STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of VERNON A. JONES,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER OF THE STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION; DR. DAVID KARANDY, FACILITY HEALTH SERVICES DIRECTOR, GREAT MEADOW CORRECTIONAL FACILITY; MARY HARRIS, RN, NURSE ADMINISTRATOR, GREAT MEADOW CORRECTIONAL FACILITY,

Respondent,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI No. 01-13-ST4357 Index No. 6684-12

Appearances:

Vernon A. Jones
Inmate No. 06-A-0604
Petitioner, Pro Se
Great Meadow Correctional Facility
11739 State Route 22
PO Box 51
Comstock, NY 12821-0051

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Keith A. Muse,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Great Meadow Correctional Facility, commenced the instant CPLR Article 78 proceeding to review an adverse grievance determination concerning follow-up medical treatment with respect to knee replacement surgery. The respondents made a motion pursuant to CPLR 3211 (a) (8) to dismiss the petition on grounds that petitioner failed to timely serve the order to show cause and petition. The Court, in a decision-order dated June 3, 2013 denied the motion and directed the respondents to serve an answer to the petition. The answer was served, and the matter is now ready for final disposition.

On November 23 ,2011 the petitioner underwent total knee replacement surgery at Rome Memorial Hospital. Prior to the surgery he was required to sign a form known as a "Contract For Specialty Care Treatment" pursuant to Department of Corrections and Community Service ("DOCCS ") Directive 4308. Because the surgery was unsuccessful he was scheduled for a second consultation. On February 9, 2012 he was informed that he was scheduled to go to his medical appointment that day. He refused to go because he had not signed a second Contract For Specialty Care Treatment. He was issued a misbehavior report by reason of his refusal (it was subsequently dismissed). Petitioner thereafter filed a grievance, maintaining that he should sign a new Contract For Specialty Care Treatment for each and every outside medical appointment. Petitioner's grievance recited as follows:

> "Description of Problem []: The medical department scheduled an outside appointment for me without my consent and/or counseling or advising me of the appointment. Nor was I given a 'Specialty Care Contract Agreement' to sign. Nor did I sign one. This is in contract with the Policy and Procedures 'outside' medical appointments outlined in Directive 4308. When I refused to go I was written a 'Misbehavior Report' that ultimately was dismissed.
>
> "Action requested by Inmate" That the entire medical staff is given copies of Directive 4308 to read and follow. That inmates are given Specialty Care Contract Agreements to sign 'before' the appointment or referral is made for 'each' outside appointment as outlined in Directive 4308. That I am reimbursed a day's wages for the day of programs that I missed."

On February 24, 2012 the inmate grievance review committee ("IGRC") issued a deadlock determination in which the two inmate representatives upheld the grievance, while the two staff representatives voted to deny the grievance. The following decision was issued by the inmate representatives:

> "Attn.: We recommend grievance be granted. Directive 4308 is clear on the policy for 'every' outside specialty care appointments. "Absent a signed contract, no referral for specialty care will be submitted via FHS1 and no appointment will be scheduled'. The medical staff here at Great Meadow believes that one contract agreement is a blanket consent for every appointment even though 4308 reads: 'Such documentation must also include the 'contract for specialty care appointment ' which must be signed by the inmate patient and primary care physical provider for each proposed medical encounter'. Ironically enough, this is a new procedure, by a new orthopedic specialist at a new location for a new problem. Therefore, it requires a 'new' contract.[]".

The staff representative's determination recited: "The grievance should be denied. Staff defers to the expertise of the medical dept."

The petitioner appealed the determination to the Superintendent, who issued the following decision (dated February 29, 2012):

> "Offender Jones is alleging that he was set up for an appointment with an outside provider on 2/9/12 without his permission. He states that he was taken to Medical to go on the medical trip and refused to go. He was written a misbehavior report. He claims that a Contract for Specialty Care Agreement should have been completed for this trip as per Directive 4308.
>
> "This complaint was investigated by a Supervisor. Offender Jones signed a Contract on 11/10/11 for orthopedic surgery. The surgery was unsuccessful and the 2/9/12 appointment was a further consultation on the same medical issue. It was determined by Medical staff that since this was part of the same ongoing issue, no new contract was necessary. Per form 3126E3, Contract for Specialty Care Appointment, it states in the signed agreement 'I understand that if a referral is approved and any appointment or appointments...'
>
> "Since this was part of the original treatment plan, no new contract was necessary. It is noted that the misbehavior report was dismissed and offender Thompson[1] was not penalized, probably due to the confusion over the trip."

The petitioner then appealed the determination to the Central Officer Review Committee ("CORC"). CORC's decision, dated February 14, 2012, recites as follows::

> "GRIEVANT'S REQUEST UNANIMOUSLY ACCEPTED IN PART

---

[1]The determination incorrectly referred to inmate Thompson, instead of inmate Jones (see the last sentence of the decision of CORC).

> "Upon full hearing of the facts and circumstances in the instant case, and upon recommendation of the Division of Health Services, the action requested is hereby accepted only to the extent that CORC upholds the determination of the Superintendent for the reasons stated.
>
> "CORC notes that this matter has been properly investigated by the facility administration. Acting N.A.H... states that the grievant signed a 'Contract for Specialty Care Agreement' on 11.10.11 for orthopedic surgery. She further states that one trip agreement covers all of the consultations that may be required for the same medical issue. CORC notes that medical staff interviewed the grievant on 2/10/12 after he refused the appointment with the surgeon and he signed another trip agreement for the same procedure.
>
> "With respect to the grievant's appeal, CORC advises the grievant to continue to address his medical issues via the sick call mechanism.
>
> "Further, CORC notes that there was a clerical error in the Superintendent's response and that the grievant's name has since been corrected.":

The petitioner frames his grievance in terms of what he perceives to be a violation of his "constitutional right to informed consent in violation of the 14th amendment of the United States Constitution, New York Public Health Law § 2805-d (1), and New York Corrections Law §§ 402 (1)-(2).

The respondent argues that the subject matter of the instant grievance is now moot by reason that Directive 4308 has been repealed. "It is a fundamental principle of our jurisprudence that the power of a court to declare the law only arises out of, and is limited to, determining the rights of persons which are actually controverted in a particular case

pending before the tribunal" (see Hearst Corp. v Clyne, 50 NY2d 707, at 713 [1980], citations omitted; see also Matter of City of New York v New York State Public Employment Relations Board, 54 AD3d 480, 481-482 [3rd Dept., 2008]). "This principle, which forbids courts to pass on academic, hypothetical, moot, or otherwise abstract questions, is founded both in constitutional separation-of-powers doctrine, and in methodological strictures which inhere in the decisional process of a common-law judiciary" (Hearst Corp. V Clyne, supra, at 713-714; see also Saratoga County Chamber of Commerce v Pataki, 100 NY2d 801, 810-811 [2003], cert denied 540 US 1017; Matter of NRG Energy, Inc. v Crotty, 18 AD3d 916, 918-919 [3rd Dept., 2005]; Matter of Orsi v Board of Appeals of the Town of Bethlehem, 3 AD3d 698, 700-701 [3d Dept., 2004]; Matter of Kowalczyk v Town of Amsterdam Zoning Board of Appeals, 95AD3d 1475, 1477 [3d Dept., 2012]).

The respondent has submitted a copy of a rescission notice issued by DOCCS which recites that Directive 4308 has been rescinded effective January 7, 2013. As such, the Court finds that the matter is now moot, and not subject to further review.

Moreover, and apart from the foregoing, were the Court to reach the merits the Court would find, particularly in view of the language found in Attachment A to Directive 4308[2], that the determination 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

[2]Attachment A is a sample Contract for Specialty Care Appointment which refers to medical appointments in the plural. This would support respondent's contention that there is no need for a second Contract For Specialty Care Appointment with respect to follow-up care for the same medical condition.

discretion. Nor does the Court discern any violation of petitioner's constitutional rights.

For the foregoing reasons, the Court concludes that the petition must be dismissed.

Accordingly 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 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: October 2, 2013
Troy, New York

George B. Ceresia
Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated December 21, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated June 18, 2013