

<b>Shepherd v Annucci</b>
2018 NY Slip Op 30001(U)
January 4, 2018
Supreme Court, Seneca County
Docket Number: 51037
Judge: Dennis F. Bender
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STATE OF NEW YORK  
COUNTY OF SENECA SUPREME COURT

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EON SHEPHERD  
DIN 96A0356

Petitioner

ORDER GRANTING  
REARGUMENT

-against-

DECISION & JUDGMENT  
Index No. 51037

ANTHONY J. ANNUCCI, Acting Commissioner  
NYS Department of Corrections and Community  
Supervision,

Respondent

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The Petitioner herein, Eon Shepherd, filed this Article 78 proceeding requesting the Court grant Petitioner a reasonable accommodation request, transferring him to a flat prison where he does not have to walk long distances and which can accommodate his physical limitations; allowing Petitioner access to programs, religious services, activities; to provide him with adequate medical care for his breathing complications as well as treatment that offers him relief for his chronic extreme pain and discomfort in his lower back, right shoulder, knee and hips, and for an Order directing the issuance of medical boots for his painful hammer toes. In addition, the Petitioner requests an Order directing the Respondent to refund him for monies that were allegedly illegally taken out of his account for postage; for an Order directing Respondent to house Petitioner in the New York City, downstate, or the Sullivan County hub, together with such other and further relief as to the Court seems just and proper. A Verified Answer and Return has been received from the Respondent through his attorney, Assistant Attorney General Ted O'Brien. The Court issued a Decision and Judgment denying the petition in July of 2017. The Petitioner, per letter dated July 15, 2017, requested that this Court allow renewal or reargument, noting he had brought prior applications for the same issues, to wit, that the Respondent had transferred him to Five

Points Correctional Facility(hereinafter “Five Points”) on more than one occasion, and the Petitioner submits that Five Points cannot accommodate his mobility disabilities.

The Court hereby grants the Petitioner’s motion for reargument, limited to the issue of whether the Respondent should be prohibited from transferring him to Five Points in the future. The Court previously directed, per letter dated October 11, 2017, that the Respondent submit a response, limited to that issue.

The Petitioner was transferred to Sullivan Correctional Facility on June 23, 2017, and he is not on permanent bed rest/medical keeplock at this time. The issue is whether the Respondent should be directed to not transfer the Petitioner to Five Points in the future. The Respondent submits this request cannot be raised within the context of an Article 78 proceeding, seeking injunctive relief binding future decisions of DOCCS and limiting its ability to apply penological considerations to the issue where an inmate can best be housed. The Respondent also submits the determination is not final, because the Petitioner is challenging a future determination. The Court has received and reviewed the Respondent’s Reply Affirmation and December 21, 2017, submission, with affidavits of Dr. Dinello and Dr. Wolf, and the Petitioner’s November 6, 2017, December 5, 2017, December 27, 2017, and December 29, 2017 submissions, as well as the original application and response.

The Petitioner correctly points out this has been a recurring issue. The Respondent submits, however, per affidavit of David S. Dinello, M.D., dated October 30, 2017, that Five Points is ADA compliant, and can accommodate the Petitioner’s ambulation-related disabilities. Dr. Dinello also opines per affidavit dated December 21, 2017, that there does not seem to be a medical reason for the Petitioner’s refusal to use a wheelchair. He states the Petitioner has been seen a number of times ambulating without apparent discomfort or gait

disturbances, but that the Petitioner continues to complain of back pain. Due to his complaints, the Respondent has provided the Petitioner with a molded back brace and a cane. Per Ex. K attached to the original petition, however, is a medical report showing “After wearing brace for 16 years, inmate likely dependent upon it. No need for wheelchair.” Dr. Dinello also explained that the Petitioner’s “medical keep lock status” while at Five Points meant he did not have to attend mandatory programs if he was in pain, and that he did not have to go. (Dinello affidavit dated December 21, 2017.) Two Five Points health care memos, however, dated 1/5/15 and 4/24/15(Ex. E & O) show the Petitioner is on “medical bed rest in cell. Inmate may not leave cell for meals or any activity including work, program or recreation” and “These limitations are permanent.”

The Petitioner has provided documentation that shows on January 4, 2017, Dr. Dinello indicated he would attempt to move the Petitioner from Five Points to a “facility with closer areas to ambulate to”. (Ex. B, Petitioner’s November 6, 2017, submission) According to a memo from ORC Smithers to the Petitioner dated February 14, 2017, ORC Smithers “spoke with medical staff and they are currently pursuing a medical transfer”. (Memo attached to Petitioner’s December 5, 2017, submission)

The Respondent submits Five Points can meet the Petitioner’s medical needs, yet he keeps getting moved when he gets transferred back to Five Points and files an Article 78 petition, alleging Five Points cannot meet his needs. (See Seneca County Index #44315, #47503, #49582 as well as the current application). Further, despite Dr. Dinello’s statement the Petitioner was not transferred due to medical needs, the record contradicts his assertion.

“...it is well settled that the State possesses a duty to render reasonable and adequate medical care to its inmates without undue delay(citation omitted). In the court’s

view, once claimants sought medical intervention for his prostheses, decisions with respect to not only the treatment of his condition, but also whether and how he would ambulate within the facility by reason of that condition, became matters of medical care and treatment, rather than simple classification and assignment under 9 NYCRR Part 7013.” Carlson v State, 34 Misc. 3d 242, 253(Court of Claims, 2011).

It is clear that Five Points is not an ideal location for the Petitioner because of his ambulatory issues. Five Points staff have consistently shown, however, that the facility is ADA compliant, and that while not ideal for the Petitioner’s programming needs, he can be reasonably accommodated. (Ex. P, R & T); Affidavits of Laurine Jones, Dr. Marshall M. Trabout and Dr. Michelle Belgard; Affidavit of Dr. David S. Dinello.

The Court is mindful of the broad discretion given the Respondent to minimize safety risks and staff fatigue by transferring inmates between facilities. There are a limited number of correctional facilities that can accommodate the Petitioner’s medical needs (Laurine Jones affidavit, paragraph 20). While Five Points may not be the most ideal choice of the options available, the Respondent is required to provide essential, not optimal care. Jarvis v Pullman, 297 AD 2d 842, 843(3d Dept., 2002) The Respondent has demonstrated several efforts to try and accommodate the Petitioner’s medical needs.

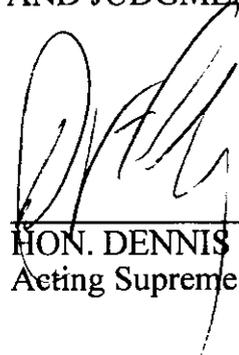
“Judicial review of the denial of an inmate grievance is limited to whether such a determination was arbitrary or capricious, without a rational basis or affected by an error of law (citations omitted). With regard to Petitioner’s request for a transfer to a specific facility, Respondent has broad discretion deciding whether to transfer inmates from one correctional facility to another and an inmate has no right to be housed at any particular facility (citations omitted).” Brooks v Annucci, 149 AD 3d 1434,1435(3d Dept., 2017) The Court finds the

Petitioner has failed to meet his burden of showing the Respondent cannot adequately meet his medical needs at Five Points Correctional Facility.

The Court adheres to its original Decision and Judgment denying and dismissing the petition, but for the reasons stated herein, rather than on mootness.

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

DATED: January 4, 2018



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HON. DENNIS F. BENDER  
Acting Supreme Court Justice