

Matter of Hauswirth v Annucci
2016 NY Slip Op 30276(U)
February 19, 2016
Supreme Court, Franklin County
Docket Number: 2015-874
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
VERNON HAUSWIRTH, #08-B-3922,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2015-0518.74
INDEX # 2015-874
ORI #NY016015J**

-against-

ANTHONY J. ANNUCCI, Acting Commissioner,
NYS Department of Corrections and Community
Supervision,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Vernon Hauswirth, verified on October 30, 2015 and filed in the Franklin County Clerk's office on November 30, 2015. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the adequacy of medical care he has received at that facility, as addressed in a final determination of the Inmate Grievance Program Central Officer Review Committee (CORC) in conjunction with inmate grievance UST-56086-15. The Court issued an Order to Show Cause on December 10, 2015 and has received and reviewed respondent's Answer and Return, verified on January 8, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated January 8, 2016¹. No Reply has been received from petitioner.

Commencing in February of 2015 petitioner initiated contact with medical staff at the Upstate Correctional Facility with respect to "sinus pain and pressure in his head." (Petition ¶6). He was seen by medical staff at Upstate on at least four occasions prior to

¹ Although respondent's Answer and Return is actually dated and verified on January 8, 2015, and Assistant Attorney General Fleury's Letter of Memorandum is actually dated January 8, 2015, these are obviously typographical errors.

March 11, 2015, when he filed an inmate grievance complaint (UST-55746-15). In that grievance complaint petitioner requested “. . . a CAT scan because it’s the only way to rule out something life threatening because it feels like something is pushing against my skull.”²

Petitioner was next seen by medical staff at Upstate on April 2, 2015 and at that time an MRI was apparently ordered. Petitioner was seen by medical staff one more time - on April 18, 2015 - prior to May 7, 2015 when an MRI of his head was conducted. The subsequent MRI report stated an impression of “NORMAL BRAIN MRI.”

In paragraphs 18 through 23 of the Petition, the following is alleged:

“On the date of May 8, 2015, Petitioner was once again taken to emergency sick-call due to numbness in his face and right arm . . . On the very next day, May 9, 2015, Petitioner was once again taken to emergency sick-call for what can only be explained as a popping sensation in his head with an awkward drainage . . . On the date of May 11, 2015, Petitioner was taken to emergency sick-call by stretcher after passing out in the Law Library³ . . . On the date of May 13, 2015, Petitioner wrote a letter to the Nurse Administrator informing her that Petitioner recently had an MRI and the night of the MRI he heard and felt a popping sensation and requested that the Nurse schedule Petitioner to see a Specialist to determine what can be done to alleviate the pressure that Petitioner fears will ultimately take his life . . . A response from the Nurse Administrator was forwarded to Petitioner the same day May 13, 2015, informing Petitioner to sign up for sick-call.” (References to exhibits omitted).

On or about May 15, 2015 petitioner filed an Inmate Grievance Complaint dated May 13, 2015 (UST-56086-15). In that grievance complaint petitioner stated as follows: “I recently had an M.R.I. for severe pressure in my forehead. The M.R.I. didn’t show the

² There is nothing in the record to suggest that petitioner’s grievance UST-55746-15 was pursued through to a final CORC determination.

³ Petitioner’s allegation notwithstanding, the DOCCS Ambulatory Health Record Progress Note for May 11, 2015, a copy of which is annexed to the petition as Exhibit F thereof, states that petitioner was “[b]rought by stretcher to facility ER for ‘passing out’ in Law Library. Per Law Library CO inmate did not pass out or fall . . .”

problem and I've since felt a popping sensation and now have pressure along with a burning sensation on top and all around my head. My hearing goes in and out in one of my ears and I hear ringing. I have not yet had a follow up to figure out what's going on and have not seen a specialist for this and I need help as soon as possible because it's getting worse." In his grievance complaint petitioner specifically requested that he needed " . . . to see a specialist because I could have a serious infection and the longer it takes the more damage is being done. The pressure I'm feeling is debilitating." Petitioner was next seen by medical staff at the Upstate Correctional Facility on May 14, 2015, May 15, 2015, May 16, 2015, May 18, 2015 and May 22, 2015.

On May 27, 2015 the Inmate Grievance Resolution Committee (IGRC) at the Upstate Correctional Facility responded as follows with respect to petitioner's grievance UST-56086-15:

"Dr. Schroyer is the grievant's PCP [Personal Consulting Physician] and has the sole responsibility for the grievant's plan of care. Dr. Schroyer has reviewed the grievant's MRI results. There are no consults pending at this time. The grievant needs to go to nursing sick call and request to see Dr. Schroyer. An OMH [Office of Mental Health] referral was submitted on 5/15/15 to rule out mental difficulties. Per CORC Disposition of UST-37632-08, the Facility Health Services Directors have the sole responsibility for providing treatment to the inmates under their care. Per CORC Disposition of MCY 5634-97, medical decisions must ultimately rest with Medical Service Staff since they are trained and experienced in that area and are cognizant of the resources available to them. The IGRC does not have the authority to assess and determine medical protocol."

Petitioner disagreed with the IGRC response, stating that he wished to take an administrative appeal to the facility superintendent.

Petitioner had additional contact with medical staff at the Upstate Correctional Facility on May 28, 2015, June 2, 2015, June 8, 2015 and June 11, 2015. On or about June 22, 2015 Donald G. Uhler, Superintendent, Upstate Correctional Facility, issued a decision

with respect to petitioner's grievance UST-56086-15. The superintendent's decision stated as follows: "This grievance was reinvestigated by N. Smith, N.A. and completed by chart review. Grievant has been appropriately seen, evaluated, referred, and treated as medically indicated. There is no indication for him to be referred to a specialist at this time as exams and all testing have been normal." Petitioner appealed the superintendent's decision to the CORC as follows: "I am appealing the superintendent's decision because I am suffering with pain and pressure in my nose, head and neck and if the 1 and only test (M.R.I.) did not show what is causing this, then I need a specialist to get diagnosed and treated. I am suffering."

Petitioner was next seen by medical staff at the Upstate Correctional Facility on June 30, 2015, September 11, 2015 and September 14, 2015. Petitioner alleges that on September 15, 2015 he received the final determination of the CORC with respect to his grievance UST-56086-15. The CORC denied petitioner's grievance as follows:

"Upon full hearing of the facts and circumstances in the instant case, and upon recommendation of the Division of Health Services, the action requested herein is hereby denied. CORC upholds the determination of the Superintendent for the reasons stated.

CORC notes that the grievant was seen by his provider on 4/2/15, and that a 5/7/15 MRI of his head was normal. It is also noted that a CT scan of his head was denied by Regional Medical Director pending additional information. CORC asserts that it is at the discretion of the Regional Medical Director to either approve or deny outpatient care referrals, or request additional information from the facility. There is no medical indication that further specialty referrals are warranted at this time.

With respect to grievant's appeal, CORC has not been presented with sufficient evidence of improper medical care or malfeasance by staff and advises him to address medical concerns via sick call."

This proceeding ensued.

The only argument advanced by petitioner in this proceeding is that “[t]he failure of the Respondents to provide Petitioner with adequate medical care regarding the denial of the scheduling to see a Specialist, (Ear, Nose and Throat Specialist) violates Petitioner’s right to be free from cruel and unusual punishment as guaranteed by the Eighth Amendment of the United States Constitution.”

To prevail on his challenge to the final results of Inmate Grievance UST-56086-15 petitioner “. . . 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. In the case at bar, the Court finds that petitioner has failed to carry this burden.

There is no doubt that “deliberate indifference to serious medical needs of prisoners constitutes a violation of the Eighth Amendment proscription against the infliction of cruel and unusual punishment. *See Estelle v. Gamble*, 429 US 97 and *Shomo v. Zon*, 35 AD3d 1227. “. . . [T]he deliberate indifference standard embodies both an objective and a subjective prong. Objectively, the alleged deprivation must be ‘sufficiently serious,’ in the sense that ‘a condition of urgency, one that may produce death, degeneration, or extreme pain’ exists. Subjectively, the charged official must act with a sufficiently culpable state of mind . . . [T]he subjective element of deliberate indifference ‘entails something more than mere negligence . . . [but] something less than acts or admissions for the very purpose of causing harm or with knowledge that harm will result.’ The subjective element requires a state of mind that is the equivalent of criminal recklessness; namely, that the prison official ‘knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.’” *Hathaway v. Coughlin*, 99 F3d 550 at 553, *cert den sub nom, Foote v. Hathaway*, 513 US 1154 (citations omitted). The

inadvertent failure to provide proper medical care or negligence in the diagnosis and/or treatment by a prison physician or other medical personnel are insufficient to support an eighth amendment claim. See *Davis v. Goord*, 7 AD3d 889 and *Bryant v. Brunelle*, 284 AD2d 936.

Even if this Court ultimately determined that petitioner's repeated complaints of pain/pressure and other non-observable symptoms were sufficient to meet the objective prong (sufficiently serious medical need) of the cruel and unusual punishment test, it is clear that the subjective prong of that test (deliberate indifference) was not met. In this regard the Court finds that the facts and circumstances confronted by the United States Supreme Court in *Estelle v. Gamble*, 429 US 97 - and the manner in which the Supreme Court analyzed such facts and circumstances - are particularly relevant to the case at bar. Inmate Gamble injured his back while performing a prison work assignment and was repeatedly seen by prison medical staff who diagnosed his injury as a lower back strain, prescribed various pain medications/muscle relaxants, and ordered that petitioner's physical activities within the prison be substantially curtailed. Eventually Inmate Gamble was medically cleared to return to light physical activity but he refused, citing continued back pain.

The Supreme Court ultimately determined that Inmate Gamble's civil rights action complaint (42 U.S.C. §1983) failed to state an eighth amendment claim (cruel and unusual punishment). In this regard the *Gamble* court stated as follows:

“Gamble was seen by medical personnel on 17 occasions spanning a 3-month period . . . They treated his back injury . . . The doctors diagnosed his injury as a lower back strain and treated it with bed rest, muscle relaxants and pain relievers. Respondent contends that more should have been done by way of diagnosis and treatment, and suggests a number of options that were not pursued. The Court of Appeals agreed, stating ‘Certainly an x-ray of (Gamble’s) lower back might have been

in order and other tests conducted that would have led to appropriate diagnosis and treatment for the daily pain and suffering he was experiencing.’ But the question of whether an X-ray or additional diagnostic techniques or forms of treatment is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice . . .” 429 US 97 at 107 (citations omitted).

In the case at bar petitioner was seen by medical staff at the Upstate Correctional Facility numerous times, both before and after he filed Inmate Grievance UST-56086-15. Medical providers at Upstate prescribed antibiotics, ordered/reviewed an MRI of petitioner’s head and made an OMH (Office of Mental Health) referral. In view of the foregoing, the Court finds that the decision not to refer petitioner to an outside specialist or order further diagnostic tests (such as a CT scan) do not represent cruel and unusual punishment. Accordingly, the Court further finds that petitioner has not met his burden of demonstrating that the final determination of the CORC with respect to Inmate Grievance UST-56086-15 was irrational or arbitrary and capricious. *See Scott v. Goord*, 32 AD3d 638 and *Singh v. Eagen*, 236 AD2d 654.

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: February 19, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice