

Shepherd v Fischer
2013 NY Slip Op 33104(U)
December 5, 2013
Supreme Court, Franklin County
Docket Number: 2013-512
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
EON SHEPHERD, #96-A-0356,
Petitioner,

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

**DECISION, ORDER AND
JUDGMENT**

RJI #16-1-2013-0245.71

INDEX # 2013-512

ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Eon Shepherd, verified on February 5, 2013 and originally filed in Seneca County. The petitioner was an inmate at the Five Points Correctional Facility at the time this proceeding was commenced. He was subsequently transferred to the Upstate Correctional Facility but is now confined at the Shawangunk Correctional Facility. Petitioner seeks a Court order directing respondent to transfer him “. . . to a flat facility where he is exempt from double bunking and does not have to walk long distances . . .”

Citing petitioner’s March 21, 2013 transfer from Five Points Correctional Facility to Upstate Correctional Facility, as well as certain implemented and planned accommodations, respondent moved in Seneca County for dismissal of this proceeding as moot or, in the alternative, a transfer of venue to Franklin County. By Decision and Transfer Order dated June 2, 2013 the Supreme Court, Seneca County (Hon. Dennis F. Bender), denied respondent’s motion to dismiss but granted his motion for a change in

venue.¹ As set forth in its June 2, 2013 Decision and Transfer Order, the Seneca court agreed “. . . that in light of the Petitioner now being in Franklin County, it would be appropriate for that County to address the concerns. Although some of the issues may or may not be moot with the relocation to Upstate, it appears appropriate the Court [Franklin County] review the validity of Petitioner’s claims and perhaps, if such Court deems appropriate, place restriction on the Respondent’s ability to relocate this Petitioner to yet another double-bunk facility or placing him in an area were he would have to walk long distances.”

The papers originally filed in Seneca County were received in the Franklin County Clerk’s office on June 12, 2013 and in chambers on June 17, 2013. This Court directed the filing of answering papers and has received and reviewed respondent’s Notice of Motion to Dismiss, supported by the Affirmation of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated August 1, 2013, as well as by the Affidavit of Douglas Botsford, DOCCS Director of Classification and Movement, sworn to on August 1, 2013. The Court has also received and reviewed petitioner’s undated opposing papers (denominated Petitioner’s Response to Respondent’s Motion to Dismiss), filed in the Franklin County Clerk’s office on September 6, 2013.

¹ In the Decision and Transfer Order of June 2, 2013 Acting Justice Bender noted that petitioner commenced a similar proceeding in Seneca County in 2010 [Index No. 44315] but that the prior proceeding was ultimately dismissed as moot because petitioner was transferred from the Five Points Correctional Facility to the Upstate Correctional Facility. The petitioner, however, was apparently later transferred back to Five Points prompting the commencement of this proceeding. With respect to respondent’s motion to dismiss in this proceeding, Acting Justice Bender made the following observations: “. . . [W]e have a case of *deja vu*. The Respondent, after the filing of this petition, has again transferred the Petitioner from Five Points Correctional Facility to Upstate Correctional Facility in Franklin County. The respondent notes the dismissal of the prior application and urges the Court to dismiss this application as moot as well. Their argument is disingenuous. One must question the rationale in Respondent’s decision to move the Petitioner [back] to Five Point[s] Correctional Facility, knowing it is a double-bunk facility without addressing the purported medical concerns involving this inmate. Indeed, Respondent does not attempt to address the validity of the medical claims the Petitioner sets forth, to show why he believes double-bunking and long-distance walking are contrary to his health. Thus, the Motion to Dismiss as moot is denied.”

In February of 2013, while still confined at the Five Points Correctional Facility, petitioner filed at least four inmate grievance petitions. In Grievance FPT-27127-13 petitioner requested that “[p]rovisions be made exempting me from being double-bunked due to my having shy bladder.” In Grievance FPT-27134-13 petitioner requested that “[p]rovisions be made exempting me who is a sexual assault victim from double bunking and I stop being discriminated against.” In Grievance FPT-27146-13 petitioner requested that he “. . . be given my [metal knee] brace for support and stability in the alternative be housed in a facility where I can have my brace.” In Grievance FPT-27148-13 petitioner requested that he “[b]e housed in a facility where I do not have to walk long distances, adhere to the Seneca County Supreme Court Order of 2010².” Although all four grievance complaints were apparently filed prior to the commencement of this proceeding in Seneca County on or about March 12, 2013, none were followed through to a final decision of the Inmate Grievance Program Central Office Review Committee (CORC) prior to such commencement.

A facility superintendent-level determination in Grievance FPT-27127-13 was rendered on February 27, 2013 and an administrative appeal to the CORC was taken on

² This Court does not understand the basis of petitioner’s reference to the “Seneca County Supreme Court Order of 2010.” In *Shepherd v. Fischer* (Seneca County Index No. 44315) petitioner, who was apparently housed at the Five Points Correctional Facility when that proceeding was commenced, challenged the denial of his request for transfer to a flat facility where he does not have to walk long distances and further challenged the requirement that he double bunk. By Decision and Partial Summary Judgment dated September 27, 2010 the Supreme Court, Seneca County, dismissed petitioner’s double bunking challenge as moot after noting that he had been transferred to the Upstate Correctional Facility and there held in a single cell. The Supreme Court, Seneca County, however, declined to dismiss petitioner’s challenge with respect to walking long distances. Rather, that court directed respondent “. . . to address the issue of distances and respondent’s efforts to accommodate the petitioner’s physical limitations.” By Decision and Judgment dated November 8, 2010 the Supreme Court, Seneca County, noted that petitioner’s anticipated transfer within the confines of the Upstate Correctional Facility would apparently obviate his need to walk long distances. Accordingly, the underlying petition was “. . . in all respects denied and dismissed as moot.” The petition currently before this Court contains no references to any other Seneca County proceedings. Since the causes of action asserted by petitioner in the proceeding in Seneca County under Index No. 44315 were dismissed as moot on September 27, 2010 and November 8, 2010, there does not appear to be any basis to “. . . adhere to the Seneca County Supreme Court Order of 2010.”

or about March 14, 2013. In a final decision dated July 17, 2013 the CORC denied petitioner's grievance asserting "... that there is no requirement to house an inmate who claims to suffer from shy bladder syndrome in a single cell. Further, it is noted that the grievant has been housed in a double cell throughout his incarceration." A facility superintendent-level decision in Grievance FPT-27134-13 was rendered on March 6, 2013 and an administrative appeal taken to CORC on or about March 18, 2013. There is nothing in the record of this proceeding to indicate when a final CORC decision was rendered. A facility superintendent-level decision in Grievance FPT-27146-13 was rendered on March 15, 2013 and an administrative appeal was taken to CORC on or about April 8, 2013. There is nothing in the record of this proceeding to indicate when a final CORC decision was rendered. A facility superintendent-level decision in Grievance FPT-27148-13 was rendered on or about March 15, 2013 and an administrative appeal was taken to CORC on or about April 8, 2013. There is nothing in the record of this proceeding to indicate when a final CORC decision was rendered.

Respondent's motion to dismiss is predicated upon the assertion that petitioner failed to exhaust administrative remedies with respect to any of his four grievances by not following through to final determinations by CORC prior to the commencement of this proceeding. The respondent also notes that the information currently contained in the computerized data base utilized by the DOCCS Office of Classification and Movement "... reflects Petitioner's need for (i) a single cell, (ii) 'flats/no stairs' and (iii) his need for braces on both legs and a cane for walking." Respondent goes on to assert that "[u]nder such circumstances there may be or may not be issues not covered by DOCCS transfer criteria for Petitioner, such as the distances he might be required to ambulate and whether, in a given situation a plastic verses a metal brace is more appropriate, but these are NOT matters involving irreparable harm, and they are quintessentially the types of

matters that involve administrative expertise and direction on the part of DOCCS, requiring exhaustion of administrative remedies before judicial review is appropriate.” (Emphasis in original). Petitioner’s arguments to the contrary notwithstanding, the Court agrees. *See Jarvis v. Pullman*, 297 AD2d 842, *Jones v. Department of Correctional Services*, 283 AD2d 805 and *Hakeem v. Wong*, 223 AD2d 765, *lv den* 88 NY2d 802.

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 for failure to exhaust administrative remedies.

Dated: December 5, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice