

<b>Matter of Johnson v Annucci</b>
2016 NY Slip Op 31782(U)
September 7, 2016
Supreme Court, Franklin County
Docket Number: 2016-92
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, ORDER & JUDGMENT  
RJI #16-1-2016-0063.18  
INDEX # 2016-92**

-against-

**ANTHONY J. 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 (denominated “Affidavit in Support of Order to Show Cause”) of Johnathan Johnson, sworn to on February 19, 2016 and filed in the Franklin County Clerk’s Office on February 23, 2016. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the failure of the DOCCS Inmate Grievance Program Central Office Review Committee (CORC) to timely issue decisions on administrative appeal with respect to inmate grievances GM-60,328-15 and GM-60,327-15.

The Court issued an Order to Show Cause on February 29, 2016. In response thereto, the Court has received and reviewed the answer and return of the respondent, with exhibits annexed thereto, together with the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 21, 2016. In addition, the Court has received and reviewed the supplemental return with an exhibit, together with the respondent’s Supplemental Letter Memorandum dated April 25, 2016 by Attorney Fleury.

Presumably in response to the information contained in the supplemental return<sup>1</sup>, the Court has received and reviewed the motion to amend the petition and proposed amended petition verified April 28, 2016. By letter dated May 12, 2016, Attorney Fleury noted that the petitioner need not move to amend the petition as such was available as of right pursuant to CPLR §3025. Moreover, Attorney Fleury requested the Court consider the amended petition as a reply insofar as no different or additional claims are raised therein. As such, by letter-order dated June 8, 2016, the Court directed the petitioner to advise the Court in writing as to whether he was abandoning the timeliness challenge previously raised in the original petition which was superceded by the filing of the amended petition<sup>2</sup> or the Court would grant leave for a second amended petition to be filed including the previous timeliness claims. Rather than providing either of the foregoing, the petitioner instead filed a motion to convert the Article 78 proceeding to a §1983 action. In response thereto, the Court has received and reviewed the affirmation in opposition by Attorney Fleury dated July 8, 2016. Based upon the foregoing, the original petition verified on February 19, 2016 and filed with the Franklin County Clerk on February 23, 2016 has been superceded by the amended petition verified on April 28, 2016 and filed with the Franklin County Clerk on May 6, 2016.

In the first cause of action, the petitioner seeks a “writ of mandamus to compel. To (*sic*) determine, whether the respondent’s [CORC] has violated lawful procedure”. *See*, ¶7.

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<sup>1</sup> The CORC issued a Final Determination for Grievance Number GM-60,328-15 on March 16, 2016.

<sup>2</sup> The Court advised that if the petitioner chose to abandon the timeliness claims, an amended motion schedule would have been provided.

It is undisputed that the CORC did issue a final determination for GM-60,328-15<sup>3</sup> on March 16, 2016. “Although CORC failed to issue its decisions on the grievances within the 30-day time limit prescribed by 7 NYCRR 701.5 (d) (3) (ii), such a time limit is directory, not mandatory, and petitioner has not alleged or shown that he was substantially prejudiced by either delay.” *Jones v. Fischer*, 110 A.D.3d 1295, 1296. Furthermore, the issuance of a determination renders the motion to compel moot.

As for the second cause of action raised in the amended petition, the petitioner argues that the respondent has denied him equal protection and equal treatment. Petitioner further asserts that there is “no rational relationship to a legitimate governmental purposes (sic) for difference in headphones treatments (sic) for special housing unit prisoners at Great Meadows (sic) nor any other special housing units of DOCCS.” Amended petition, ¶8. In sum and substance, petitioner appears to allege that he should not have to be subject to a new 30 day period of adjustment each time he moves facilities, particularly when it is a temporary transfer for attending court. However, the petition has failed to specify how this is a denial of equal treatment. Furthermore, the petition does not assert that petitioner was discipline-free for a period of 30 days prior to his transfer to Great Meadow.

“(a) After completing a period of 30 consecutive days of satisfactory adjustment, i.e., a period free of disciplinary sanctions (including time spent serving a keeplock or special housing disposition prior to transfer to a SHU), each inmate will be permitted additional items/privileges as set forth below. Determination of satisfactory adjustment shall be based on a review of log

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<sup>3</sup> While the original petition requested the determination of GM-60,328-15 and GM-60,327-15, the amended petition only cited GM-60,328-15. As such, any challenge to the determination relating to GM-60,327-15 has been abandoned.

entries and the disciplinary record for the period by the superintendent or his designee. An inmate assigned to Southport Correctional Facility or a double-celled SHU must also have completed an orientation period prior to receiving these additional items/privileges.

(b) Actions resulting in disciplinary sanctions during the ‘post adjustment’ period may result in a loss of privileges and the imposition of a new 30-day adjustment period.” 7 NYCRR § 303.1

“A complaining inmate bears the burden of establishing that the prison regulations are unreasonable.” *DeMaio v. Coughlin*, No. 89-CV-1237E(M), 1996 WL 377203. Herein, the petitioner merely makes a bald and conclusive statement that the Great Meadow Correctional Facility denied him equal treatment. As such, the petition must be denied.

Turning to the motion seeking to convert the Article 78 proceeding into a §1983 action, the motion is without basis in the law and must be denied. Preliminarily, upon review of the proposed verified complaint, while Anthony Annucci, Acting Commissioner of DOCCS, is also named in the amended petition in this matter, the proposed verified complaint names thirteen other defendants for whom jurisdiction has not yet been obtained in this proceeding. Similarly, the allegations contained in the proposed verified complaint relate to purported denial of medical treatment, food allergies, deprivation of showers and hot water, as well as other generally stated grievances. Insofar as the underlying amended petition related only to the denial of headphones, the proposed verified complaint does not organically derive from the petition. The use of CPLR §103(c) is an improper use.

“If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution. If the court finds it appropriate in the interests of justice,

it may convert a motion into a special proceeding, or vice-versa, upon such terms as may be just, including the payment of fees and costs.” CPLR §103.

The petitioner has not provided any reason to convert the Article 78 petition. Clearly, this petitioner has commenced dozens of actions and currently has several pending before this Court. The petitioner is fully aware of how to commence the action he seeks and inasmuch as he is seeking a monetary award, this is not the proper venue for same.

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

**ADJUDGED**, that the amended petition is dismissed; and it is further

**ORDERED**, the motion to convert the Article 78 to a §1983 complaint is denied.

**Dated:** September 7, 2016 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice