

Matter of Shepard v Annucci
2015 NY Slip Op 31825(U)
September 30, 2015
Supreme Court, Clinton County
Docket Number: 2014-1732
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF CLINTON

X

In the Matter of the Application of
EON SHEPARD, #96-A-0356,

Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**

RJI #09-1-2014-0673.38

INDEX #2014-1732

ORI #NY009013J

-against-

ANTHONY ANNUCCI, Commissioner,
New York State Department of Corrections
and Community Supervision, and **STEVEN
RACETTE**, Superintendent, Clinton Correctional
Facility,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Eon Shepard, verified on November 13, 2014 and filed in the Clinton County Clerk's office on December 3, 2014. Petitioner, who was an inmate at the Clinton Correctional Facility but is now confined at the Five Points Correctional Facility, challenged, in effect, his then current placement (as of August 2014) at the Clinton Correctional Facility.

The Court issued an Order to Show Cause on December 10, 2014 and has received and reviewed respondents' Notice of Motion to Dismiss, supported by the Affirmation of Glen Francis Michaels, Esq., Assistant Attorney General, dated January 6, 2015 as well as by the Affidavit of Laurine Jones, Deputy Superintendent of Programs, Five Points Correctional Facility, sworn to on January 8, 2015 (the Jones Affidavit) and the Affirmation of Marshall M. Trabout, M.D., Facility Health Services Director, Five Points Correctional Facility, dated January 8, 2015. In response thereto the Court has received

and reviewed Petitioner's Affirmation in Opposition to Respondent's Motion to Dismiss, dated January 9, 2015 and filed in the Clinton County Clerk's office on January 20, 2015. The Court has also received and reviewed petitioner's Addendum Affirmation in Opposition to Respondent's Motion to Dismiss, dated January 12, 2015 and filed in the Clinton County Clerk's office on January 22, 2015.

Petitioner has a well-documented medical history of chronic knee and back problems. His Petition, moreover, is replete with disturbing allegations with regard to multiple transfers in and out of Clinton Correctional Facility. In this regard it appears that after being transferred to Clinton in May of 2009 petitioner filed an Request for Reasonable Accommodation requesting transfer to a flat facility. In that request petitioner alleged that he ". . . cannot walk up and down stairs, knees giving out causing me to fall." By memorandum dated June 5, 2009, petitioner was advised by M. Patnode, Deputy Superintendent/Program Services, Clinton Correctional Facility, that his request for reasonable accommodation in the form of a transfer to a flat facility had been approved. In his memorandum, Deputy Superintendent Patnode noted that "[t]he Medical Department has informed me of the following[:] right knee instability chronic pain, Moderate degeneration of lumbar spine . . . ambulates with a cane and right ACL brace. The inmate is not able to ambulate long distances, stairs pose a threat to the patient's safety, stairs should be very limited or none at all . . ." Although petitioner acknowledges that he was transferred out of the Clinton Correctional Facility and into a flat facility in August of 2009, he alleges that he was transferred back to Clinton two months later in October of 2009. Petitioner goes on to allege two additional transfers out of and back to the Clinton Correctional Facility culminating with a transfer back to Clinton in August of 2014. Petitioner goes on to allege that after his transfer back to the Clinton Correctional Facility in August of 2014 he contacted medical staff and the

respondent Superintendent Racette with regard to his concerns. Petitioner also alleges filing several grievances with respect to his transfer back to Clinton.

This proceeding was commenced on December 3, 2014 when the petition, verified on November 13, 2014, was filed in the Clinton County Clerk's office. In the WHEREFORE clause petitioner "... prays that this Court Order Respondents to transfer Petitioner to a 'Flat Facility' in the Green-Haven hub that has and can accommodate his medical needs, and for any other relief as this Court may deem just and equatiable [sic]."

