Matter of Green v Kirkpatrick
2017 NY Slip Op 32838(U)
June 19, 2017
Supreme Court, Clinton County
Docket Number: 2016-1475
Judge: S. Peter Feldstein

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

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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, ORDER
AND JUDGMENT
RJI #09-1-2016-0580.51
INDEX #2016-1475

-against-

MICHAEL KIRKPATRICK, Superintendent,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Shawn Green, verified on November 9, 2016 and filed in the Clinton County Clerk's Office on November 16, 2016. By Order to Show Cause dated December 5, 2016, this Court directed service dates. Thereafter, the petitioner filed a "Supplemental Verified Petition" which was deemed an Amended Petition as indicated in the Amended Order to Show Cause dated December 29, 2016. Petitioner, who is an inmate at the Clinton Correctional Facility, challenged three (3) Tier II Superintendent's Disciplinary Hearings held in August, October and November of 2016, and further challenged various procedures and practices in the facility.

In response to the Amended Order to Show Cause, the Court received and reviewed the Answer and Return dated March 27, 2017, together with the Letter-Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General. In further support of the Amended petition, the Court received and reviewed the Letter-Reply of the petitioner dated March 31, 2017 and received on April 20, 2017. In addition, the Court received and reviewed a letter dated May 2, 2017 from Attorney Fleury in response to a letter dated April 25, 2017 directed

to the attention of this Court.[1] Finally, the Court received and reviewed a letter dated May 5, 2017 by the petitioner in response to the May 2, 2017 letter of Attorney Fleury.

Preliminarily, the original Verified Petition submitted is a compilation of statements, arguments, grievances and complaints which are baldly asserted. The "Supplemental Verified Petition" filed on December 22, 2016 is a more succinct and organized petition and therefore was determined to be an Amended Petition pursuant to CPLR §3025. The Amended Petition seeks the following Orders:

"a) DIRECTING, Respondent to issue Petitioner swintec typewriter delivered to Clinton in September 2016, cease/refrain from practices deemed unlawful within prior Court Order;
b) DECLARING, Respondent's package restrictions practice as unconstitutional/unlawful;
c) COMPELLING, Respondent to be in compliance with Judge Timothy J. Lawliss Order in the *Matter of Golston v. Fischer*, Index #2012-1669 entered June 3, 2013;
d) INSTRUCTING, Respondent to pay Petitioner incidental damages of a reasonable sum entered by Court;
e) DECLARING, Respondent's November 23, 2016 determination annulled and expunged from Petitioner's institutional records; and
f) For such other and further relief as this Court may deem just and proper."

It is noted that the original Verified Petition sought relief, including but not limited to: various inmate grievance determinations to be overturned without a specified basis for reversal, an order directing the respondent to provide daily law library access, an order directing the respondent to refrain from discriminatory practices in program placement,

[1] It is noted that the letter dated April 25, 2017 addressed to the Court from the petitioner was never received by Chambers directly and was only provided as an attachment to the letter of May 2, 2017 from Attorney Fleury.

as well as other broad requests[2]. Indeed, much of the original Petition lacked clarity as to what was being challenged and on what basis. CPLR §3013 provides, in relevant part, that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action . . ." The Court notes that the majority of the original petition filed by the petitioner failed to meet that standard. As such, upon the filing of the more concise "Supplemental Verified Petition", same was considered to be an Amended Petition, as was indicated in the Amended Order to Show Cause. Thus, the Court will focus on such relief requested in the Amended Petition captioned as the "Supplemental Verified Petition" with the exception of also considering the challenged misbehavior reports identified in August and October of 2016.

In the original Petition, the petitioner alleges that the misbehavior reports issued on August 3, 2016 and October 8, 2016 failed "to satisfy particulars of alleged incident involving specific behavior reference (*sic*) to within rule(s) violated. 7 NYCRR §251-3.1(c)(1)(2)." Petition, ¶1(c). In response thereto, the respondent asserts that the petitioner was indeed aware of the particulars as required by 7 NYCRR §251-3.1(c), which reads in relevant part:

"(c) The misbehavior report shall include the following:

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[2] Petitioner provides examples of the alleged "Dysfunctional Facility Operation" as follows: "Prisoners' drafting into Clinton early with serious medical conditions aren't being medically screened until hours later nor an initial Doctor's appointment in regard to such matters. See, CL#694691." (Petition, ¶17); "Clinton staff malfeasance and malicious rejection of Petitioner monthly law library request hindered his access to the law library to conduct legal research and prepare papers in relation to active pending matters. See, CL#70195-16." (Petition, ¶19); and, "Clinton's job placement process is conducted in a discriminatory manner to prohibit prisoners assignment to position their (*sic*) qualified and skilled to perform. See, CL #70316-16." (Petition, ¶25).

> (1) a written specification of the particulars of the alleged incident of misbehavior involved;
> (2) a reference to the inmate rule book number allegedly violated by the inmate, and a brief description of the rule;
> (3) the date, time and place of the incident . . .”

In the misbehavior report dated August 3, 2016, the author of the report indicated that the incident date was “8/3/16”, the time was “10:50 a.m. approximately” and the location of the incident was the “Hospital Basement”. Resp. Ex. A. The misbehavior report clearly indicated that the rule violations were: 106.10 (direct order), 104.13 (creating a disturbance) and 107.11 (harassment of an officer). Resp. Ex. A. The description of the incident is as follows:

> “On the above date and time I CO V. McCoslad was the sick call waiting area when Inmate Green 97A0821 was ordered into the waiting area. Inmate Green 97A0821 was told to check in with the desk officer and started arguing whith (*sic*) CO R. Noelting and myself and was again told to go into the waiting room and continued to argue. There were other inmates in the room that were getting loud do (*sic*) to this event. Inmate Green 97A0821 was again told to go to the waiting area. He relucktintly (*sic*) complied. As I was wrighting (*sic*) the misbehavior ‘Inmate Green stated make sure that ticket goes Tier III so it gets me out of this jail.’ ” Resp. Ex. A.

Although the petitioner raises a general argument that there are no signs that indicate a “no talking” rule, the allegations contained in the misbehavior report do not allege that talking was the rule violation. Indeed, the petitioner was charged with refusing a direct order and creating a disturbance. “Adequate notice is provided when a misbehavior report sets forth the rule violations alleged and the conduct providing a basis for the charges, so as to enable the preparation of a defense.” *Toro v. Fischer*, 104 AD3d 1036,

1037. On the face of the misbehavior report alone, the petitioner's argument that he was not provided sufficient factual allegations to formulate a defense is without merit.

On October 8, 2016, the author of the misbehavior report indicated that the incident date was "10-8-16", the time was "10:20 a.m." and the location of the incident was the "Law Library". Resp. Ex. B. The misbehavior report clearly indicated that the rule violations were: 106.10 (direct order) and 104.13 (disturbance). Resp. Ex. A. The description of the incident is as follows:

> "On the above date and time I officer Lagree observed inmate Green (97A0801) talking with inmate Ford (95B1045) after they were given a direct order there was no talking in the law library earlier. There are no talking signs all around the library that can be seen from anywhere you sit. There was 23 inmates that were interrupted by inmate Green and Ford." Resp. Ex. B.

Although the petitioner raises an argument that there are no institutional directives that indicate a "no talking" rule in the library, the allegations contained in the misbehavior report allege the petitioner and another inmate were previously directed not to talk while in the library in addition to signs also instructing not to talk being readily visible in the law library. Indeed, the petitioner was charged with refusing a direct order and creating a disturbance. *See, Toro v. Fischer*, *supra*. On the face of the misbehavior report alone, the petitioner's argument that he was not provided sufficient factual allegations to formulate a defense is without merit.

On November 4, 2016, the author of the misbehavior report indicated that the incident date was "11-4-16", the time was "8:30 a.m." and the location of the incident was the "Hospital Basement waiting area". Resp. Ex. C. The misbehavior report clearly

indicated that the rule violations were: 106.10 (direct order), 104.13 (disturbance), 107.10 (interference), 107.11 (harassment) and 109.12 movement violation. Resp. Ex. A. The description of the incident is as follows:

> "On the above date and approximate time inmate Green 97A0801 of D-2-33 was standing in the small waiting area in the Hospital Basement. I then gave another direct order to sit down and made him aware of the signs on the wall that stated 'All inmates remain seated at all times 106.10'. Inmate Green then replied 'What the fuck are you going to do about it. Get the fuck out of here.' I gave another direct order to remain seated and to stay seated. Inmate Green looked at the other eight inmates and said, 'If we all stand up he will have to leave us alone.' I ordered him again to sit he looked around at all the inmates sitting and he complied. Inmate Green's actions and behavior interfered with my abilities to check inmates in and to keep sick call moving smoothly." Resp. Ex. C.

However, in addition to his challenge that there was inadequate notice of the "no talking rule", petitioner also alleges that he was denied relevant documents and material witnesses. Respondent admits that Hearing Officer Miller erroneously denied the petitioner his right to call witnesses to testify. Therefore, the respondent consents to a reversal and expungement of the November 23, 2016 Tier II disciplinary determination, together with reimbursement of the surcharge.[3] As such, the Court directs that the determination be reversed and expunged, as well as the surcharge deducted from the petitioner's inmate account be credited to the petitioner within thirty (30) days of the date of this Decision, Order and Judgment.

[3] It is noted that in his Reply, the petitioner questioned why the disciplinary action was still listed on his disciplinary history sheet as provided as Resp. Ex. E. Insofar as the respondent has agreed to reversal and expungement upon the direction of this Court, same has not yet been reversed and expunged.

As relates to petitioner's claims that he was wrongfully denied the television that he asserts he purchased, the respondent argues that the petitioner has failed to exhaust his administrative remedies, to wit: filing a formal grievance utilizing the Inmate Grievance Program. Based upon the Inmate Grievance Active Cases attributable to the petitioner pending as of March 21, 2017 (Resp. Ex. E), the petitioner has failed to submit an inmate grievance addressing the issue of the typewriter or even the purchase of items from non-approved external vendors.

> "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'. Clearly administrative relief was available to petitioner through the Inmate Grievance Program and none of the exceptions to the exhaustion doctrine are applicable [*internal citations omitted*]." *Cliff v. Russell*, 264 AD2d 892, 893.

Although the petitioner has provided what purports to be a letter in which the petitioner explains his "package privilege predicament" together with an acknowledgment of receipt by the respondent, if indeed the letter submitted corresponds with the respondent's reply[4], same was not treated as a formal Inmate Grievance as it was not properly recorded pursuant to 7 NYCRR §701.5. Respondent's reply memo dated October 5, 2016 states: "Your letter has been referred to the person listed below for whatever action they deem appropriate. Any further correspondence on this matter should be referred to this person." Pet. Ex. (Attached to Reply dated March 31, 2017). Upon receipt of this

[4] Based upon the Inmate Grievance Log submitted as Resp. Ex. E, the petitioner also submitted a grievance on October 4, 2016 which is identified as a Law Library Callout issue.

memorandum, the petitioner was on notice that his letter was not considered an Inmate Grievance and he was not pursuing administrative remedies. As such, the petitioner did not exhaust his administrative remedies relative to his claim of denial of the typewriter he allegedly purchased.

As relates to the applicability of the holding in the *Matter of Golston v. Fischer*, Supreme Court, Clinton County (Lawliss, J.) issued on May 31, 2013, the petitioner was not a party thereto and cannot enforce the terms contained therein as he lacks standing. *See*, *Mineo v. Fischer*, 57 AD3d 1033; *Eulo v. Walker*, 277 AD2d 547.

As relates to the petitioner's request for incidental damages, the petitioner's request is unspecified as to what damages he has incurred. Notwithstanding same, the appropriate forum for monetary damages against the State of New York, or the employees thereof, is to bring a claim in the Court of Claims and not before the Supreme Court. Court of Claims Act §9(2).

The petitioner seeks a finding of frivolous conduct by Assistant Attorney General Fleury as well as an award of $500.00 sanction against Attorney Fleury to be paid to the petitioner. The petitioner makes a bald and conclusory statement that Attorney Fleury "has a tendency of disclosing only a partial and not full record regarding issues presented to (*sic*) Court." (Reply, ¶3). Furthermore, the petitioner alleges:

> "There is no substantial purpose for conduct being exhibited by Fleury other than to delay and prolong proceedings. 22 NYCRR §1200.00, Rule 3.1(b), 3.2. He also is concealing and knowingly failing to disclose that which the lawyer is required by law to reveal, that are grievance files, disciplinary packets and transcripts not included with answer. CPLR §7804(e), Rule 3.4(a)(3)." Reply, p. 4 (unnumbered paragraph).

Although the petitioner asserts that the Return provided by the Assistant Attorney General did not contain documents relevant to each and every one of his claims, assertions and complaints in the original Petition and Supplemental (Amended) Petition, Attorney Fleury was not required to do so. As indicated hereinbefore, the numerous inmate grievances referenced in the body of the original Petition are not even specifically challenged but instead summarily stated. "With regard to the denial of petitioner's grievances, he must demonstrate that CORC's determination was 'irrational, arbitrary and capricious or affected by an error of law' ". *Jones v. Fischer*, 110 AD3d 1295, 1296. The petitioner, herein, failed to even challenge the determinations or allege that the determinations were irrational, arbitrary and capricious or affected by an error of law. It is not clear from the petition(s) what the petitioner seeks relative to the grievances and as such, Mr. Fleury was not required to include copies of each and every grievance referenced therein.

> "'The court rule set forth in 22 NYCRR 130–1.1, which is intended to limit frivolous and harassing behavior, authorizes a court, in its discretion, to award a party in a civil action reasonable attorney's fees resulting from frivolous conduct'. Conduct during litigation is frivolous and subject to sanction and/or the award of costs, including an attorney's fee, when: '(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false'. (22 NYCRR 130–1.1 [c]). To avoid sanctions, at the least, the conduct must have a good faith basis (*internal citations omitted*)." *Marx v. Rosalind & Joseph Gurwin Jewish Geriatric Ctr. of Long Island, Inc.*, 148 AD3d 696.

Insofar as the petitioner has not met the burden of proving that Mr. Fleury has engaged in frivolous conduct, the demand for a finding of same together with a sanction is denied.

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

ORDERED, that the Tier II Superintendent's Disciplinary Hearing decided on November 23, 2016 is reversed and expunged; and it is further

ORDERED, that the $5.00 surcharge deducted, or whatever portion was deducted, shall be credited to the petitioner's institutional inmate account within thirty (30) days of the date of this Decision, Order and Judgment; and it is further

ADJUDGED, that except as otherwise provided herein, the petition is dismissed.

Dated: June 19, 2017 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice