

Matter of Bookman v Fischer

2011 NY Slip Op 33125(U)

December 1, 2011

Supreme Court, Albany County

Docket Number: 8188-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of the Application of
GLENN BOOKMAN, 86-B-0227,

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

BRIAN FISCHER, Commissioner,
New York State Department of Correctional Services,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-11-ST2199 Index No. 8188-10

Appearances:

Glenn Bookman
Petitioner, Pro se
Inmate No. 86-B-0227
Great Meadow Correctional Facility
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DECISION/ORDER

George B. Ceresia, Jr., Justice

Petitioner, an inmate currently incarcerated at Great Meadow Correctional Facility,
commenced the above-captioned CPLR Article 78 proceeding to review a disciplinary

determination dated July 28, 2010 and three grievances (dated July, 12, 2010, August 20, 2010, and September 24, 2010, respectively). Respondent filed an answer that requested that the proceeding be transferred to the Appellate Division pursuant to CPLR 7804 (g). The Court, in a decision-order dated June 30, 2011 found that the portion of the petition which sought review of the July 28, 2010 disciplinary determination should be transferred to the Appellate Division. The Court further found, however, that prior to transfer, it should render a determination with regard to the three grievances, which are reviewable under CPLR 7803 (3). The Court directed that the respondent submit a complete record with regard to the respective grievance determinations. The respondent did so through the filing of an amended answer.

The respondent has submitted the affidavit of Scott Woodward, employed in the New York State Department of Correctional Services as Supervisor on the Inmate Grievance Program at Great Meadow Correctional Facility. Mr. Woodward indicates that his duties and responsibilities include maintaining records of grievances filed by inmates at Great Meadow Correctional Facility. He indicates that he caused a search to be made of records concerning petitioner's submission of grievances to the Inmate Grievance Program, and found that the respondent did not receive the grievances dated July 12, 2010 and August 20, 2010.

It is well settled that before an issue may be considered in a CPLR Article 78 proceeding, it is necessary for the petitioner to exhaust all available administrative remedies (see Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375; see also Matter of East Lake

George House Marina v Lake George Park Commission, 69AD3d 1069 [3rd Dept., 2010]).

This includes seeking review of all issues within the context of an administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3rd Dept., 1996]; Matter of Tafari v Artus, 79 AD3d 1468, 1468-1469 [3rd Dept., 2010]).

The Court finds that the respondent demonstrated that the petitioner failed to seek administrative review of the grievances dated July 12, 2010 and August 20, 2010 as authorized under Part 701 of the Rules of the Department of Correctional Services (see 7 NYCRR Part 701). As such, he failed to exhaust his administrative remedies, and the petition, as to these grievances must be dismissed.

The grievance dated September 24, 2010 mentions events which occurred in August 2010, and a falsified “ticket” (which the Court understands to be a misbehavior report). Supervisor Woodward indicates that he disallowed the grievance for two reasons: that it related to a disciplinary action, which is not grievable (see 7 NYCRR 701.3 [e] [2]) and because the grievance had not been filed within 21 days of the alleged occurrence (see 7 NYCRR 701.5 [a] [1]).

Judicial review of administrative decisions denying inmate grievances is limited to whether the determination is “irrational, arbitrary or capricious or affected by an error of law” (see Matter of Hernandez v Fischer, 79 AD3d 1544, 1546 quoting Matter of Bermudez v Fischer, 71 AD3d 1361, 1362 [2010] lv denied 15 NY3d 702, 2010]; see also Matter of Green v Bradt, 69 AD3d 1269 [3rd Dept., 2010]; Matter of Clark v Fischer, 58 AD3d 932

[3rd Dept., 2009]). Phrased differently, “[t]o prevail, petitioner must demonstrate that the [] determination was arbitrary and capricious or without a rational basis” (Matter of Patel v Fischer, 67 AD3d 1193 [3rd Dept., 2009] citing Matter of Keesh v Smith, 59 AD3d 798, 798 [2009]; Matter of Green v Bradt, *supra*; Matter of Frejomil v Fischer, 68 AD3d 1371 [3rd Dept., 2009]; Matter of Simmons v New York State Department of Correctional Services, 82 AD3d 1382, 1383 [3d Dept., 2011]).

Under § 701.5 (a) (1) of the Rules of the Department of Correctional Services, a complaint must be filed within 21 days of the alleged occurrence (see 7 NYCRR 701.5 [a] [1]). Inasmuch as the only occurrences mentioned in the September 24, 2010 grievance are dated in August 2010, the Court finds Supervisor Woodward properly found that the complaint was untimely.¹ In addition, to the extent that the September 24, 2010 complaint could be construed as seeking review of a “falsified” misbehavior report, that portion of the complaint was non-grievable and properly denied (see 7 NYCRR 701.3 [e] [2]).

The Court has reviewed and considered petitioner’s remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination with regard to petitioner’s grievance complaint dated September 24, 2010 was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition, as it relates to petitioner’s September 24,

¹In fact, the September 24, 2010 grievance complaint contains the following statement: “I waited to file this grievance in fear of further retaliation and to make sure certain people were aware of these actions.” Whatever his motivation, the fact remains that he concededly delayed filing the grievance.

2010 grievance complaint must be dismissed.

In summary, the Court finds that the portion of the petition which seeks review of grievance complaints dated July 12, 2010, August 20, 2010 and September 24, 2010, must be dismissed. That portion of the petition which seeks review of the Tier III disciplinary determination dated July 28, 2010, must be transferred to the Appellate Division pursuant to § 7804 (g) (see Matter of Abreu v Bezio, 78 AD3d 1341, 1341-1342 [3rd Dept., 2010]; Matter of Thibodeau v Northeastern Clinton Central School Board of Education, 39 AD3d 940, 941 [3rd Dept., 2007]; Matter of Somma v Jackson, 268 AD2d 763, 763-764 [3d Dept., 2000]; Matter of Bevacqua v Sobol, 176 AD2d 1, 3 [3d Dept., 1992]; Matter of Department of Env'tl. Protection v Department of Env'tl. Conservation, 120 AD2d 166, 169 [3d Dept., 1986] lv denied, 69 NY2d 921)

Accordingly, it is

ORDERED and ADJUDGED, that the portion of the petition, which seeks review of grievance complaints dated July 12, 2010, August 20, 2010 and September 24, 2010, is hereby dismissed; and it is

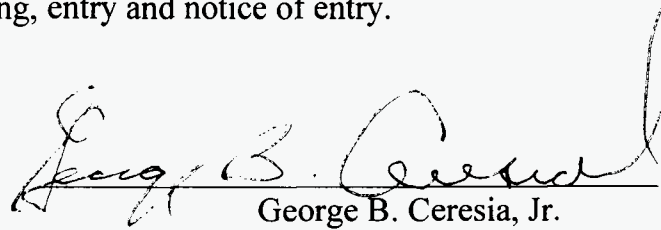
ORDERED, that the balance of the petition, which seeks review of the Tier III disciplinary determination dated July 28, 2010, be and hereby is transferred to the Appellate Division pursuant to CPLR § 7804 (g).

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute

entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: December 1, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated December 21, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Verified Answer and Return, filed April 7, 2011
3. Petitioner's Letters dated April 11, 2011, April 12, 2011, July 5, 2011 and July 30, 2011
5. Respondent's Amended Answer filed August 3, 2011, Supporting Papers and Exhibits