Matter of Green v Uhler
2016 NY Slip Op 30862(U)
May 9, 2016
Supreme Court, Franklin County
Docket Number: 2014-304
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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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

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

-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.

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The above-captioned proceeding, brought pursuant to Article 78 of the Civil Practice Law and Rules, now comes before the Court by the motion of petitioner Shawn Green (hereinafter "petitioner"), returnable August 7, 2015, in which petitioner seeks leave to renew and reargue a prior Decision and Judgment of this Court, dated May 20, 2015, (2015 N.Y. Slip Op. 31290 [U]), which dismissed the underlying petition. *See* CPLR §2221(d). Specifically, petitioner seeks leave to renew his challenges to several grievance proceedings that were dismissed as moot and seeks leave to reargue his challenge to the outcome of a tier III Superintendent's Hearing that was held on April 1, 2014.

In response to petitioner's motion, the Court has received an Affirmation from respondents' attorney Christopher J. Fleury, Esq., Assistant Attorney General. In said Affirmation, counsel opposes the relief requested in petitioner's motion, arguing that the application should have been in the nature of a motion for relief from a prior judgment or order pursuant to CPLR § 5015[1], rather than as a motion for leave to renew and reargue

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[1] Counsel's Affirmation consistently refers to "CPLR §5105", rather than correctly citing to CPLR §5015. The Court hereby takes judicial notice of the fact that a motion for relief from a prior judgment or order is governed by the provisions of CPLR §5015. The Court can only presume that counsel's citation to

pursuant to CPLR §2221.

In the interest of judicial economy, the Court shall duly consider petitioner's application under the statutory framework of a motion for reargument brought pursuant to CPLR §2221, as well as that of a motion for relief from a prior judgment or order, made pursuant to CPLR §5015.

Inasmuch as petitioner seeks renewal pursuant to CPLR §2221(e), the Court hereby denies petitioner's application, as motions to renew are "not the proper procedural vehicle to address a final judgment" of dismissal. *Maddux v. Schur*, 53 AD3d 738, 739, *citing*, *Gorman v. Hess*, 301 AD2d 683, 686 and *Matter of Urbach*, 252 AD2d 318, 320-321. Rather, such applications are more properly couched as motions for relief from a judgment or order based upon newly discovered evidence. *See* CPLR §5015 (a)(2); *see also James v. Shave*, 62 NY2d 712, 714 (holding that appellant's "motion to vacate the prior judgment, if available at all, would be made pursuant to CPLR 5015, not CPLR 2221").

As is more thoroughly set forth below, the Court shall deny petitioner's motion for reargument, as he has failed to show that matters of fact or law were overlooked or misapprehended by the Court in rendering its prior Decision and Judgment. Moreover, petitioner's application, inasmuch as it is a motion for relief from a prior judgment or order, shall be similarly denied, as petitioner has failed to sufficiently demonstrate that the newly discovered evidence, particularly petitioner's transfer back to Upstate Correctional Facility (hereinafter "Upstate"), would have likely produced a result other than dismissal of the underlying petition. *See* CPLR §5015 (a)(2).

Procedural History:

The instant proceeding was commenced upon the filing of a Verified Petition on April 18, 2014. In his pleading, petitioner challenged the results of various inmate grievance proceedings as well as the results and disposition of a Tier III Superintendent's Hearing that was conducted on April 1, 2014. Petitioner also requested that the Court issue a Preliminary Injunction and Temporary Restraining Order pursuant to the provisions of CPLR §§6311 and 6313.

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the incorrect section of law represents a typographical error, which shall be hereby disregarded, as Petitioner has not been prejudiced by the defect in citation. *See generally* CPLR §2101(f).

Having issued an Order to Show Cause in the matter, the Court subsequently received and reviewed respondents' Answer and Return and Letter Memorandum, as well as petitioner's Reply thereto. Furthermore, the Court has duly considered the allegations raised in petitioner's Third Amended Petition, the documentation set forth in respondents' supplemental Answer and Return along with the arguments contained in the corresponding Letter Memorandum. The Court has also taken into consideration petitioner's Reply to respondents' supplemental filings, as well as the arguments and information contained in respondents' second set of supplemental filings, dated April 5, 2016.

In the process of reviewing the underlying proceeding, it came to the Court's attention that petitioner was transferred from the Upstate Correctional Facility to the Elmira Correctional Facility. As such, by Letter Order, dated March 17, 2015, the Court directed petitioner and respondents' counsel to submit supplemental memoranda of law regarding the issue of mootness based upon petitioner's transfer from Upstate. Having received the requested submissions, and having reviewed the memoranda and the accompanying documentation, the Court issued its Decision and Judgment, dated May 20, 2015, finding that all but one of petitioner's grievance proceedings pertained exclusively to Upstate staff or policies. The Court found, however, that the allegations set forth in Grievance Complaint No. UST-53564-14 raised issues of State-wide policies of the New York State Department of Correction and Community Supervision (hereinafter "DOCCS"), which would survive petitioner's transfer from one correctional facility to another. Notwithstanding the foregoing, petitioner's Third Amended Petition was ultimately dismissed in relation to Grievance Complaint No. UST-53564-14, as the record demonstrated that petitioner failed to exhaust his administrative remedies, thereby precluding judicial review of the findings made by the Inmate Grievance Resolution Committee (hereinafter "IGRC"). *See Fulton v. Reynolds*, 83 AD3d 1308 and *Torres v. Fischer*, 73 AD3d 1355, 1356.

The Court found that all of petitioner's remaining grievance claims were made against Upstate directly and not DOCCS as a whole. As such, the Court found that based upon his transfer, petitioner was no longer aggrieved by Upstate's staff and policies, such

that any challenges thereto had been rendered moot. *See Dawes v. Annucci*, 125 AD3d 1035, *Sylvester v. Fischer*, 124 AD3d 1411 and *Ortiz v. Simmons*, 67 AD3d 1208. Accordingly, the remaining portions of the Third Amended Petition relating to petitioner's grievance proceedings were dismissed as moot.

With regard to the outcome of petitioner's April 1, 2014 Tier III Superintendent's Hearing, respondents' counsel conceded that the "determinations in this disciplinary hearing remains (*sic*) with [p]etitioner even when transferred to another facility, the portions of the Petition relating to this proceeding [were] not rendered moot by his relocation to Elmira Correctional Facility." Respondents' Letter Memorandum, dated March 24, 2015 at pg. 2. As such, the Court reviewed petitioner's challenge to the superintendent's hearing on the merits, ultimately dismissing all remaining claims in the Third Amended Petition.

Petitioner's motion for renewal and reargument ensued.

Petitioner's Motion for Reargument Pursuant to CPLR §2221:

In his supporting Affirmation, petitioner asserts that he was transferred back to Upstate on June 11, 2015 and that he is once again aggrieved by the policies of Upstate that he previously challenged. Petitioner contends that his transfer back to Upstate "in and of itself" will likely change the results of the Court's recent decision, particularly in relation to his grievance proceedings. Petitioner further avers that the Court "conveniently ignored sufficient facts contained in [the] record for tier III Superintendent's disciplinary hearing conducted on April 1, 2014, regarding Officer R. Richard's March 21, 2014 misbehavior report, particularly". He also argues that Nurse P. Roberson, had no knowledge of the reason for petitioner's podiatry consultation, thereby demonstrating that the requested testimony of the podiatrist, which was denied by the hearing officer, "was crucial and material to [p]etitioner's defense".

Furthermore, petitioner contends that had the Court reviewed the "consultation request form" which he requested from his employee assistant (*see* Respondents' Supplemental Answer and Return at Exhibit "O"), it would have shown that his doctor never informed Officer Richards to instruct petitioner to only to remove his right boot and sock, thereby causing Officer Richards' instruction that petitioner keep his left boot on

sock on to be given outside the scope of the officer's official duties.

"'[I]t is well settled that a motion for leave to reargue pursuant to CPLR 2221 is addressed to the sound discretion of the court and is properly granted upon a showing that the Court overlooked or misapprehended the facts and/or the law or mistakenly arrived at its earlier decision (*Peak v. Northway Travel Trailers*, 260 AD2d 840, 842, 688 NYS2d 738 [1999])'". *Loris v. S&W Realty Corp.*, 16 AD3d 729, 730. Moreover, "a motion to reargue – as distinguished from a motion to renew – does not require new proof and can be premised upon the court overlooking or misapprehending pertinent facts or law". *Paterno v. Strimling*, 107 AD3d 1233, 1234.

Bearing this standard in mind, the undersigned hereby finds that petitioner has failed to demonstrate how the Court overlooked or misapprehended issues of fact or law in rendering the May 20, 2015 Decision and Judgment. Having thoroughly reviewed the record as it stands before it, the Court is not persuaded by petitioner's arguments in relation to the hearing officer's denial of petitioner's evidentiary requests. After receiving Nurse Roberson's testimony regarding the underlying incident, the Hearing Officer denied petitioner's request to have the podiatrist called as a witness, finding that his testimony would be redundant to that which was proffered by the nurse. *See* Respondent's Supplemental Answer and Return at Exhibit "M", pgs. 14 – 20.

"An inmate may not be disciplined without being afforded the opportunity to call and present witnesses, but that right is conditional. If a Hearing Officer has determined that the testimony of the requested witnesses would be redundant, irrelevant or threatening to the facility's safety, he is under no obligation to call them. (*Internal citations omitted*) *Matter of Lewis v. Lacy*, 233 AD2d 637; *see also Matter of Escoto v. Goord*, 9 AD3d 518, 519. Moreover, with regard petitioner's request that "any inmate on callout" at the time of incident in question be called to testify, the hearing officer properly denied the request "because they were not in the vicinity of the incident at the time it occurred. Inasmuch as they did not have personal knowledge of facts pertinent to the charges, their testimony was irrelevant." (*citation omitted*) *Tafari v. Fischer*, 94 AD3d 1324, 1325, *lv. denied*, 19 NY3d 807.

Furthermore, the hearing officer noted that petitioner had been informed by his

employee assistant to make a Freedom of Information Law (hereinafter "FOIL") request to obtain the documentation he sought. *See* Respondent's Supplemental Answer and Return at Exhibit "O". At the disciplinary hearing, the hearing officer reviewed the Assistant Form, stating on the record that "there is (*sic*) some items that [petitioner] was instructed he could FOIL .... [T]he consultation report and the patient bill of rights, um, was part of that FOIL request that he could make. As far as any medical related information as well. And the job description is denied because it's not relevant, relevant to the actual hearing." *Id*. at Exhibit "M", pg 5.

A hearing officer may properly deny a request for documentary evidence that is irrelevant to the underlying disciplinary charges. *See Matter of Macedonio v. Fischer*, 116 AD3d 1313, *Matter of Barnes v. Prack*, 87 AD3d 1251, 1252, *Matter of Pujals v. Fischer*, 87 AD3d 767. Furthermore, a hearing officer may properly deny a request for relevant documentary evidence, if "an adequate justification for the denial of [the inmate's] request" is provided. *Marshall v. Fischer*, 103 AD3d 726, 802, *see generally Matter of Torres v. Goord*, 261 AD2d 759, *Matter of Cowart v. Coughlin*, 193 AD2d 887. To the extent that the requested documentation was relevant to the underlying disciplinary proceeding, the record reflects that petitioner's employee assistant provided him with advance notice of the proper manner in which he could obtain the documentation he sought. Thereafter, he failed to make the appropriate FOIL request. In light of petitioner's acquiescence, the Hearing Officer reasonably denied petitioner's request. Accordingly, and based upon the foregoing, the Court hereby denies petitioner's motion for reargument, as the undersigned is not persuaded that the Court misapprehended or overlooked issues of fact or law in rendering its May 20, 2015 Decision and Judgment.

Petitioner's Motion for Relief From Prior a Judgment or Order Pursuant to CPLR §5015:

As noted above, respondents' counsel contends that petitioner's motion should be denied on procedural grounds, in that the application should have been made pursuant to the provisions of CPLR §5015, rather than section 2221 of the CPLR. Moreover, counsel argues that even if petitioner had moved pursuant to CPLR §5015, his application is insufficient, as what he claims to be newly discovered evidence, *i.e.* petitioner's transfer back to Upstate, is not what is contemplated as "newly discovered evidence" for purposes

of CPLR §5015.

Counsel for respondent correctly argues that "'[o]nly evidence which was in existence but undiscoverable with due diligence at the time of judgment may be characterized as newly discovered evidence'". *Pezenik v. Milano*, 137 AD2d 748, *quoting Matter of Commercial Structures v. City of Syracuse*, 97 AD 965, 966; *see also Matter of Dyno v. Village of Johnson City*, 255 AD2d 737, 737-738. The fact that petitioner had been transferred back to Upstate was not in existence at the time of issuance of the May 20, 2015 Decision and Judgment, as his transfer back had yet to occur. Therefore, it is not the type of fact that can be relied upon in moving for relief from a judgment or order pursuant to the provisions of CPLR §5015, and, as such, petitioner's application must be denied.

Discretionary Review of Petitioner's Grievance Proceedings Previously Dismissed as Moot:

The Court finds that the lack of a procedural means by which to raise the issue of his transfer back to Upstate has prejudiced petitioner by impeding the Court's ability to review his challenge to the grievance proceedings on the merits. Accordingly, in the interest of justice, the Court shall exercise its inherent discretion to revisit its prior Judgments and Orders, by vacating the May 20, 2015 Decision and Judgment as it relates to petitioner's challenges to the outcome of his grievance proceedings which were dismissed as moot.

During the course of the Court's discretionary review of petitioner's grievance proceedings it became apparent that respondent's Answer and Return was incomplete in relation to several of the grievance proceedings challenged in the Third Amended Petition. As such, the undersigned issued a Letter Orders, dated January 19, 2016 and March 22, 2016, directing counsel for respondents to submit supplemental answering papers relating to an enumerated set of grievance complaints, along with petitioner's administrative appeals thereof.

The Court is in receipt of respondents' Supplemental Returns and the accompanying Letter Memorandums of Christopher J. Fleury, Esq., dated February 19, 2016 and April 5, 2016. In addition, petitioner has provided the Court with a supplemental letter reply, dated February 26, 2016 as well as a second supplemental letter reply, dated April 22, 2016. The Court has duly considered the parties' respective submissions and the

assertions and information contained therein.

In his Third Amended Petition, petitioner asserts the following First Amendment claims: 1.) Respondent Woodard infringed upon prisoners' ability to file grievances regarding DOCCS policies and to exhaust their administrative remedies; 2.) Improper treatment of petitioner's greeting card as oversized postage, despite the fact that petitioner had purchased the greeting card at Upstate's commissary; and 3.) Respondents repeatedly refused to provide petitioner with his subscribed issues of Hip Hop Weekly magazine, based upon the recommendations of Upstate's Media Review Committee.

Next, petitioner raises the following Eighth Amendment claims: 1.) The testing and treatment of petitioner's diabetes by Upstate's medical department is inadequate; 2.) Upstate personnel failed to provide reasonable accommodations to prisoners with medical needs; 3.) Upstate's infirmary care unit was "totally overall dysfunctional for patients' placement" (*see* Third Amended Petition at ¶12); 4.) Upstate's medical staff failed to follow standard medical orders and protocols; and 5.) Upstate staff failed to provide prisoners suffering from diabetes with routine dental examinations and prohibited inmates housed in its special housing unit (hereinafter "SHU") from purchasing certain dental items from Upstate's commissary.

Petitioner also raises the following claims of status discrimination: 1.) Upstate failed to set a rotating or alternating exercise and recreation schedule for its SHU inmates; 2.) SHU inmates transferred to Upstate from other DOCCS facilities were denied access to, and possession of, cosmetic goods that were purchased at other facilities; and 3) Upstate staff prohibited SHU inmates from taking pictures with their visitors and did not allow them to purchase items from the vending machines, whereas "cadre prisoners [are] permitted to do" so. Third Amended Petition at ¶19.

Petitioner also claims that he has been denied equal protection of law, based upon the following claims: 1.) As a result of Upstate's SHU progressive inmate movement system (hereinafter "PIMS"), petitioner was deprived of several of his personal belongings and legal materials; 2.) Upstate unlawfully imposed the PIMS system upon petitioner despite his unwillingness to participate in the same; and 3.) There have been occasions when Upstate staff provided its SHU units with "[s]ubstandard food rations ... as a means of corporal punishment". Third Amended Petition at ¶22.

Finally, petitioner advanced two Due Process claims. *See Id.* at ¶¶23 – 29. Inasmuch as these claims related exclusively to petitioner's April 1, 2014 Tier III Superintendent's hearing, and do not reference or raise issues related to a grievance proceeding, the undersigned is unwilling to review or reconsider such claims, as the Court's Decision and Judgment, dated May 20, 2015, (2015 N.Y. Slip Op. 31290 [U]) dismissed petitioner's due process claims, after having addressed his challenges to the disciplinary proceeding upon the merits.

Petitioner's First Amendment Claims:

As is set forth in his Grievance Complaint No. UST-53723-14, petitioner contends that the inmate grievance program (hereinafter "IGP") is engaged in the discriminatory practice of screening his grievances, prior to assigning them a formal identification number. A copy of Grievance Complaint No. UST-53723-14 and the administrative findings made thereon are annexed to respondents' Supplemental Answer and Return at Exhibit "B". The record reflects that on April 2, 2014, the Inmate Grievance Resolution Committee (hereinafter "IGRC") found that proper procedures had been followed, indicating that "[p]er Directive #4040; all grievances are filed and investigated in accordance with the directive. The grievance program is intended to supplement, not replace, existing formal or informal channels of problem resolution as set forth in section 701.3.(A)." Respondents' Supplemental Answer and Return at Exhibit "B". The IGRC's determination was thereafter confirmed by the Acting Superintendent, noting that "[t]he greivant is assured that all of his grievances are processed in accordance with Directive # 4040." *Id.*

The record reflects that the corresponding determination by DOCCS' Central Office Review Committee (hereinafter "CORC") is annexed to respondents' March 24, 2015 Letter Memorandum as Exhibit "B". On August 6, 2014, CORC unanimously denied petitioner's grievance as without merit, upholding Upstate's "discretion of the facility administration," and ultimately concluding that "CORC has not been presented with sufficient evidence to substantiate discrimination or malfeasance by staff." Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B".

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 A.D.3d 1371, 1372 (*citations omitted*). *See Williams v. Goord*, 41 A.D.3d 1118, *lv denied*, 9 N.Y.3d 812. Having thoroughly searched the record, the Court finds that petitioner has failed to carry this burden with regard to his initial First Amendment claim. Other than petitioner's speculative assertions, there is simply nothing in the record to support his claim that Upstate's IGRC engages in a systematic, discriminatory practice of screening petitioner's grievances in advance of formally accepting them for filing. Accordingly, the Court finds the CORC's denial of Grievance Complaint No.: UST-53723-14 was neither irrational, nor an arbitrary and capricious abuse of discretion, and, as such, petitioner's claim is dismissed.

In the second of his First Amendment claims, which relates to petitioner's greeting card being treated as oversized postage, respondents argue that petitioner failed to exhaust his administrative remedies by filing a grievance complaint in advance of seeking a judicial determination on the matter. As such, counsel argues that petitioner should now be precluded from raising this claim before the Court.

In petitioner's Reply, he contends that "[n]umerous grievance complaints submitted to Upstate's Inmate Grievance Program ("IGP") were either discarded or purposely delayed in processing". This practice allegedly included his grievance in which he complains about the greeting card he purchased from Upstate's commissary being treated as oversized postage. Petitioner further argues that Upstate's actions he seeks to challenge are "unconstitutional; wholly beyond its grant of power and whose administrative remedies [are] futile, all exceptions to [the] exhaustion rule. Watergate II Apts v. Buffalo Sewer Auth., 46 N.Y.2d 52, 57."

Initially, absent the foregoing assertions, petitioner has wholly failed to offer any type of evidence demonstrating that he has followed the grievance procedure set forth 7 NYCRR §701.5 with regard to the greeting card issue, and, as such, he has failed to exhaust his administrative remedies. *See White v. State*, 117 AD3d 1250, 1251, *Hines v. Fischer*, 101 AD3d 1204, 1205, *Hawes v. Fischer*, 119 AD3d 1304, 1305. Moreover, petitioner has failed to articulate how his claim falls within one of the cognizable exceptions to the exhaustion doctrine; therefore, the Court shall hereby deny the second of petitioner's First Amendment claims. *See Cliff v. Russell*, 264 AD2d 892, 893.

In his next claim, petitioner seeks to challenge to outcome of Grievance Complaint No. UST-53918-14. *See* Respondents' Answer and Return at Exhibit "D". In this grievance, petitioner sought recompense, in kind or via monetary reimbursement, for the issues of Hip Hop Weekly that Upstate withheld from him. On April 29, 2014, the IGRC issued its finding which closed and dismissed petitioner's grievance on the basis he "was seeking a decision or an appeal of a decision otherwise attainable through the established procedures for: (1) media review programs". Respondents' Supplemental Answer and Return at Exhibit "D".

In respondents' August 14, 2014 Letter Memorandum, counsel argues that IGRC properly dismissed Grievance Complaint No. UST-53918-14 "because the relief requested could otherwise be obtained through the established procedures for the Media Review Program . . . Directive #4040 §701.3 (e)(2) indicates that a disposition from the Media Review Committee is not a grievable issue. Therefore, Petitioner's claim must be dismissed."

In response thereto, petitioner states in his Reply that "[r]esolution of Upstate's discriminatory media review practices solely targeting Hip Hop Weekly magazines, infringing upon Petitioner's constitutional right, were sought through several channels meeting exhaustion requirements. Ans Exh. D, Petitioner Exhibit ("Peti. Exh.")1.". The record reflects that Exhibit "1" to petitioner's Reply consists of determinations made by DOCCS' Central Office Media Review Committee (hereinafter "COMRC"), dated July 9, 2014 and December 5, 2014. In both determinations, COMRC affirmed the findings of Upstate's Media Review Committee as the publication violated Guideline E of Directive #4572.

Pursuant to the provisions of 7 NYCRR §701.3 (e)(2), "[a]n individual decision or disposition of the . . . media review committee is not grievable." Given that the claim raised in Grievance Complaint No. UST-53918-14 is not grievable, the Court hereby finds that petitioner has failed to demonstrate how its denial constituted an arbitrary and capricious determination on the part of any of the above-named respondents.

PETITIONER'S EIGHTH AMENDMENT CLAIMS:

The first of petitioner's Eighth Amendment claims relates to Upstate medical unit's purported inadequate testing and treatment of petitioner's diabetes. *See* Third Amended

Petition at ¶10. In his August 14, 2014 Letter Memorandum, respondents' counsel argues that petitioner failed to file a grievance on this issue, and, as such, he has failed to exhaust his administrative remedies and should be precluded from seeking judicial review of the same. However, the tenth paragraph of petitioner's Third Amended Petition cites to Grievance Complaint No. UST-53718-14, which has been provided for the Court's review in respondent's Supplemental Return. *See* Respondent's Supplemental Return at Exhibit "R".

As is set forth in Grievance Complaint No. UST-53718-14, petitioner complained of Upstate's daily testing and treatment regimen of his diabetes. Petitioner requested that he "be provided with adequate medical care by a physician who posses[es] the requisite knowledge and skill to adjust January 8, 2014 endocrinologist request and report of consultation, an endocrinology appointment be submitted and approved, grievant be place under the care of a facility health service director with better[,] more suitable (*sic*) to provide better medical care". *Id.*

In a decision dated April 16, 2014, the IGRC denied petitioner's grievance, finding that the treatment and care of petitioner's diabetes by Upstate medical staff was within the "community standard of care". *Id.* In so doing, the IGRC stated the following:

> "Grievant claims he is receiving inadequate medical care for his diabetes – claims Dr. Kumar does not know what he is doing. The chart was reviewed. The grievant is receiving proper medical care for his diabetes. Lantus Insulin can be given either in the evening or in the morning. Lantus is a 24 hour Insulin according to the patient's blood sugar. This is called a sliding scale. This is the way Dr. Kumar has handled the grievant's diabetes which is the community standard of care." *Id.*

Petitioner thereafter appealed the denial to respondent Uhler, who subsequently affirmed the IGRC's findings for the reasons stated in the committee's written determination, further noting that petitioner's grievance had been investigated by M. Sturgen, Acting N.A. *See* Respondent's Supplemental Return at Exhibit "R". Petitioner appealed the Superintendent's determination to CORC and provided the following statement of appeal: "Contrary to incompetent medical personnel investigation[,] grievant's only accorded the opportunity to receive regular Insulin coverage before

breakfast and dinner, but not lunch, rarely in A.M. is coverage given compared to P.M. that is in the three to hi (*sic*) ranges daily, which the bozo Dr. Mandalaywama has made no attempt to regulate". *Id.*

By written decision, dated August 20, 2014, CORC upheld respondent Uhler's determination, and in so doing, CORC summarized the care and treatment regimen received by petitioner, including multiple instances of lab work and his being seen by a diabetic chronic care clinic. CORC noted that petitioner "was not entitled to be seen by the health care provider of his choice". CORC further indicated that as Upstate's Facility Health Services Director ("FHSD"), respondent Mandalaywama has "the responsibility of determining what outside health referrals are needed by the target population. Outside specialists may only make recommendations for treatment; however, the implementation of those recommendations is at the discretion fo the FHSDs, based on their professional judgment." *Id.* In conclusion, CORC found that it had "not been presented with sufficient evidence to substantiate improper medical care, and advised [petitioner] to address further concerns via sick call." *See* Respondent's Supplemental Return at Exhibit "R".

As is set forth in his Supplemental Letter Memorandum, dated February 19, 2016, counsel for respondents argues that his clients "properly investigated and addressed all of [p]etitioner's complaints. The final determination was appropriately based upon the rules and regulations governing grievances and health service policies. The reasons for the determination were clearly stated and were rationally based." As such, respondents' attorney argues that petitioner's claim should be dismissed.

The record clearly reflects that CORC's determination is founded upon a rational basis and was made in accordance with the law. The Court hereby finds that petitioner has failed to satisfy his heavy burden of showing that CORC's findings were irrational or arbitrary and capricious, and, as such petitioner's claim, relating to the outcome of Grievance Complaint No. UST-53718-14 is denied.

In his next Eighth Amendment claim, petitioner seeks to challenge Upstate's refusal to provide prisoners with medical needs, such as himself, reasonable accommodations to ensure that proper medical treatment is received. Specifically, petitioner challenges the outcome of Grievance Complaint No. UST-53580-14, in which he requested "to be moved to an open cell company on the flats in a front cell, grievant be restricted/prohibited from

being housed in any facility SHU with solid constructed doors - including [that] such be stamp[ed] on the front of his medical chart and guidance file." Respondents' Answer and Return at Exhibit "E".

In a decision dated April 16, 2014, the IGRC denied petitioner's grievance, making the following findings:

> "Grievant claims he can't (*sic*) be house in cell with solids doors and needs a cell at the front of the gallery due to his brittle diabetes. The chart was reviewed. The grievant is a diabetic. Security rounds are made every 30 minutes. The cell doors have new large windows that staff can easily see into. It is easy to hear an inmate call out for help. The grievant is double bunked so he is not alone in the cell. There are many diabetic inmates at Upstate and they all do well in these cells. The department has no policy that diabetics need an open cell or deed to be at the front of their gallery." *Id.*

For the same reasons, on April 29, 2014, respondent Uhler affirmed the IGRC's findings and petitioner appealed the determination to CORC. By decision dated September 17, 2014, CORC upheld the respondent Uhler's determination, noting that petitioner's diabetes is being appropriately monitored by Upstate medical staff, that "there is currently no medical indication to move him to the front of the gallery, or to a cell with open bars" and "the grievant is not entitled to [be] house[d] where he chooses." Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B". Ultimately, CORC concluded that it had "not been presented with sufficient evidence of inadequate medical care or negligence by staff." *Id.*

Petitioner contends that his rights under the Eighth Amendment to the U.S. Constitution (prohibiting cruel and unusual punishment) were violated by the respondents' failure to provide him with housing accommodations to ensure prompt care and treatment of petitioner's diabetes. 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. *Estelle v. Gamble*, 429 US 97 at 104. *See 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' exits. Subjectively, the charged official must act with a sufficiently cupable 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 or 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*).

Bearing this standard in mind, the record supports CORC's finding that petitioner's medical needs are being sufficiently met, and, as such, petitioner is unable to show that respondents are deliberately indifferent to the care and treatment of his diabetes. *See Shomo v. Zon*, *supra*, 35 AD at 1227. Petitioner has failed to demonstrate that CORC's disposition of Grievance Complaint No. UST-53580-14 was either irrational or arbitrary and capricious.

The third of petitioner's Eighth Amendment claims relates to Grievance Complaint No. UST-53660-14, in which he complains that his health and well being were jeopardized by his placement in Upstate's infirmary from February 17, 2014 through March 11, 2014. *See* Respondents' Answer and Return at Exhibit "F". In his grievance, petitioner asserted that the intercom system in his infirmary room was inoperable, and, as such, he was not able "to summon help being out of sight and sound of nursing staff/station in room two behind two doors", which petitioner claims is in violation of DOCCS' health service policy manual. Respondents' Answer and Return at Exhibit "F".

On March 11, 2014, petitioner submitted a related grievance, which was also assigned Grievance Complaint No. UST-53660-14. *See Id.* In this matter, petitioner noted that during his stay in the infirmary he sought medical information regarding diabetic conditions known as "dawn phenomenon" and "somology". Petitioner claims that Upstate's nursing staff informed him that they were "not allowed to provide prison patients with such information [and that] he'd have to get it off the internet somehow."

Id. It is petitioner's contention that such information should have been made available to him in accordance with the patient's Bill of Rights, and, as such, he requested that "a memorandum be issued to all nursing staff, informing them of the patient's Bill of Rights and the symptoms, causes and treatment of dawn phenomenon and somology (a/k/a rebound hyperglycemia).

On April 16, 2014, the IGRC denied petitioner's greivance, noting the following:

> "[t]he grievant was placed in cell #4 across from the nurse's station. The nurse can see the inmate at his window. The nurse makes at least hourly rounds and more frequent if the inmate's condition warrants. At no time, while placed in the infirmary was grievant's well being and safety in jeopardy. Grievant claims he was denied medical information on dawn phenomenon and somologly while in the infirmary. The grievant has never been diagnosed with these and therefore medical is not obligated to produce this information." Respondents' Answer and Return at Exhibit "F".

In a decision, dated April 25, 2014, respondent Uhler affirmed the findings and determination rendered by the IGRC, noting that "[t]he grievant can talk in a normal voice and the nurse can hear him at the nurse's station from room #4. He was placed close to the nurses station so he could be observed and so he could summon the nurse easily. At no time, while placed in the Infirmary was his well-being and safety in jeopardy." *Id*. With regard to the purported denial of medical information on dawn phenomenon and somology effect, respondent Uhler confirmed that because petitioner had never been diagnosed with these conditions, "medical is not obligated to produce this information. If the grievant wants information on any medical diagnosis that he does not have, he may request it from the library." *Id*.

Petitioner appealed respondent Uhler's decision to CORC, and on August 20, 2014, CORC unanimously accepted petitioner's grievance, in part. CORC noted the following:

> ". . . [T]here is no call bell system in the infirmary, however, all rooms are within earshot of the nurses' station. CORC further notes that the grievant was placed in room #4 in the infirmary, directly across from the nurses' station, in close enough proximity to be heard while speaking in a normal tone. In addition, nursing staff make rounds at least hourly and security staff makes rounds every half an hour. CORC

> advises the grievant that he may request information regarding Dawn Phenomenon and Somology from the library. In addition, he viewed 6 pages of medical records on 2/18/14 and he received the requested copies of 3 of the pages on 3/18/14.
>
> With regard to grievant's appeal, CORC has not been presented with sufficient evidence to substantiate improper medical care and advises him to address further concerns via sick call. CORC notes that Directive #4040, §701.1, states, in part, that the grievance program is not intended to support an adversary process." Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B".

Once again, having thoroughly reviewed the record as it stands before it, the Court hereby finds that petitioner has failed to show that Upstate's medical staff has been deliberately indifferent in their care of petitioner's diabetes; nor has it been shown that respondents' treatment of his diabetic condition was somehow deficient. Accordingly, petitioner has failed to carry his burden of demonstrating that CORC's determination, relative to Grievance Complaint No. UST-53660-14 was irrational or arbitrary and capricious.

In the fourth of his Eighth Amendment claims, petitioner asserts that Upstate Medical staff has not adhered to standard medical orders and protocols "for doctor callouts, labwork, insulin, sick call and treatment in improving or maintaining a person's involuntary weight loss". *See* Third Amended Petition at ¶14. In relation to this claim, petitioner refers the Court to the following Grievance Complaints "UST-53749/53907/53936/53948/54128/54549-14". *Id.*

In their various answering papers, respondents have provided the Court with each of the aforementioned Grievance Complaints.[2] The record reflects that in each of the

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[2] The Grievance Complaints referenced in paragraph 14 of the Third Amended Petition, and the accompanying administrative determinations made thereon, are set forth in respondents' answering papers as follows:

1.) UST-53749-14 – Respondents' Supplemental Return at Exhibit "U";

2.) UST-53907-17 – Respondents' Supplemental Return at Exhibit "V";

3.) UST-53936-14 – Respondents' Supplemental Return at Exhibit "W";

grievance proceedings, the IGRC denied petitioner's grievance, finding that proper protocols had been followed and that petitioner had been provided with the community standard of medical care in treating his diabetes, such that there was no evidence of malfeasance on the part of Upstate medical staff. For similar reasons, respondent Uhler and the Acting Superintendent affirmed the IGRC's findings in each grievance proceeding.

With the exception of Grievance Complaint No. UST-53948-14, petitioner pursued administrative appeals to CORC on each of the Grievance Complaints listed in paragraph 14 of the Third Amended Petition. In each instance, CORC upheld the denial of petitioner's grievance, finding that it had not been presented with sufficient evidence of improper medical care or malfeasance by Upstate staff. CORC further indicated that Health Services Directors of DOCCS facilities have the sole responsibility of providing treatment for all inmates in their care, including the determination as to whether an outside health referral is need by a given inmate.

Based upon petitioner's failure to exhaust his administrative remedies, relative to Grievance Complaint No. UST-53948-14, respondents' counsel argues that petitioner is now precluded from challenging the outcome in this proceeding and that petitioner's claim should be dismissed in relation to such grievance. *See* Respondents' Supplemental Return and Supplemental Letter Memorandum, dated April 5, 2016. "Although petitioner initially availed himself of the administrative appeal procedure by appealing the denial of his grievance to the Superintendent, he did not follow the proper protocol in further appealing the Superintendent's denial to CORC." *Fernandez v. Goord*, 53 AD3d 961. Accordingly, the Court finds that he failed to exhaust his administrative remedies, and, as such, petitioner's claim, relative to Grievance Complaint No. UST-53948-14, is dismissed.

In relation to the five remaining grievance complaints referenced in paragraph 14 of petitioner's Third Amended Petition, Counsel for the respondents argues that petitioner's claims are without merit. In this regard the following is asserted:

4.) UST-53948-14 – Respondents Answer and Return at Exhibit "G" and Respondents' Supplemental Return, dated April 5, 2016;

5.) UST-54128-14 – Respondents' Supplemental Return at Exhibit "S"; and

6.) UST-54549-14 – Respondents' Supplemental Return at Exhibit "T".

> "Respondents properly investigated and addressed all of Petitioner's complaints. The final determination[s] [were] appropriately based upon the rules and regulations governing grievances and health service policies. The reasons for the determination[s] were clearly stated and were rationally based. As such, Petitioner has failed to meet his heavy burden of showing that C.O.R.C.'s determination[s] [were] irrational or arbitrary and capricious." Respondents' Supplemental Letter Memorandum, dated February 19, 2016.

Having thoroughly reviewed the record before it, the Court hereby denies petitioner's Eighth Amendment claim challenging the medical care and treatment he has received from Upstate medical staff. Apart from petitioner's conclusory allegations, the record is devoid of any evidence that petitioner received anything less than the community standard of medical care and treatment for his diabetic condition. As such, the Court hereby finds that CORC's determinations on the Grievance Complaints listed in paragraph 14 of the Third Amended Petition were rationally based upon the facts and circumstances presented. Accordingly, petitioner's claims are dismissed.

Petitioner's final Eighth Amendment Claim relates to Grievance Complaint No. UST-53564-14, in which he requested that he immediately undergo a dental examination, that he be scheduled for quarterly dental cleanings, and that he be permitted to purchase "standard toothbrush, dental floss and mouthwash under SHU status or State supply him with such oral hygiene products" to combat the onset of diabetes-related periodontal disease. *See* Respondents' Answer and Return at Exhibit "H".

Relying on a previous CORC determination, the IGRC denied petitioner's grievance, noting "that there is no policy regarding the number of (*sic*) frequency of cleanings an inmate may have. The facility dentist determines if a cleaning is warranted and then places the inmate on a list. Treatment is based on priority; emergency care has top priority, followed by essential and routine care. Cleanings have the lowest priority and are done as time permits". *Id*.

As respondents' counsel noted, the record reflects that petitioner failed to appeal the IGRC's decision to respondent Uhler and subsequently to CORC. As such, the undersigned finds that petitioner has failed to properly exhaust his administrative remedies, thereby precluding the Court's review of the claim. *See Fulton v. Reynolds*, 83

AD3d 1308; *Fernandez v. Goord*, *supra*, 53 AD3d at 961-962.

Petitioner's Status Discrimination Claims:

Petitioner's first status discrimination claims relates to Grievance Complaint No. UST-54179-14, in which petitioner requested that recreation times for SHU inmates be alternated every several days, that an extra hour of recreation time be provided and "level I headphones be implemented immediately or [a] valid explanation for not doing so be provided to SHU population". Respondents' Answer and Return at Exhibit "I". On June 10, 2014, the IGRC responded to petitioner's grievance, noting that an interim Stipulation went into effect on May 19, 2014, which provides SHU inmates with additional outdoor exercise. *See Id.* Petitioner appealed the IGRC's response, and respondent Uhler concurred with the IGRC's findings, determining that "no misconduct was found by staff and no further action will be taken at this time". *Id.*

Petitioner thereafter appealed the denial of his grievance to CORC, and on October 8, 2014, CORC upheld respondent Uhler's determination, based upon the following:

> "CORC notes that outdoor exercise was increased by one hour per day, effective 5/19/14, for inmates housed in SHU200s and Upstate CF in accordance with the Interim SHU Stipulation . . . In addition, it is noted that PIMS Level 1 inmates at Upstate CF . . . will be issued headphones within 72 hours of admission to SHU." Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B."

Respondents' counsel argues that Grievance Complaint No. UST-54179-14 was properly denied, as his request for additional recreation time was rendered moot by the interim stipulation, which provided for such additional time. Respondents' counsel similarly argues that petitioner's request for alternating recreation times for SHU inmates was appropriately denied, relying on respondent Uhler's June 17, 2014 decision in which he states that "[t]he additional exercise is provided at a time when it does not interfere with the safe and secure operation of the facility". Respondents' Answer and Return at Exhibit "I".

The Court finds that petitioner failed to satisfy his heavy burden of showing that CORC's findings in relation to Grievance Complaint No.UST-54179-14 were arbitrary,

capricious or an abuse of discretion. As for petitioner's request to alternate recreation times for SHU inmates, CORC reasonably upheld "the discretion of the facility administration to promulgate local SHU procedures". Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B". Petitioner failed to demonstrate why CORC's determination should be disturbed, and, as such, his claim is dismissed.

In his next claim of status discrimination, which relates to Grievance Complaint No. UST-53564-14, petitioner argues that SHU prisoners are prohibited from purchasing from Upstate's commissary "standardize[d] toothbrushes, regular dental floss and mouthwash otherwise solded (*sic*) to general population prisoners". Third Amended Petition at ¶17. On March 4, 2014, the IGRC denied petitioner's grievance, relying on a prior CORC determination. *See* Respondents' Answer and Return at Exhibit "H". Thereafter, petitioner failed to appeal IGRC's findings to respondent Uhler and CORC. Accordingly, petitioner has failed to properly exhaust his administrative remedies, thereby precluding judicial review of this claim.

In his next claim, which relates to Grievance Complaint No. UST-53591-14, petitioner argues that "SHU prisoners transferred to Upstate from other facilities (sic) SHU are blanketly (*sic*) denied access and/or to possess their personal cosmetic purchase at in other facilities (*sic)*". Third Amended Complaint at ¶18; *see also* Respondents' Answer and Return at Exhibit "J". As part of its investigation into petitioner's grievance, the IGRC obtained written statements from the officers involved in the processing of petitioner's personal property upon his transfer into Upstate, all of whom indicated that petitioner's property was processed in accordance with DOCCS protocols. The IGRC also interviewed petitioner during the course of its investigation. *See Id.* According to the Sergeant who conducted the interview, petitioner indicated "that this grievance was only one of many as it is part of his plan and he will eventually file a lawsuit in his effort to get out of jail. Inmate Green did not name any witnesses and did not supply any new information to substantiate his claims." *Id.*

In light of its investigation, the IGRC denied petitioner's grievance on March 11, 2014, concluding that "[a]t this time, no evidence can be found to support inmate Green's claims of staff misconduct." *Id.* Subsequently, on March 24, 2014, respondent Uhler concurred with the IGRC's findings. Based upon the information submitted, he concluded

that no staff misconduct was found, and, as such, no further action would be taken in relation to Grievance Complaint No. UST-53591-14. *See Id.*

By decision dated July 30, 2014, CORC upheld respondent Uhler's determination, finding that upon petitioner's transfer into Upstate on February 24, 2014, "his property was properly inventoried, packed for storage and sealed in his presence in accordance with Directive #4933. CORC also notes that staff state [petitioner] was provided all in-cell items he was entitled to." Respondents' Letter Memorandum, dated March 24, 2015 at Exhibit "B". Ultimately, CORC concluded that it "had not been presented with a compelling reason to revise current policy for SHU inmates, and finds insufficient evidence of malfeasance by staff." *Id.*

As previously noted, "[i]n reviewing CORC's denial of petitioner's grievance, our inquiry is limited to whether it was irrational, arbitrary and capricious or affected by an error of law" (*citation and quotation marks omitted*). *Abreu v. Fischer*, 97 AD3d 877, 878, *appeal dismissed*, 19 NY3d 1096. The record demonstrates that petitioner's allegations set forth in Grievance Complaint No. UST-53591-14 were thoroughly investigated, with the staff members involved in the processing of petitioner's property being interviewed and providing written statements indicating that they followed proper protocols in the handling of petitioner's personal property. *See* Respondents' Answer and Return at Exhibit "J". Based upon the evidence before it, the Court finds no reason to disturb "the determination crediting the denials of facility's staff over the allegations of petitioner". *Dallio v. Goord*, 15 AD3d 803, 804, *lv. denied*, 5 NY3d 709; *see also Cliff v. Brady*, 290 AD2d 895, 896, *lv. denied*, 98 N.Y.2d 642, *Wilson v. State of N.Y. Dept. of Correctional Servs.*, 261 AD3d 670, 671, *appeal dismissed*, 93 NY2d 1039. Accordingly, the Court denies petitioner's claim relating to Grievance Complaint No. UST-53591-14.

In his third claim of status discrimination, which relates to Grievance Complaint No. UST-53722-14, petitioner asserts that "SHU prisoners who receive visits at Upstate aren't allowed to take pictures with visitors or purchase particular items out of vender (sic) machines as cadre prisoners [are] permitted to do". Third Amended Complaint at ¶19; *see also* Respondents' Answer and Return at Exhibit "K". In his grievance complaint petitioner averred that this inconsistent treatment of SHU and general population inmates constituted "unlawful discrimination", and, as such, the action requested by petitioner was

that "SHU prisoners be allowed to take pictures with their visits, an area be arranged and designated for SHU prisoners and visitors to take pictures, a picture tickets machine be installed within SHU visiting area." Respondents' Answer and Return at Exhibit "K"

Relying on two prior CORC determinations, which provide that the so-called "Click-Click program" is unavailable for SHU inmates, the IGRC denied petitioner's grievance and informed him that the inmate grievance program "is intended to supplement, not replace, existing formal or informal channels of problems resolution as set forth in section 701.3 (A) of this part. It is not intended to support an adversary process, but to promote medication (*sic*) and conflict reduction in the resolution of grievances." *Id*. Upon appeal, respondent Uhler concurred with the IGRC's findings and denied petitioner's grievance. *See Id*. Thereafter, petitioner appealed respondent's determination to CORC, claiming that "[c]ontrary to IGRC recommendation there is no existing formal channels for problem described resolution (*sic*) other than grievance. That has provisions specifically for unlawful disciplinary decisions and status discrimination. *See* 7 NYCRR §702.9, 9 NYCRR §7695.4(a)". Respondents' Answer and Return at Exhibit "K".

By decision dated August 6, 2014, CORC denied petitioner's grievance and the action requested therein, and in so doing, CORC confirmed "that there is no provision for the Click Click Program to be made available during SHU visiting hours. CORC upholds the discretion of the facility administration to promulgate local policy and procedures". Respondents' Letter Memorandum dated March 24, 2014 at Exhibit "B". CORC's determination further indicated that "[w]ith respect to the grievant's appeal, CORC asserts that the instant compliant was appropriately investigated and advises him to address concerns to area supervisory staff for the most expeditious means of resolution." *Id*.

As noted above, "[i]t is beyond dispute that, to prevail, petitioner must demonstrate that CORC's determination was arbitrary, capricious or without a rational basis" (*citation and quotation marks omitted*) *Green v. Bradt*, 91 AD3d 1235, 1237, *lv. denied*, 19 NY3d 802. Based upon the evidence submitted, denial of the action requested by petitioner in Grievance Complaint No. UST-53722-14 was neither arbitrary, nor capricious and was rationally based upon the fact that CORC had previously determined, on two separate occasions, that there is no provision for the Click Click program to be made available to SHU inmates during their visiting hours. *See generally* 7 NYCRR Chapters IV and VI.

Given CORC's prior determinations on the issue, it would have been arbitrary and capricious for it to come to a different conclusion with regard to petitioner's grievance. Accordingly, petitioner's claim relating to Grievance Complaint No. UST-53722-14 is denied.

Petitioner's Equal Protection Claims:

In the first of his Equal Protection claims, which relates to Grievance Complaint No.UST-53917-14, petitioner alleges that he was "deprived of several personal belongings as well as legal materials on April 7, 2014 by officer W. Seymour, that aren't (*sic*) restricted to level one prisoners." Third Amended Complaint at ¶20; *see also* Respondents' Answer and Return at Exhibit L. As is set forth in the grievance complaint, petitioner requested that the following action be taken: "carbon/writing paper, greeting cards, cases and jurisprudence materials seized by Seymore (*sic*) be returned to grievant immediately, officer be counseled as to her duties, a separation between grievant and officer be issued, and no reprisal of any kind be taken against grievant by officer or co-workers in block/facility for utilization of grievance procedure". Respondents' Answer and Return at Exhibit "L".

During the course of its investigation into his grievance, the IGRC interviewed both petitioner and Officer Seymour. The record reflects that Officer Seymour submitted a memorandum to the IGRC, indicating that upon his relocation into a PIMS level one cell, petitioner "received everything he was entitled to at level one. I gave him all his legal papers." *Id.* In light of its investigation, on April 29, 2014, the IGRC denied petitioner's grievance, noting that "grievant's level was moved to PIMS Level 1 for disciplinary reasons and his property was adjusted according to procedure". *Id.*

Thereafter, petitioner appealed the IGRC's denial to the superintendent, and on May 22, 2014, respondent Uhler issued a decision which concurred with the IGRC's response. Respondent Uhler provided the following as the basis for his determination:

> "The PIMS system is designed to afford inmates the opportunity to achieve designated privileges. Disciplinary issues result in a lower PIMS level and a loss of privileges.... The staff member named in the grievance submitted a written memorandum indicating that the grievant's property was adjusted to reflect the reduction of the PIMS level, and this

> was reviewed by the supervisor.
>
> Upon review of the information submitted, no misconduct was found by staff and no further action will be taken at this time. Grievance is denied." Respondents' Answer and Return at Exhibit "L".

Petitioner subsequently appealed respondent Uhler's determination to CORC, and on September 17, 2014, CORC issued a ruling which unanimously denied petitioner's grievance. In support of its denial, CORC provided the following:
"CORC notes that this matter has been properly investigated by the facility administration. CO S... states that the grievant was issued all allowable cell property, legal work and supplies when his level was lowered to PIMS Level 1 on 4/7/14. Contrary to the grievant's assertions, CORC has not been presented with sufficient evidence to substantiate any malfeasance by staff." Respondent's Letter Memorandum at Exhibit "B".

