

Matter of Johnson v Annucci
2015 NY Slip Op 32328(U)
November 24, 2015
Supreme Court, Franklin County
Docket Number: 2014-928
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
JOHNATHAN JOHNSON, #89-A-1042,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2014-0509.99
INDEX # 2014-928
ORI #NY016015J**

-against-

ANTHONY ANNUCCI, Acting 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 Johnathan Johnson, verified on December 1, 2014 and filed in the Franklin County Clerk's office on December 3, 2014. By Decision and Order dated April 13, 2015 the Court denied petitioner's request for an issuance Order to Show Cause in a CPLR Article 78 proceeding but granted him leave to file an Amended Petition addressing the concerns identified by the Court in its Decision and Order. In response thereto the Amended Petition of Johnathan Johnson, dated April 30, 2015 and verified on May 4, 2015, was filed in the Franklin County Clerk's office on May 6, 2015. Petitioner, who is an inmate at the Upstate Correctional Facility, is, in effect, challenging the results of an inmate grievance proceeding (UST-54201-14) as set forth in the October 8, 2014 determination of the Inmate Grievance Program Central Office Review Committee (CORC). More specifically, petitioner is challenging the failure of DOCCS officials to review a security videotape (DVD) as part of the review of Inmate Grievance UST-54201-14.

The Court issued an Order to Show Cause on May 19, 2015 and has received and reviewed respondent's Answer and Return, verified on July 16, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated July 16, 2015. The Court has also received and reviewed petitioner's Reply thereto, sworn to on July 21, 2015 and filed in the Franklin County Clerk's office on July 29, 2015.

On June 10, 2014 petitioner filed two inmate grievance complaints. In the first complaint, dated June 4, 2014, the following was alleged: "On June 4, 2014 prison guard ([CO Tuper]) came in front of grievant cell-location for morning supplies and was intoxicated. And had refused to give grievant the needed supplies requested[.]" In the second inmate grievance complaint, dated June 5, 2014, the following was alleged: "On June 5, 2014 prison guard ([CO Tuper]) came in front of grievant cell-location for morning supplies and again like on June 4, 2014 appeared to be intoxicated. And once again refused to give grievant needed supplies requested." Petitioner's two inmate grievance complaints were apparently consolidated into Grievance UST-54201-14.

An investigation by DOCCS staff was conducted with respect to the allegations set forth in petitioner's consolidated grievance. In a June 10, 2014 memorandum to a DOCCS investigator (Sergeant Scott) C.O. Tuper made the following statement: "While doing supplies on the morning of June 4th & 5th inmate [petitioner] did not receive supplies due to no lights on in the cell and he refused to turn them on. And on these days I CO L Tuper was not intoxicated nor have I ever been intoxicated while on duty." In a June 16, 2014 memorandum from the investigating sergeant to DOCCS Lieutenant Barkman the following account was provided: "On 6/10/14 I interviewed inmate Johnson at 10-C-04 cell. He had no new witnesses or information to add to substantiate his allegations. I spoke with Officer Tuper and he has submitted a written statement denying the

allegations made against him by inmate Johnson. Due to my investigation and the lack of witnesses I find no merit to the inmate[']s allegations.”

By Decision dated June 17, 2014 the Superintendent of the Upstate Correctional Facility denied petitioner’s consolidated grievance as follows:

“Grievant is advised that the allegations contained in this complaint have been investigated. The investigation included an interview with the grievant by the investigating supervisor, as well as an interview of the staff member identified by the grievant.

The grievant was interviewed by a security supervisor regarding this complaint and offered no additional information and no witnesses to the alleged incident.

The staff member identified in the complaint submitted a written statement denying the allegations of denying grievant supplies.

The investigating supervisor states that there is no evidence to support the allegations made by the grievant.

Upon review of the information submitted, no misconduct by staff was found and no further action will be taken at this time. Grievance is denied.”

Petitioner appealed the superintendent’s decision to the CORC, asserting that “. . . video-tapes [inclusion¹] would be sufficient to support the denial of supplies. Prison guard denial without tapes evidence is arbitrary and capricious[.]”

By decision dated October 8, 2014 the CORC upheld the grievance denial determination of the facility superintendent for the reasons stated by the superintendent. In its determination the CORC went on to note “. . . that this matter has been properly investigated by the facility administration, and CO T[uper] denies being intoxicated at work. Further, CO T[uper] states that the grievant did not receive supplies on 6/4 and

¹ In his Appeals Statement petitioner actually utilized the word “exclusion” rather than “inclusion.” In paragraph five of his Reply, however, petitioner clarified that the word “exclusion” was inadvertently used rather than “inclusion.”

6/5/14 because he refused to turn his cell light on. With respect to the grievant's appeal, CORC upholds the discretion of the facility administration to review videotapes when deemed necessary based on security concerns, unusual incidents, etc. CORC has not been presented with sufficient evidence of malfeasance by staff." This proceeding ensued.

To prevail on a challenge to the final results of the grievance proceeding an inmate "... must carry the heavy burden of demonstrating that the determination by CORC was irrational or arbitrary and capricious." *Frejomil v. Fischer*, 68 AD3d 1371, 1372 (citations omitted). *See Williams v. Goord*, 41 AD3d 1118, *lv denied* 9 NY3d 812 and *Winkler v. New York State Department of Correctional Services*, 34 AD3d 993. For the reasons set forth below, the Court finds that the petitioner in the case at bar has failed to carry this burden.

Although petitioner notes his regulatory right to "present relevant information, comments, or other evidence" in support of his position in an inmate grievance proceeding (*see* 7 NYCRR §701.5(b)(2)(iii)²), the Court's review of the record reveals that petitioner did not request, or otherwise reference, potential review of any security video until after DOCCS' investigation of the consolidated grievance had been completed and after the facility superintendent issued his June 17, 2014 grievance denial determination. To the extent anything in the petition might be construed as an assertion that a DOCCS grievance investigation must, in all instances, include a review of any potentially relevant security videos - even where the grievant does not request such review - the Court rejects such argument. In this regard it is noted that DOCCS Directive 4942, relating to "Fixed

² This regulatory provision relates to the first step of the inmate grievance proceeding process before the Inmate Grievance Resolution Committee. The grievance in the case at bar, however, was apparently processed pursuant to the provisions of 7 NYCRR §701.8, wherein grievance proceedings before the IGRC are bypassed. This Court finds, however, that even under such circumstances petitioner's right to present relevant information, comments, or other evidence in furtherance of his position must be deemed preserved when the matter is before the facility superintendent. *See* 7 NYCRR §701.8(i).

Video Monitoring Systems,” does not specifically provide for utilization of such systems in the context of inmate grievance proceedings. In any event, DOCCS Directive 4942 does provide a mechanism, within the context of the New York State Freedom of Information Law, for inmates to request copies of incidents recorded by the DOCCS fixed video monitoring system to be utilized other than in connection with inmate disciplinary proceedings. *See* DOCCS Directive 4942(V)(B)(2)(b). Petitioner apparently did not avail himself of this process.

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

ADJUDGED, that the petition is dismissed.

Dated: November 24, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice