

<b>Matter of Johnson v Annucci</b>
2016 NY Slip Op 31119(U)
June 7, 2016
Supreme Court, Franklin County
Docket Number: 2015-876
Judge: S. Peter Feldstein
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**STATE OF NEW YORK  
SUPREME COURT****COUNTY OF FRANKLIN**

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In the Matter of the Application of  
**JOHNATHAN JOHNSON, DIN 89-A-1042,**  
Petitioner,

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

-against-

**ANTHONY J. ANNUCCI, Acting  
Commissioner, NYSDOCCS,**

Respondent.

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**DECISION, ORDER AND  
JUDGMENT**

**RJI #16-1-2015-0521.75**

**INDEX #2015-876**

**ORI #NY016015J**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Johnathan Johnson, verified November 25, 2015 and filed in the Franklin County Clerk's Office on November 30, 2015. Petitioner, who is an inmate at Upstate Correctional Facility, is challenging the purported failure of prison officials to respond to two (2) Freedom of Information requests dated September 8, 2015 directed to Upstate Correctional Facility and Downstate Correctional Facility for medical records pertaining to a broken and/or fractured finger treated at the Putnam Hospital Center on or about November 21, 2007. Petitioner further seeks an order of mandamus to produce such medical records.

The Court issued an Order to Show Cause on December 7, 2015. In response thereto, the Respondent has moved to dismiss the Petition based upon Petitioner's failure to exhaust administrative remedies available to him pursuant to Department of Corrections and Community Supervision (hereinafter referred to as "DOCCS") Directive 2010 and DOCCS Health Services Policy Manual (hereinafter referred to as

“HSPM”) 4.04. In support of the motion, the Court has considered the affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated February 2, 2016, together with exhibits, including the affidavit of Audrey Bashaw, sworn to on January 29, 2016. In opposition thereto and in further support of the Petition, the Court has reviewed and considered the Reply Affidavit of Petitioner dated February 11, 2016, together with exhibits.

Petitioner alleges that on September 8, 2015, he submitted two Freedom of Information (hereinafter referred to as “FOIL”) requests to the FOIL Officer, Denise Bernier, at the Upstate Correctional Facility (his current residence) and to the FOIL Officer at the Downstate Correctional Facility (a previous residence) for medical records pertaining to treatment received at the Putnam Hospital Center on November 21, 2007 for a broken and/or fractured finger. Petitioner alleges that the FOIL Officers at both the Upstate and Downstate Correctional Facilities failed to respond to the FOIL requests as required by 21 NYCRR 1401.5, Article 6 of the Public Officers Law, Public Officers Law Section 87(2), 89(3),(4)(a),(4)(c) and (5)(a). In addition, on or about October 13, 2015, Petitioner submitted an appeal to the Respondent pursuant to Public Officer Law §89(4)(a) and Directive 2010 (VI)(a) and (VII)(d)(2), and Respondent failed to respond to the appeal within thirty (30) days as required by Public Officers Law §89(4)(a).

Respondent moves to dismiss based upon the Petitioner’s alleged failure to exhaust administrative remedies. Respondent relies upon the affidavit of Audrey Bashaw who is employed by DOCCS at the Upstate Correctional Facility Medical Department as Office Assistant I. Ms. Bashaw indicates that “[a]t the request of the Office of the Attorney General in connection with this matter, I have conducted an exhaustive review and search

of FOIL requests in the records maintained at Upstate Correctional Facility and have found no evidence that Inmate Johnathan Johnson, No. 89-A-1042, ever submitted a records request, dated on or about September 8, 2015, for medical records.” Bashaw Aff., Ex. A, ¶4. Respondent further asserts that upon consultation with Carmela Napolitano, Secretary II at Downstate Correctional Facility, that upon review of the facility’s records, there is no evidence that Inmate Johnathan Johnson, No. 89-A-1042, ever submitted a FOIL request, dated on or about September 8, 2015, for medical records.<sup>1</sup>

In reply, Petitioner has provided documentation which was available at the time the Petition was filed but not attached thereto. Petitioner has provided a copy of the medical records request he sent to the Putnam Hospital Center on or about August 17, 2015. (Petitioner’s Reply, Ex. A.) Petitioner has also provided the responsive letter dated August 26, 2015 from the Health Information Management Department which indicates that the records no longer exist as same are only held for a period of six (6) years. (Petitioner’s Reply, Ex. B). Petitioner has also provided what appears to be a blank response from the Records Access (FOIL) Office dated December 24, 2015 in response to a FOIL request received December 23, 2015. (Petitioner’s Ex. C). It is noted that there appears to have been writing on the page but may have been erased or “whited out”.

Petitioner has also provided a copy of a letter from Nancy J. Heywood, Deputy Counsel, wherein she indicates that the appeal dated October 13, 2015 had been reviewed, however, the request for medical records was received in the Guidance Office of Upstate Correctional Facility as opposed to the medical records office. (Petitioner’s Ex. D).

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<sup>1</sup>The Court will reject such hearsay representations as the proper means of introducing such evidence would be through an affidavit from Ms. Napolitano.

Attorney Heywood suggested that the Petitioner submit his request for medical records directly to the medical records office at Upstate Correctional Facility and further indicated that the medical records would not be held at the Downstate Correctional Facility. Finally, Petitioner provided a memorandum received from A. Bashaw, dated January 29, 2016, that indicated the medical records the Petitioner requested are not in the file.

“A petitioner must exhaust all administrative remedies before seeking judicial review unless ‘an agency’s action is challenged as either unconstitutional or wholly beyond its grant of power \* \* \* or when resort to an administrative remedy would be futile \* \* \* or when its pursuit would cause irreparable injury.’” *Cliff v. Russell*, 264 A.D.2d 892, 893.

In the matter at bar, the Petitioner alleges that the Respondent failed to respond to the FOIL requests and also failed to timely address his appeal. Respondent alleges that the Petitioner has failed to exhaust his administrative remedies.<sup>2</sup> Based upon the letter from Nancy Heywood, it appears that the medical records request was directed to the Guidance Office at Upstate Correctional Facility as opposed to the medical records office. There is no reference date of the FOIL request indicated nor is there any indication of when such request was received.

HSPM 4.10 addresses the “Access, Use and Disclosure of Protected Health Information” (PHI) for inmates. Part II, paragraph C addresses the Facility Responsibility for Processing Requests for PHI as follows:

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<sup>2</sup>It is noted that on the same day that Audrey Bashaw, Office Assistant I, at the Upstate Correctional Facility Medical Records Office executed an affidavit denying that a FOIL request has been received, she also provided a memorandum to the Petitioner indicating that the FOIL request had been “just forwarded . . . from the IRC office” and that the records are unavailable. Such information would have been beneficial to have been included in Ms. Bashaw’s affidavit.

- “1. Requests for copies of health records need to be processed at the inmate’s owning facility. Check the record location specified in FHS1. Requests received in error at other than the owning facility need to be forwarded promptly to the correct facility via fax. The original will also be mailed to the owning facility. The facility that received the request in error must notify the owning facility via phone of any urgent or special requests that are being sent to them.
2. Some older inactive records or records of facilities that have been closed are located in DOCCS storage facilities. If the record is stored in the Central Repository, the Center Office HIMA will complete the request. Requests for PHI from facilities who are not closed, but the records are located in a storage facility, will be completed by the owning facility. In these cases, DOCCS may complete the request by no later than 60 calendar days from the receipt of the request...
6. Every request, even requests with invalid authorizations, must be entered into the FHS1 Disclosure Request System.”

In this matter, it appears that the Petitioner’s request may have been received by the Guidance Office at Upstate Correctional Facility, which is the Petitioner’s owning facility, but that such office failed to forward same to the medical records officer. It is unclear whether the Downstate Correctional Facility received either of the two (2) FOIL requests purportedly provided and, if they were received, it is unclear whether they were provided per the HSPM Directive to the Upstate Correctional Facility for processing. Pursuant to HSPM 4.04(II)(C)(1), the onus is upon the facility for transmitting the request for documentation to the appropriate office. In this instance, it does not appear that same occurred or, if it did, that it was done timely. Indeed, Assistant Counsel Heywood admitted that the request was received by the Guidance Office, although failed to specify when it was received, and then Assistant Counsel Heywood erroneously advised the Petitioner that it was his responsibility to submit the request directly to the Upstate

Correctional Facility Medical Records Office. In any event, the request was evidently submitted to the proper office and Ms. Bashaw has indicated that there are no medical records pertaining to the November 21, 2007 injury in the file.

HSPM 4.04(II)(K) states:

“If the inmate has a complaint concerning access or disclosure under this policy, he/she should resolve the problem through contact with the Nurse Administrator. If this is unsuccessful, the inmate should file a grievance through the established Inmate Grievance Program in accordance with Directive 4040 “Inmate Grievance Program” or write to the Secretary of the U.S. Department of Health and Human Services.”

In this instance, it does not appear that the Petitioner filed a grievance nor sought to resolve the problem with the Nurse Administrator. It should also be noted that despite the denomination of the request as pursuant to “FOIL”, HSPM 4.04(I) indicates that “[w]hen a request for inmate-specific PHI is made via FOIL, it will be converted to a request to be handled under this policy.” As such, the appropriate vehicle to address grievances would be as designated in the written policy. *See* HSPM 4.04(II)(K). Inasmuch as the Petitioner has failed to properly pursue the appropriate grievance procedures, therefore failing to exhaust the administrative remedies available, the Respondent’s motion is granted and the Petition must be dismissed. *See Torres v. Fischer*, 73 A.D.3d 1355; *Chaney v. VanGuilder*, 14 A.D.3d 739; *Harrison v. Leonardo*, 183 A.D.2d 983.

Notwithstanding the foregoing, in light of the letter to the Petitioner from the Putnam Hospital Center Health Information Management Department, it appears that the hospital no longer retains the Petitioner’s medical records from the treatment received

on November 21, 2007. As evidenced by the January 29, 2016 memorandum from Ms. Bashaw to the Petitioner, the inmate file does not appear to contain such information either. Insofar as the Petitioner has been provided an answer to his request, even if the Respondent's motion had not been granted, the Petition would be moot. *See Scott v. Shepard*, 231 A.D.2d 759.

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

**ORDERED**, that Respondent's motion is granted; and it is further  
**ADJUDGED**, that the petition is dismissed.

**Dated:** June 7, 2016  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice