

Matter of Boone v Yelich
2016 NY Slip Op 30542(U)
March 25, 2016
Supreme Court, Franklin County
Docket Number: 2015-808
Judge: S. Peter Feldstein
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
HARVEY BOONE, #12-A-2525,
Petitioner,

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

DECISION AND JUDGMENT

RJI #16-1-2015-0470.64

INDEX # 2015-808

ORI #NY016015J

-against-

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility, and **T.
GERO**, Counselor, ORC,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Harvey Boone, verified on October 19, 2015 and filed in the Franklin County Clerk's office on October 27, 2015. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the determination that he is not eligible to be considered for an area of preference transfer. Petitioner's challenge appears to embody a challenge to the July 29, 2015 determination of the Inmate Grievance Program Central Office Review Committee (CORC) with respect to Inmate Grievance BRL-14018-15. The Court issued an Order to Show Cause on October 29, 2015 and has received and reviewed respondents' Answer and Return, verified on December 17, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated December 17, 2015. The Court has also received and reviewed petitioner's reply papers, dated December 30, 2015 and filed in the Franklin County Clerk's office on January 14, 2016.

The Commissioner of Correctional Services has broad discretion over the transfer of inmates within the New York State prison system and such discretion should not be disturbed absent clearly stated impermissible reasons. *See Taylor v. Kennedy*, 159 AD2d 827. *See also Lugo v. Goord*, 49 AD3d 1114, *Burr v. Goord*, 8 AD3d 853 and *Howard v. Miller*, 193 AD2d 988. Indeed, the Appellate Division, Third Department, has described the scope of the commissioner's discretion to transfer inmates from one facility to another as "almost unbridled." *Salahuddin v. Coughlin*, 202 AD2d 835, 836, quoting *Johnson v. Ward*, 64 AD2d 186, 188. Notwithstanding the foregoing, the *Salahuddin* court specifically held that the commissioner's broad authority ". . . does not permit transfers that are made for the purpose of denying an inmate a constitutional right, or in retaliation for the exercise of such a right." 202 AD2d 835, 836 (citation omitted).

In a February 9, 2011 memorandum (originally issued June 30, 2004) the Deputy Superintendent (Programs) at the Bare Hill Correctional Facility spelled out the criteria that must be met in order for an inmate to be considered eligible for transfer to a DOCCS facility closer to his/her home ("an area of preference transfer"). The stated purpose for establishing such criteria was ". . . to reward inmates who have shown positive behavior and who have consistently programmed appropriately." Three criteria are set forth in the memorandum. First, "[i]nmates will only be considered for movement to an area of preference at the first quarterly review after they have been in the Hub for at least two years (since their most recent admission)." Second, "[i]nmates will only be considered for an area of preference transfer when they have participated successfully in major programs: Academic, Vocational, Work, Substance Abuse, Aggression, Sex Offender Counseling and Transitional Services Programs." Third, "[i]nmates must have acceptable

disciplinary adjustments . . .” The memorandum states that “acceptable disciplinary adjustments” include no more than 60 days of keeplock or special housing unit confinement in the past two years, no loss of good time in the last two years and no disciplinary infractions in the last two years for certain specified offenses.

The record in this proceeding reflects that at a Tier II Disciplinary Hearing conducted on September 26, 2014 petitioner was found guilty of violating inmate rules 113.11 (altered item) and 113.15 (unauthorized exchange). The disciplinary penalties imposed included some sort of cube confinement as well as the loss of various privileges. Petitioner apparently served these dispositional penalties until October 15, 2014.¹

Petitioner’s April 30, 2015 inmate grievance complaint (BRL-14018-15) was filed on May 6, 2015. In his complaint petitioner stated as follows: “I am putting in this grievance because I been here at Bare Hill for 3 years and on 4/23/15 my counselor . . . informed me that my [area of] preference transfer has been denied because central office is saying I’m not program satisfied, which I been program satisfied since my first year here.” As further set forth in his inmate grievance complaint, petitioner specifically requested that he “. . . would like this issue to be fully investigated because there must be a mistake made.”

On or about May 14, 2015 the Inmate Grievance Resolution Committee at the Bare Hill Correctional Facility responded to petitioner’s grievance as follows: “Grievant is not

¹ The limited record in this proceeding does not specify the exact term(s) of the dispositional penalties imposed at the underlying disciplinary hearing. The record does indicate, however, that by memorandum dated October 7, 2014 Deputy Superintendent Phelix stated that he had reviewed the record of petitioner’s September 26, 2014 disciplinary hearing (presumably pursuant to 7 NYCRR §253.9) and that “[e]ffective October 15, 2014 the remainder of your cube confinement, loss of recreation, packages, commissary and phones will be restored.”

currently eligible for an area [of] preference transfer due to a disciplinary removal from his work assignment on 10/5/14.” In his May 18, 2015 administrative appeal to the facility superintendent petitioner asserted, in relevant part, as follows: “I was removed from my I.P.A. [Inmate Program Associate] program ^[2] due to a Tier II misbehavior report that had nothing to do with my I.P.A. program. Removal from the I.P.A. program does not automatically make me ineligible for an area preference transfer . . . The I.P.A. Program is not a mandatory/major program, it is a volunteer program, removal from a volunteer program does not automatically disqualify me for an area preference transfer.”

In a May 29, 2015 decision on administrative appeal the Superintendent of the Bare Hill Correctional Facility (respondent Yelich) found, in relevant part, as follows: “Grievant was submitted for transfer by his ORC [Offender Rehabilitation Coordinator] in October 2014. Grievant was removed from his work assignments of IPA and Porter 10/5/14 due to disciplinary. Consequently, transfer was denied by Central Office. April 2015 GNC401 report indicates grievant remains ineligible for a lateral transfer due to negative status in his Program Plan.” In his June 9, 2015 administrative appeal to the CORC from the facility superintendent’s determination petitioner first appeared to call into question the sufficiency of the evidence underlying the findings of guilt at the underlying Tier II Disciplinary Hearing. He then went on to assert that he was not found guilty of any drug-related, gang-related or violence-related infraction and, in addition,

² One pathway whereby an “eligible offender” (Correction Law §803-b(1)(a)) may receive a “limited credit time benefit” (Correction Law §803-b(1)(b)) is for him/her to “successfully participate as an inmate program associate for no less than two years . . .” Correction Law §803-b(1)(c)(iii). The record herein suggests that petitioner participated in an Inmate Program Associate position (7 NYCRR §290.2(d)(3)) at the Bare Hill Correctional Facility from January 20, 2014 to October 5, 2014 when he was apparently removed from his IPA position based upon the results and disposition of the Tier II Disciplinary Hearing of September 26, 2014.

that he was not found guilty of any of the disciplinary infractions specified in the February 9, 2011 memo as disqualifying an inmate from consideration for an area preference transfer. He then went on to assert the following:

“I have all major programs satisfied, I have been in DOCCS for over 3 years and have been at this facility for 3 years and this misbehavior report is the only one I’ve received during my incarceration . . . Because of the fact I was the facilitator of the Nations of Gods and Earth (NOGE) the denial of my transfer request was retaliatory and biased because the disposition I received far exceeds what is usual, normal, and even proper for what I was charged with, a Kufi . . . My reason for my claim of bias is also due to the overwhelming anti-Muslim sentiment that is prevalent throughout this facility.” (Emphasis in original).

By final determination on administrative appeal dated July 29, 2015 the CORC upheld the determination of the facility superintendent for the reasons stated by the superintendent. The following was set forth in the final CORC determination:

“CORC asserts that Correction Law grants DOCCS the discretion to transfer inmates between its correction facilities. Further, CORC asserts that an area of preference transfer is a privilege, not a right, and the inmates are not entitled to house in a hub or correctional facility of their choice. CORC notes that the grievant received a MBR [misbehavior report] for unauthorized exchange and possessing an altered item on 9/22/14. He was removed from his porter assignment in industries and his IPA position on 10/5/14 for disciplinary reasons. CORC further notes that he is not being considered for an area of preference transfer at this time and should address any further concerns to his assigned Offender Rehabilitation Coordinator (ORC).

CORC notes that the grievant has raised a separate issue in his appeal statement that was not addressed in his original complaint. CORC has not been presented with sufficient evidence of malfeasance by staff and advises him that disciplinary dispositions are non-grievable in accordance with Directive #4040.”

As this Court understands the area of preference transfer process, an inmate who meets the criteria set forth in the February 9, 2011 memorandum is referred by facility-level DOCCS staff to the DOCCS Commissioner (presumably through the DOCCS Office of Classification and Movement) for final determination as to whether or not the inmate is to be transferred. As alluded to previously, the DOCCS Commissioner is vested with broad, almost unbridled, discretion with respect to the transfer inmates from one facility to another. Therefore, the mere fact that an inmate may have met the area of preference transfer criteria set forth in the February 9, 2011 memorandum does not bind the DOCCS Commissioner in the exercise of his broad discretion. *See Lugo v. Goord*, 49 AD3d 1114, *lv denied* 10 NY3d 714 (dictum). In any event, on October 21, 2014 facility-level officials at the Bare Hill Correctional Facility apparently referred petitioner to the DOCCS central office for transfer consideration with the following notation: “SUBJECT [petitioner] APPEARS ELIGIBLE FOR SECURITY REDUCTION AND AREA OF PREFERENCE TRANSFER CONSIDERATION. REMAINING NEEDS ARE PHASES 2 AND 3 TRANSITIONAL.” On November 4, 2014, however, DOCCS central office denied the transfer as follow: “PRESENT PLACEMENT APPROPRIATE.” Given the broad, almost unbridled, discretion vested in the DOCCS Commissioner with respect to the transfer of inmates from one facility to another, this Court simply finds no basis to intervene in the determination not to transfer petitioner from the Bare Hill Correctional Facility. In this regard the Court notes that petitioner’s bald, conclusory allegations of religious bias/discrimination underlying the denial of his transfer request - raised for the first time in his administrative appeal to CORC from the May 29, 2015 determination of the facility

superintendent in Inmate Grievance BRL-14018-15 - are patently insufficient to support any finding of a proscribed motive underlying the denial of transfer.

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 25, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice