

20-8357
No. _____

FILED
DEC 07 2020
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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

Andrew Hendricks — PETITIONER
(Your Name)

VS.

Anthony Annucci, et al. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

New York State Appellate Division: Third Department
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Andrew Hendricks
(Your Name)

Clinton Corr. Fac., P.O. Box 2002
(Address)

Dannemora, N.Y. 12929
(City, State, Zip Code)

(Phone Number)

ORIGINAL

QUESTION(S) PRESENTED

Before seeking judicial intervention from New York State Supreme/County Court did I first exhaust all available administrative remedies, in accordance with New York regulations, federal case law and the Prisoners' Litigation Reform Act?

LIST OF PARTIES

- All parties appear in the caption of the case on the cover page.
- All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Anthony Annucci, Commissioner
New York State Dept. of Corr. and Comm. Supervision
1220 Washington Ave., Bldg. 9
Albany, N.Y. 12226

Earl Bell, Superintendent
Clinton Corr. Fac.
P.O. Box 2002
Dannemora, N.Y. 12929

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OTHER

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

reported at 179 A.D.3d 1232 (2020); or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the Clinton County court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was Jan. 9, 2020. A copy of that decision appears at Appendix A .

A timely petition for rehearing was thereafter denied on the following date: April 6, 2020, and a copy of the order denying rehearing appears at Appendix C .

An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Prisoners' Litigation Reform Act, 42 U.S.C.A., 1997e

STATEMENT OF THE CASE

My Inmate Grievance Complaint dated November 21, 2017 was filed on December 11, 2017. I appealed the Inmate Grievance Resolution Committee's (IGRC) denial of my grievance to the facility Superintendent, and then the Superintendent's denial to the Central Office Review Committee (COCR) on January 24, 2018, filed February 6, 2018. After the COCR still had not yet issued a decision on my grievance appeal within 30 calendar days from receiving it, on April 18, 2018 I filed an Article 78 Petition in the New York State Supreme/County Court, Clinton County, asking the court to reverse the constructive denial of my Inmate Grievance Complaint.

Although the COCR did not render a decision on my grievance appeal within 30 calendar days, nor request an extension of time to decide my grievance appeal pursuant to New York Department of Corrections and Community Supervision (DOCCS) regulations, the trial court dismissed my Article 78 Petition for failure to exhaust my administrative remedies because I did not continue to wait, well past the the 30 day time limit for the COCR to render a decision on my grievance appeal, before I sought judicial intervention with my Article 78 Petition.

I appealed the trial court's decision to the Appellate Division: Third Dept. asserting largely, among other things, that I did indeed exhaust all available administrative remedies prior to seeking judicial intervention. The Third Dept. affirmed the lower court's decision holding that the 30 calendar day time limit for the COCR to render a decision on a grievance appeal is "directory, not mandatory. Therefore, again, because I sought judicial intervention before the COCR rendered a decision on my grievance appeal, I failed to exhaust my administrative remedies.

After the Appellate Division: Third Dept. denied my motion for reargument or, in the alternative leave to appeal to the New York State Court of Appeals on April 6, 2020, I sought leave to appeal from the Court of Appeals who denied my request on September 10,

2020.

The Third Dept.'s holding and decision to affirm the lower court's decision in this matter is in direct conflict with the holding and decision of this court in the matter of Ross v. Blake. In Ross this court held, "an inmate is required to exhaust those, but only those, grievance procedures that are 'capable of use' to obtain 'some relief for the action complained of.'" (Ross v. Blake, 136 S.Ct. 1850, 1859; citing Booth v. Churner, 532 U.S. 731, 738, 121 S.Ct. 1819; see also Prisoners' Litigation Reform Act, § 101 [a], 42 U.S.C.A., § 1997e [a]). The Ross court held that an administrative remedy is unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation or intimidation." (Ross, 136 S.Ct. at 1860). By ignoring my appeal the CORC could delay my exhaustion indefinitely, making the remedy "unavailable" by thwarting my attempt to exhaust. I tried to appeal my grievance to the "next step" after the Superintendent level, but was unable to do so because the CORC ignored my grievance appeal until finally issuing a decision on it on May 8, 2019, approximately 15 months after they received my grievance appeal and approximately 13 months after I sought judicial intervention.

The Third Dept.'s holding and decision in this matter are also in direct conflict with this court's holding and decision in Booth v. Churner. In Booth this court held, "While the modifier 'available' requires the possibility of some relief for the action complained of..., the word 'exhausted' has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered. It would, for example, be very strange usage to say that a prisoner must 'exhaust' an administrative order reassigning an abusive guard before a prisoner could go to court and ask for something else; or to say (in states that award money damages administratively) that a prisoner must 'exhaust' his damages award before going to court for more. How would he 'exhaust' a transfer of personnel? Would he have to spend the money to 'exhaust' the monetary relief given him? It makes no sense to demand that someone exhaust 'such administrative [redress]' as is available; one 'exhausts' processes, not forms of relief, and

the statute provides that one must." (Booth v. Churner, 532 U.S. 731, 738 - 739, 121 S.Ct. 1819 [2001]). In other words, it would be impossible for me to "exhaust" a decision from the CORC.

It is undisputed that the CORC did not render a decision on my grievance appeal within 30 days of receiving it on February 6, 2018 appeal. But the Third Dept. held in its decision that the 30 day time limit is "directory, not mandatory", and I was supposed to continue to wait for the CORC to issue a decision on my grievance appeal, no matter how long it took, before seeking judicial intervention. This holding and decision by the Third Dept. is in direct conflict with other federal caselaw.

The CORC "shall review each appeal and render a decision on the grievance... within 30 days from the time the appeal is received." (7 NYCRR, § 701.5 [d] [3] [ii]). In Hayes v. Dahlke the Second Circuit held, "Unlike the word 'may', which implies discretion, the word 'shall' usually connotes a requirement." Kingdomware Techs., Inc. v. United States, — U.S. —, 136 S.Ct. 1969, 1977, 195 L.Ed.2d 334 (2016); see also Lexecon Inc. v. Milberg Weiss Bershad & Lerach, 523 U.S. 26, 35, 118 S.Ct. 959 140 L.Ed.2d 62 (1998) (noting that the word "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"). (Hayes v. Dahlke, 976 F.3d 259, 269 [2020]). The Hayes court further held, "DOCCS regulations impose a 30 day deadline with no qualifications. In fact, the regulations specifically prohibit prison officials from stalling the resolution of an inmate's grievance by ignoring the various deadline throughout the process. Instead, to obtain an extension 'at any level of review', the agency must obtain the inmates consent. NYCRR tit. 7 § 710.6 (g) (2). 'Absent such extension, matters not decided within the time limits may be appealed to the next step.' Of course, after CORC review, there is simply no 'next step' in the process - other than to file a lawsuit in court." (Hayes, 976 F.3d at 269).

REASONS FOR GRANTING THE PETITION

There is a square conflict among this court and the Second Circuit regarding the question presented. That conflict is starkly illuminated by the contrast between the Second Circuit's decision in *Hayes v. Dahlke*, 976 F.3d 259 (2020) and the decision below. In addition, as the Second Circuit acknowledged, other courts of appeals also have rejected the Third Dept.'s approach. This unchecked mode of operation creates an intolerable conflict - and severe unfairness - that this court should resolve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew Hendrick

Date: January 3, 2021