Once again, petitioner has failed to satisfy the heavy burden of showing that CORC's denial of Grievance Complaint No. UST-53917-14 was either arbitrary, capricious or an abuse of discretion. *See Frejomil v. Fischer*, *supra*, 68 AD3d at 1372, *Williams v. Goord*, *supra*, 41 AD3d 1118. Apart from the speculative assertions set forth in his pleadings, petitioner has failed to offer any type of evidence demonstrating that Upstate staff deviated from proper protocol in the handling of petitioner's personal property during his processing into Upstate, or during his intra-facility relocation under the PIMS program. Accordingly, petitioner's claim, which challenges the outcome of Grievance Complaint No.: UST-53917-14 is denied.

In his next equal protection claim, which challenges the outcome of Grievance Complaint No. UST-54249-14, petitioner avers that Upstate's "SHU Progressive Inmate Movement System ("PIMS") program has been unlawfully imposed upon Petitioner regardless of unwillingness to participate in said program and not being required to". Third Amended Petition at ¶21.

The Court hereby takes judicial notice of its Decision and Judgment issued in a separate CPLR Article 78 proceeding brought by petitioner, which is identified by Franklin County Index Number: 2014-987 and Request for Judicial Intervention Number: 16-1-2014-0538.106. The record reflects that the aforementioned Decision and Judgment was

issued on March 10, 2016 and was filed with the Clerk of the Court on March 15, 2016.

It is noted that petitioner challenged the outcome of Grievance Complaint No. UST-54249-14 in Article 78 proceeding mentioned above, and the Decision and Judgment issued therein reviewed petitioner's grievance upon its contended merits, with the claim ultimately being denied and dismissed. Accordingly, under principles of *res judicata* and collateral estoppel, the Court hereby denies petitioner's equal protection claim relating to the outcome of Grievance Complaint No. UST-54249-14, as the matter has been previously adjudicated by this Court.

In Petitioner's third equal protection claim, he asserts that "[s]ubstandard food rations are served in SHU blocks at Upstate as a means of corporal punishment, on several occasions items were missing from Petitioner's meals, not replace[d] during lunch (April 17, 2014) and dinner (April 20 & 28, 2014). *See* Grievance Complaints, dated April 27 & 28, 2014". Third Amended Petition at ¶22. Based upon this purported equal protection violation, petitioner seeks the issuance of a judgment prohibiting "Respondent Uhler from depriving SHU population allotted food rations and required calories intake per meal". *Id*. at WHEREFORE Clause, ¶"Z".

The record reflects that petitioner failed to specifically indicate the Grievance Complaint numbers associated with his "April 27 & 28, 2014" grievances. Having thoroughly reviewed respondents' Return and Supplemental Return, it appears that petitioner is referencing Grievance Complaint No. UST-53936-14. *See* Respondents' Supplemental Return at Exhibit "W".[3] In said Grievance, petitioner made the following allegation:

> "[On] April 27, 2014, nurse J. Bergerson while conducting medication/sick call run[,] place[d] a no jelly, juice or sugar sign upon the front of grievant's cell door in complete interference and violation with his therapeutic meals conducive to medical treatment. That such nurse doesn't have any authorization to impose, which has resulted in officers' altering and removing jelly, juice and sugar from grievant's

[3] A review of Exhibit "W" reveals that petitioner submitted three other Grievance Complaints, dated April 30, May 1, and May 4, 2014, all of which relate to the issues raised in Grievance Complaint No. UST-53936-14. As such, the IGRC consolidated all four of the grievances under the "UST-53936-14" identification number.

> breakfast trays per said doo sign. Said sign is being utilized as a means by medical and security personnel at Upstate to harass grievant." Respondents' Supplemental Return at Exhibit "W".

Based upon the aforementioned grievance, petitioner requested that the "[s]ign be removed from grievant door, breakfast trays served to grievant not be tampered with, nurse be discipline[d] for misconduct and excessing (*sic*) professional limits, and no reprisal of any kind be taken against grievant by nurses/officers in block/facility for utilization of grievance procedure." *Id*.

By written decision, dated May 14, 2014, the IGRC informed petitioner that the "[o]rder for no sugar[,] juice or jelly was written by Dr. Schroyer, not RN Bergeron. Grievant's uncontrolled chronic medical condition requires careful and controlled dietary restrictions. It is not harassment of any form. There is no evidence of malfeasance." *Id*. Petitioner appealed the determination, and on May 23, 2014, the Acting Superintendent affirmed the IGRC's findings for the same reasons stated in the IGRC's written decision. *See Id*.

Thereafter, petitioner appealed the Acting Superintendent's affirmance, arguing that petitioner never gave Dr. Schroyer consent to impose further dietary restrictions, above and beyond those provided in the therapeutic diet which petitioner agreed to, which did not include a restriction on jelly, juice and sugar. *See Id*.

By written decision, dated September 17, 2014, CORC unanimously denied petitioner's grievance. In so doing, CORC made the following findings:

> ". . . [G]rievant was seen by his provider 6 times between 4/28/14 and 9/8/14, and at the Diabetic Chronic Care Clinic on 8/4/14 and 9/8/14. It is noted that he refused his 5/14/14 endocrinologist appointment and has frequent blood work to monitor his glucose [levels]. CORC further notes that his provider ordered no jelly, juice or sugar for the grievant's uncontrolled diabetes, and that he is approved for a follow up appointment with his provider.... With regard to grievant's appeal, CORC has not been presented with sufficient evidence to substantiate improper medical care or malfeasance by staff. CORC advises him to cooperate with medical staff regarding his treatment plan and to address further concerns via sick call." Respondents' Supplemental Return at Exhibit "W".

As is set forth in his Supplemental Letter Memorandum, counsel argues that petitioner's grievance was properly investigated and addressed by respondents. He further contends that CORC's final determination was appropriate and was based upon the applicable rules and regulations regarding grievances and health service policies. As such, counsel argues that petitioner has failed to satisfy his heavy burden of showing that CORC's findings were irrational or arbitrary and capricious. *See* Respondents' Supplemental Letter Memorandum at pg. 21–22.

Given the circumstances, particularly petitioner's medical condition, the Court hereby finds that CORC's September 17, 2014, decision was founded on a rational basis, which is supported by the evidence presented before it. Petitioner failed to proffer any type of evidence indicating that Dr. Schroyer's decision to restrict petitioner's intake of jelly, juice and sugar was based upon anything other than sound medical judgment. As such, the Court finds that petitioner failed to satisfy his heavy burden of showing that CORC's denial of his grievance was irrational or arbitrary and capricious. Accordingly, petitioner's equal protection claim relating to the grievance complaints, dated April 27 and 28, 2014 is dismissed.

To the extent that they are not specifically addressed by the foregoing analysis, the Court has thoroughly reviewed petitioner's remaining arguments and finds them to be without merit.

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

ORDERED, that petitioner's motion for reargument and renewal is denied; and it is further

ADJUDGED, that the petition is dismissed.

Dated: May 9, 2016 at
Indian Lake, New York

_____
S. Peter Feldstein
Acting Justice, Supreme Court