

<b>Matter of Johnson v Annucci</b>
2016 NY Slip Op 31118(U)
June 17, 2016
Supreme Court, Franklin County
Docket Number: 2015-644
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  
**JOHNATHAN JOHNSON, #89-A-1042,**  
Petitioner,

**DECISION AND JUDGMENT  
RJI#16-1-2015-0357.51  
INDEX#2015-644  
ORI#NY016015J**

For a Judgment pursuant to Article 78  
of the Civil Practice Law and Rules,

-against-

**ANTHONY J. ANNUCCI,** Acting  
Commissioner, NYS DOCCS,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Johnathan Johnson, verified July 30, 2015 and filed in the Franklin County Clerk's Office on August 4, 2015. Petitioner, who is an inmate at Upstate Correctional Facility, is challenging a determination of the Inmate Grievance Program Central Office Review Committee on July 27, 2015. Petitioner further seeks an order of mandamus to "compel Respondent's (*sic*) to follow their own directives."

The Court issued an Order to Show Cause on August 10, 2015. In opposition to the Petition, the Court has considered Respondent's Answer and Return, with exhibits, as well as the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated September 9, 2015. By letter dated December 16, 2015 this Court advised counsel for the Respondent that the answering papers only addressed the Petitioner's regulatory challenge and did not address his constitutional challenge. An extension was provided to allow the constitutional challenge to be addressed. As such, the Court has considered the

Supplemental Letter Memorandum of Assistant Attorney General Fleury dated January 21, 2016. In further support of the Petition, the Court has reviewed and considered the Reply Affidavit of Petitioner dated February 11, 2016, together with exhibits.

The Petitioner asserts that on or about March 24, 2015 he received correspondence that was “legal mail” from the Queens County Supreme Court Clerk that was processed by DOCCS staff as “regular mail” and therefore subject to opening outside his presence. Petitioner duly filed a grievance (#UST-55889-15) seeking an investigation into this event. The Inmate Grievance Resolution Committee (hereinafter the “IGRC”) determined that the mail was not “legal mail” and therefore subject to search outside the presence of Petitioner. On April 14, 2015, Petitioner appealed to the Superintendent. By response dated April 27, 2015, Superintendent Donald Uhler upheld the decision of the IGRC. On May 7, 2015, Petitioner appealed the Superintendent’s decision and the matter was forwarded to the Central Office Review Committee (hereinafter referred to as the “CORC”). Following a hearing date on June 24, 2015, the CORC upheld the decision of the Superintendent. The CORC decision states as follows:

“Upon full hearing of the facts and circumstances in the instant case, the action requested herein is hereby accepted only to the extent the CORC upholds the determination of the Superintendent for the reasons stated.

CORC asserts that mail from a county clerk shall be processed as general incoming correspondence, therefore the grievant’s mail was not entitled to privileged correspondence status in accordance with Directive #4421.

With respect to the grievant’s appeal, CORC notes that his mail was processed in accordance with Department guidelines and advises him to address his concerns to the mail room supervisor.”

Directive #4421 pertains to “privileged correspondence” which specifically refers to mail received from governmental/public officials, legal services, medical services or rape crisis programs. *See* 721.2(II)(A)(1-4). The issue at bar, however, is the following language contained in 7 NYCRR 721.2(b)(5) [in relevant part]:

“The following shall not be defined as privileged correspondence but shall be processed as *general incoming correspondence* in accordance with Part 720 of this Title, ‘Inmate Correspondence Program[<sup>1</sup>]’ . . .

5. mail received from any county or local tax assessor or clerk, except for a clerk of a court (*note*: notwithstanding that a county clerk may also be a clerk of a court, mail from a county clerk shall be processed as general incoming correspondence) . . .” (Emphasis in original).