Respondent's motion to dismiss is premised upon the assertion that on December 16, 2014 - less than two weeks after this proceeding had been commenced - petitioner was transferred from the Clinton Correctional Facility to the Five Points Correctional Facility. According to respondents' motion papers, Five Points "... is a 'flat' facility, and thus Petitioner has already received all the relief he requested." In this regard the Court notes that the following is asserted in the Jones Affidavit:

"Five Points is a 'flat facility.' It was designed and constructed by the NYS Office of General Services to comply with all applicable NYS codes, rules, and regulations pertaining to the Americans with Disabilities Act. We typically have at Five Points approx. 50-60 inmates who require wheelchairs, walkers, or other assistance with ambulation . . . Five Points provides cells designed to accommodate wheelchairs and has elevators in every area. These elevators are made available to any individual in need of their use . . . Five Points provides trained cell assistants and wheelchair pushers to assist the inmates in our population who need assistance with ambulation . . . An inmate at Five Points with ambulation difficulties such as Inmate Shepard may access the Law Library or any other program or activity area without encountering stairs. These areas are accessible by an inmate using a wheelchair or walker . . . Any Five Points inmate, including Inmate Shepard, who wishes to access Law Library resources but is not able to physically go to the Law Library because of medical limitations or disciplinary restrictions may request and will be provided with trained Law Library Clerk assistance."

In opposing respondent's motion to dismiss petitioner alleges that his chronic back pain is exacerbated by sitting in a wheelchair and, thus, his transfer to Five Points did not

render moot his underlying request to be transferred to a flat facility where he does not have to walk long distances. As set forth in paragraph 11 of Petitioner's Affirmation in Opposition to Respondent's Motion to Dismiss, "[r]espondents are harping on the fact that Five Points is a flat facility and ADA approved, which may be true, however, Petitioner's position is that his mobility issues cannot be addressed at Five Point[s] due to it being a long distance walking facility, and it being a wheelchair access facility still does not address Petitioner's need of avoiding walking long distances because Petitioner cannot use a wheelchair."

In petitioner's Addendum Affirmation in Opposition to Respondent's Motion to Dismiss, and the exhibits annexed thereto, it is indicated that on December 22, 2014 petitioner filed a Request for Reasonable Accommodation at the Five Points Correctional Facility wherein he requested transfer to a flat facility where he did not have to walk long distances. This request was ultimately denied on December 31, 2014 with the following findings: "Transfer not deemed medically necessary. This is a flat facility. May use wheelchair for long distances per FMSD [presumably, Facility Medical Services Director]. If unable to physically visit the law library, legal clerk's will provide assistance upon request." On January 5, 2015 petitioner signed the Request for Reasonable Accommodation denial determination indicating that he disagreed with the determination and understood his right to file an inmate grievance complaint with respect thereto. There is nothing in the record, however, to suggest that petitioner filed an inmate grievance complaint with respect to the denial of his Request for Reasonable Accommodation. Obviously, even if petitioner did file an inmate grievance complaint and pursued the complaint all the way through to a final administrative determination by the Inmate Grievance Program Central Office Review Committee, all of this would have transpired after this proceeding had been commenced on December 3, 2014.

The Court ultimately concludes that petitioner's transfer from the Clinton Correctional Facility to the Five Points Correctional Facility on December 16, 2014 has rendered this proceeding moot. Judicial resolution of any issue(s) relating to the conditions of petitioner's confinement at Five Points, including but not limited to the issue of whether or not petitioner's medical limitations can be reasonably accommodated at Five Points, must await the exhaustion of administrative remedies through the DOCCS Inmate Grievance Program. *See Jarvis v. Pullman*, 297 AD2d 842, *Jones v. Department of Correctional Services of the State of New York*, 283 AD2d 805 and *Hakeem v. Wong*, 223 AD2d 765, *lv denied* 88 NY2d 802.

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

ORDERED, that respondents' Motion is granted; and it is further

ORDERED, that petitioner's request for an injunctive relief is denied; and it is further

ADJUDGED, that the petition is dismissed as moot.

Dated: September 30, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice