

**Matter of Gibson v Fischer**

2011 NY Slip Op 33212(U)

December 1, 2011

Sup Ct, Albany County

Docket Number: 644-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT                      COUNTY OF ALBANY

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In The Matter of the Application of  
JONATHAN GIBSON, 00-A-4478,

Petitioner,

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

-against-

BRIAN FISCHER, COMMISSIONER,  
NYSDOCS,

Respondent.

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-11-ST2361 Index No. 644-11

Appearances:            Jonathan Gibson  
                                  Petitioner, Pro se  
                                  Inmate No. 00-A-4478  
                                  Franklin Correctional Facility  
                                  62 Bare Hill Road  
                                  P.O. Box 10  
                                  Malone, NY 12952

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State of New York  
Attorney For Respondent  
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Assistant Attorney General  
of Counsel)

**DECISION/ORDER/JUDGMENT**

George B. Ceresia, Jr., Justice

Petitioner, an inmate currently incarcerated at Franklin Correctional Facility,

commenced the instant CPLR Article 78 proceeding to review several determinations related to filed grievances. The petition was filed on January 18, 2011. By motion dated April 8, 2011, the respondent sought dismissal of the petition on grounds that it failed to state a cause of action. The Court, in a decision-order signed on June 30, 2011<sup>1</sup>, granted the motion with respect to two of the grievance determinations, but denied the motion with respect to two others: one with respect to petitioner's claim for thirteen months credit for incarceration in the special housing unit; and one with regard to a claim improper medical care, specifically with regard to how he was required to receive his medication. As to the latter grievances, the Court directed the respondent to serve an answer within twenty (20) days. The respondent failed to serve an answer on or before the July 20, 2011 deadline. The respondent has made two motions: one for an order to extend the time for serving responsive papers; and one to dismiss the petition by reason of petitioner's failure to exhaust his administrative remedies. Neither motion is opposed.

On a motion to extend the time in which to serve an answer, the movant must demonstrate a reasonable excuse for the delay (CPLR 3012 [d]; Dinstber v Allstate Insurance Company, 75 AD3d 957, 958 [3<sup>rd</sup> Dept., 2010]; Eagles Landing, LLC v New York Department of Environmental Protection, 75 AD3d 935, 936-937 [3<sup>rd</sup> Dept., 2010]; Watson v Pollacchi, 32 AD3d 565, 565-566 [3<sup>rd</sup> Dept., 2006]). "The determination of '[w]hether a proffered excuse is reasonable is a matter within the sound discretion of the trial court'" (Bedard v Najim, 222 AD2d 979, 980 [3d Dept., 1995], quoting Special Prods. Mfg. v.

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<sup>1</sup>The decision-order was incorrectly dated June 30, 2009.

Douglass, 159 AD2d 847, 848 at 848). Counsel for the respondent has presented a reasonable excuse for the relatively brief delay in serving responsive papers, citing health issues. Respondent's accompanying motion to dismiss demonstrates that the respondent has a meritorious defense. Moreover, and apart from the foregoing, the Court notes that CPLR 7804 (e) provides in pertinent part:

(e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a trial of any issue of fact. *The court may order the body or officer to supply any defect or omission in the answer, transcript, or an answering affidavit.* Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. *Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted* (emphasis supplied).

The Court has reviewed the relevant law with respect to the application of CPLR §7804 (e).

Professor Vincent C. Alexander in his commentary on this section has stated:

“Provision is made in the last sentence of CPLR 7804 (e) for entry of a default judgment against the *respondent* for failure to serve an answer. Such entry is not mandatory, however, and courts are likely to exercise their discretion to permit service of an untimely pleading.”(Alexander, McKinney's Consolidated Laws, Practice Commentary C7804:6, Main Volume, p. 656.).

Under all of the circumstances, the Court finds that the motion for an extension of time to serve responsive papers should be granted. Accordingly, the Court will proceed to consider respondent's motion to dismiss.

The respondent maintains that the petitioner failed to exhaust his administrative

remedies, as it relates to petitioner's claim of improper medical treatment. Petitioner's specific claim is that the respondent has insisted that he receive Ultram medication crushed and dissolved in water, rather than in tablet form. Petitioner's grievance with respect to this issue was denied by the Inmate Grievance Resolution Committee ("IGRC") on December 15, 2011. The petitioner appealed the decision to the Superintendent, who upheld the determination of the IGRC on January 3, 2011. The petitioner, by appeal statement dated January 6, 2011, filed an appeal to the Central Office Review Committee ("CORC"). While the appeal to CORC was still pending, the petitioner, in a petition verified January 12, 2011 and filed with the Court on January 18, 2011, commenced the instant CPLR Article 78 proceeding. The order to show cause was dated February 3, 2011. CORC did not issue its determination until March 9, 2011.

With regard to petitioner's claim for credit for serving thirteen months in the special housing unit, petitioner's grievance is dated December 20, 2010. It was denied by the IGRC on December 29, 2010. The petitioner appealed the determination to the Superintendent, who denied the grievance in a determination dated January 6, 2011. The respondent has submitted the affidavit of Jeffery Hale, Assistant Director of Department of Corrections and Community Supervision ("DOCCS") Inmate Grievance Program, who indicates that he conducted a search of the database of CORC of grievances filed by the petitioner. He indicates that the petitioner never appealed the grievance to CORC.

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 [3<sup>rd</sup> 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 [3<sup>rd</sup> Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3<sup>rd</sup> Dept., 1996]; Matter of Tafari v Artus, 79 AD3d 1468, 1468-1469 [3<sup>rd</sup> Dept., 2010]).

Moreover, the fact that an administrative appeal is perfected, or even decided, after commencement of the CPLR Article 78 proceeding does not operate to retroactively validate the petition (see Matter of Boddie v New York State Division of Parole, 293 AD2d 884, 884 [3d Dept., 2002]; Matter of Robinson v Bennett, 300 AD2d 715, 716 [3rd Dept., 2002]; People ex rel. Howe v Travis, 18 AD3d 1052, 1052 [3<sup>rd</sup> Dept., 2005]; Matter of West v McGinnis, 4 AD3d 654, at 655 [3rd Dept., 2004]; Matter of Howe v Travis, 18 AD3d 1052 [3d Dept., 2005]).

With regard to petitioner's grievance concerning the method of administering his Ultram medication, the Court finds that the petitioner failed to exhaust his administrative remedies, in that he did not wait until CORC had rendered its determination before commencing the instant CPLR Article 78 proceeding (see Matter of Boddie v New York State Division of Parole, *supra*; Matter of Robinson v Bennett, *supra*; People ex rel. Howe v Travis, *supra*; Matter of West v McGinnis, *supra*; Matter of Howe v Travis, *supra*). For this reason the petition, as it relates to this grievance, must be dismissed.

With regard to petitioner's grievance requesting credit for 13 months of incarceration

in the special housing unit, the petitioner failed to exhaust his administrative remedies by not appealing the superintendent's determination to CORC (see Matter of Fernandez v Goord, 53 AD3d 961, 961-962 [3<sup>rd</sup> Dept., 2008]).

The Court concludes that the petition must be dismissed.

Accordingly, it is

**ORDERED**, that respondent's motion for an extension of time to serve responsive papers is granted; and it is

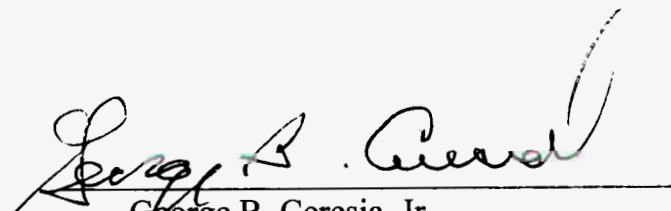
**ORDERED**, that respondent's motion to dismiss the petition is granted; and it is

**ORDERED and ADJUDGED**, that the petition be and hereby is dismissed.

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 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 February 3, 2011, Petition, Supporting Papers and Exhibits
2. Amended Petition dated March 6, 2011, Supporting Papers and Exhibits
3. Respondent's Notice of Motion dated April 15, 2011
4. Respondent's Notice of Motion dated August 31, 2011 for an Order Extending the Time to Respond
5. Respondent's Notice of Motion dated August 31, 2011 For An Order

## Dismissing the Petition