate Green #97A0801 into the emergency room for a callout with the podiatry doctor. Upon Entering the room I asked both the nurse and the doctor what restraints and clothing he needed removed from the inmate. The doctor said the right boot and sock only. I then took the lock off that holds the handcuffs to the wastechain and then I told inmate Green to remove his right boot and sock which he did. Inmate Green then started to remove his left boot and I told him the doctor only wants him to remove his right boot and sock. Inmate Green became very argumentive stating ‘I will due [sic] what I want to and I want the doctor to look at my left foot also.’ I gave inmate Green several direct orders to only remove his right boot and inmate Green continued to yell and argue with me. I told inmate Green if he continues to be disruptive that his callout would be terminated and he would be taken back to the holding pen. Inmate Green continued to argue with me in a loud voice stating ‘I’m going to do what I want.’ This went on for some time resulting in all the callouts in the infirmary being delayed. I then terminated inmate Green’s callout and put him back in the holding pen. Area Sergeant was notified of this incident.” (sic) Respondents’ supplemental Answer and Return as Exhibit “N”.

The record reflects that on the 23rd of March, 2014, petitioner was assigned Officer B. Loeb as his employee assistant (7 NYCRR §251-4.2), and during their meeting on March 31, 2014, petitioner requested that his assistant interview as potential inmate witnesses “any inmate on callout”. *See* Respondents’ supplemental Answer and Return at Exhibit “O”. Petitioner also requested that the doctor and nurse present during the alleged incident be interviewed as potential staff witnesses, and further requested that the assistant obtain the names of the doctor and nurse, along with a copy of the consultation report, patient bill of rights, podiatrist callout sheet, and the escort officer job description and guidelines. *Id.* According to his Assistant Form, petitioner’s

employee assistant instructed petitioner to make a Freedom of Information Law (“F.O.I.L.”) request for all medical related information, and his request for a copy of the escort officer’s job description was denied. *See* respondents’ supplemental Answer and Return as Exhibit “O”.

As indicated in the Witness Interview Notice annexed to respondents’ supplemental Answer and Return at Exhibit “P”, Hearing Officer Trombley denied petitioner’s request to call all of the inmates on callout as witnesses, as such inmates were “not present during [the] incident”. Moreover, petitioner’s request to call the podiatrist as a witness was also denied, as the Hearing Officer determined that his testimony would be redundant. *See* respondents’ supplemental Answer and Return as Exhibit “P”.

Petitioner’s tier III Superintendent’s Hearing commenced on April 1, 2014. A copy of the transcribed minutes thereof is attached to respondents’ supplemental Answer and Return as Exhibit “M”. Initially, petitioner acknowledged being served with a copy of the underlying Inmate Misbehavior Report on March 23, 2014. A brief discussion ensued regarding the witnesses and documents petitioner requested through his employee assistant. The Hearing Officer then read the Inmate Misbehavior Report into the record and asked petitioner to enter a plea to the charges. Petitioner plead not guilty to both charges, and the hearing officer made a notation of the same in the hearing record sheet.

Thereafter, the Hearing Officer took a brief adjournment to review petitioner’s assistant form (respondents’ supplemental Answer and Return as Exhibit “O”), coming back on the record moments later. The Hearing Officer noted that petitioner’s employee

assistant had previously informed petitioner that some items he had requested, the medical documents in particular, were available via F.O.I.L. request. Moreover, petitioner was informed that his request for a copy of the job description for an escort officer was denied as irrelevant to underlying charges.

The hearing proceeded forward and Officers A. Tavernier, W. Comstock and R. Richards were present during the proceeding. As the author of the Inmate Misbehavior Report, Officer R. Richards was called to testify regarding the underlying incident. A review of his testimony reveals that it mirrors the allegations set forth in the misbehavior report. The record reflects that petitioner was permitted to pose a series of questions to Officer Richards through the Hearing Officer.

At the conclusion of Officer Richards' testimony, petitioner asked to call as witnesses "the nurse, the doctor and ... the other 2 inmates that was on the callouts" on the date of the incident in question. Respondents' supplemental Answer and Return at Exhibit "M" as pg. 13. The Hearing Officer denied petitioner's request to call the inmates to testify, as they were not witnesses to the alleged incident; however, Nurse Roberson was summoned to testify. Upon the Hearing Officer's inquiry as to the alleged incident, Roberson testified that he was instructed by the officers to remove one boot; however, "the inmate wanted to take off, um, his other boot and that the, uh, officer than [sic] he said the doctor said only one." *Id.* at pg. 14. The nurse further testified that words were exchanged between petitioner and the officers, and that petitioner was instructed that, if he did not want to follow the officers' direct orders, his callout would be terminated, which ultimately occurred. *Id.* at pg. 15.

Once again, petitioner was permitted to submit questions to the witness through

the Hearing Officer. At the conclusion of Nurse Roberson's testimony, petitioner also requested that the podiatrist, Dr. Langstein, be called to testify. As noted above, the Hearing Officer denied petitioner's request on the basis that the doctor's testimony would amount to "a repetition of what the nurse just testified to". Respondents' supplemental Answer and Return as Exhibit "M" at pg. 20. It was petitioner's position that the doctor's testimony was necessary, as Officer Richard's order to remove only one boot and sock was at the doctor's instruction. However, the Hearing Officer indicated that he had already received testimony to that effect from Nurse Roberson, and, as such, he deemed the doctor's potential testimony to be redundant. Upon conveying this explanation to petitioner, he replied "Fair that, alright, alright". *Id.* at pg. 21.

The Hearing Officer then asked petitioner if he had any further testimony or documentary evidence that he wished to proffer in his defense, to which petitioner indicated that he wished to submit a copy of the "patients bill of rights" and his "consultation". *Id.* at pg. 22. Petitioner was informed by the Hearing Officer that such documents could be obtained through a F.O.I.L. request; however, they were not relevant to the underlying incident. *Id.*

At the conclusion of the Tier III Superintendent's Hearing, the Hearing Officer found petitioner guilty of violating inmate rule 106.10, for refusing a direct order; however, petitioner was found not guilty of inmate rule 107.10, for his alleged interference with an employee. Petitioner received a penalty of three months in the Special Housing Unit, with the same commencing on July 4, 2015 and ending on October 4, 2015. The Hearing Officer further recommended a loss of three months good time. *Id.* at pg. 25.

The Hearing Officer indicated that his findings were based upon petitioner's "own testimony admitting that he failed to follow direction, the testimony of the author, CO Richards, and the testimony from Tech Roberson who was a witness to the incident. Respondents' supplemental Answer and Return as Exhibit "M" at pg. 25. The Hearing Officer further noted that his reason for the disposition was that "[t]his type of behavior can not and will not be tolerated in a prison setting. Medical specialists are very expensive and time scheduled to them can not be wasted. This disposition should act as a deterrent and prevent this type of behavior from happening again." *Id.* Petitioner was informed of his right to appeal the Hearing Officer's determination and the matter was concluded.

Petitioner appealed the findings and disposition of his tier III Superintendent's Hearing, and upon review of the same, the matter was affirmed on May 22, 2014 by the Acting Director of the Special Housing Unit and Inmate Disciplinary Program on behalf of the Commissioner of DOCCS.

The instant proceeding ensued.

Initially, petitioner argues that his due process rights were violated, as the March 21, 2014 Inmate Misbehavior Report was not endorsed by the "podiatrist Mark Lentini". It is hereby noted that, according to the testimony proffered at petitioner's disciplinary hearing, a Dr. Langstein served as the podiatrist on the day of the incident in question. Nevertheless, petitioner's contention is without merit. Pursuant to the provisions of 7 NYCRR §251-3.1 (b), "[t]he misbehavior report shall be made by the employee who has observed the incident or has ascertained the facts of the incident. Where more than one employee has personal knowledge of the facts, each employee shall make a separate

report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees.” The Court hereby notes that the failure of the podiatrist and Nurse Roberson to sign the misbehavior report is merely a technical violation of the regulation from which petitioner has failed to show demonstrable prejudice. *See Rosario v. Selsky*, 5 AD3d 896, 897, *Huntley v. Goord*, 261 AD2d 401, 402, *Serra v. Selsky*, 223 AD2d 845. Accordingly, as an eye witness to the incident in question, Officer R. Richards was imbued with sufficient knowledge to serve as the author of the Inmate Misbehavior Report, and his doing so complied with the provisions of 7 NYCRR § 251-3.1.

Furthermore, despite her omission as a signatory to the Inmate Misbehavior Report, Nurse Roberson ultimately testified at petitioner’s tier III Superintendent’s Hearing and petitioner was able to interpose questions to her regarding the underlying incident. *See Sorrentino v. Fischer*, 101 AD3d 1210, *McGowan v. Fischer*, 88 AD3d 1038, 1039, *Spulka v. Selsky*, 277 AD2d 552, 553. Moreover, the Court is unwilling to disturb the Hearing Officer’s denial of petitioner’s request to call the doctor as a witness, as his testimony would have been redundant to that of the Officer Richards and Nurse Roberson. *See Knight v. Bezio*, 82 AD3d 1381, 1382, *lv. dismissed* 17 NY3d 788, *Abreu v. Bezio*, 82 AD3d 1381, 1382. Accordingly, petitioner’s contention, relative to the lack of the podiatrist’s signature upon the March 21, 2014 Inmate Misbehavior Report is without merit.

Next, petitioner argues that the Hearing Officer erred in refusing petitioner’s request to submit into evidence his podiatry consultation request form, and further erred by not permitting petitioner to call the podiatrist as a witness. It is petitioner’s

contention that had the Hearing Officer permitted him to introduce such evidence, petitioner would have been able to invalidate his violation for refusing to comply with a direct order.

Pursuant to the provisions of 7 NYCRR § 254.5 (a), an “inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.” As noted above, petitioner’s request to call the doctor as a witness was denied, as the Hearing Officer determined that his testimony would be redundant to that proffered by the other two witnesses. As “[a]n inmate has no right to call a witness to provide testimony that is immaterial or redundant”, the Court shall not disturb the Hearing Officer’s determination. *Watson v. State*, 125 AD3d 1064, *see also Miller v. Brereton*, 98 AD3d 824, 825. Furthermore, the record reflects that petitioner was provided with a written statement which detailed the Hearing Officer’s reason for denying the requested witnesses. *See* Respondents’ supplement Answer and Return as Exhibit “P”.

In relation to the Hearing Officer’s denial of petitioner’s request to submit his podiatry consultation request form, the Court hereby finds no error in the Hearing Officer’s determination, as the requested documentary evidence was irrelevant to the issue of whether petitioner refused to obey Officer Richards’ direct orders to remove only one boot and sock. *See Macedonio v. Fischer*, 116 AD3d 1313, *Barnes v. Prack*, 87 AD3d 1251, *Pujals v. Fischer*, 87 AD3d 767.

The Court has duly considered petitioner's remaining contentions and finds that they are without merit. Accordingly, the Court hereby denies the relief requested in petitioner's Third Amended Petition, relative to his April 1, 2014 Tier III Superintendent's Hearing. Moreover, for the reasons more thoroughly set forth above, the Court similarly denies petitioner's request for the issuance of a Preliminary injunction and Temporary restraining order, as petitioner has failed to satisfy the requirements set forth in CPLR §6301.

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

ADJUDGED, that the petition is dismissed; and it is further

ORDERED AND ADJUDGED, that petitioner's request for the issuance of a Preliminary injunction and a Temporary restraining order is denied.

Dated: May 20, 2015 at
Indian Lake, New York

S. Peter Feldstein
Acting Justice, Supreme Court