Petitioner asserts that the correspondence he received on or about March 24, 2015 was from the Queens County Supreme Court Clerk and, as such, was to be considered privileged correspondence in accordance with Directive #4421, section 721.2(II)(B)(5). Petitioner provided copies of the envelopes purportedly opened in violation of the Directive. (Ex. A-H). Exhibit A is date-stamped March 19, 2015 and could conceivably be interpreted to be the envelope at issue. The remaining envelopes are date-stamped April 16, 2015 or later and are irrelevant to the grievance originally filed. Nonetheless, the remaining envelopes were reviewed and considered as part of the Petitioner’s overall

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<sup>1</sup>“(a) *Inspection of incoming correspondence.* (1) Before opening, incoming mail should be checked to make sure that the addressee can be accurately identified and is currently at the facility. If the addressee is no longer at the facility, the mail shall be forwarded in accordance with Part 722 of this Title. All incoming general correspondence must have a clearly identifiable name of sender and return address. A letter which does not have a return address will not be delivered to the inmate. It will be considered contraband and handled in accordance with departmental directive.

(2) All incoming general correspondence will be opened and inspected for cash, checks, money orders, printed or photocopied materials or contraband. The inmate's presence is not required during the inspection of incoming general correspondence. See Part 721 of this Title for the procedure to be followed for the opening of privileged correspondence and Part 712 of this Title for publications deemed to be unacceptable.”

objection to the regular mail classification of correspondence received from a County Clerk.

Exhibit A has a return address that reads: “Queens County Clerk’s Office, 88-11 Sutphin Boulevard, Jamaica, NY 11435.” It is noted that Exhibits C, D, E and H also have this return address. Exhibits B, F and G all have a return address that reads: “County Clerk’s Office, County of Kings, Supreme Court Building, 360 Adams Street, Brooklyn, NY 11201.” It is clear that none of the eight (8) envelopes provided to the Court contain a return address from a Supreme Court Clerk and instead were all received from a County Clerk. As such, the determination of the CORC, as well as the Superintendent and IGRC before it, comply with the regulations of DOCCS as set forth by Directive #4421.

Petitioner further argues that the interference with the privileged communications to an inmate from legal services, counsel or the courts is akin to denial of access to the courts. Petitioner seeks the conversion of his Article 78 action into a declaratory judgment action and further seeks judgment of this Court determining that Directive #4421 is constitutionally defective on its face. Concomitantly, Petitioner also seeks relief in the nature of mandamus to compel Respondent to comply with Directive #4421. Petitioner alleges that the opening of his “legal mail constitutes an ongoing practice of unjustified censorship” and he further alleges that he has a right to be present when such mail is opened.

Respondent correctly asserts that to obtain mandamus relief, the Petitioner must show a clear legal right to such relief. “Traditionally, the writ of mandamus is the relief invoked when a party seeks to compel performance by a governmental agency of a duty enjoined by law.” *Cty. of Fulton v. State*, 76 N.Y.2d 675, 678 (1990); *see also Heron v*

*City of Binghamton*, 307 A.D.2d 524 (3d Dept. 2003). The Petitioner, however, has not shown any right to have mail from the County Clerk classified as privileged correspondence to warrant the protections described in Directive #4421. In fact, Petitioner does not allege that there was documentation that was withheld from him, or that the correspondence from the County Clerk was of a confidential nature. The Court notes that correspondence from the County Clerk would most likely be of a non-confidential nature.

“In general, a county clerk or register of deeds is not someone who can provide legal advice about a prisoner’s rights or direct legal services and is not someone with authority to take action on behalf of a prisoner. Mail from a county clerk simply does not implicate a prisoner’s right of access to the courts, of petitioning the government to redress grievances, or of competent representation by counsel. The administrative matters about which one generally communicates with a county clerk or register of deeds, *i.e.*, birth, marriage, or death certificates, tax and real estate services, automobile title and registration, etc., are not the types of legal matters that raise heightened concern or constitutional protection.” *Sallier v. Brooks*, 343 F.3d 868, 876 (6<sup>th</sup> Cir. 2003).

Finally, the petition fails to articulate or even suggest how Directive #4421 is constitutionally defective or prohibits his access to the courts. Petitioner does not allege any actual injury as a result of the opening of the mail that has been classified as “regular mail” and therefore subject to the contraband search directed in the rules of 7 NYCRR 720.4. An inmate must establish that he has suffered “‘actual injury’ (that is, that the inmate has been hindered or impaired in a significant way in her or his ability to access the courts).” *Cobaugh v. Goord*, 15 Misc. 3d 1109(A) (Sup. Ct., Albany Co. 2007).

Herein, the petition makes bald, conclusory statements that are insufficient to warrant further inquiry. As such, the petition must be dismissed.

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:** June 17, 2016  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice