Matter of Jones v Brian Fischer Commr. N.Y. State Dept. of Correction & Community Supervision

2012 NY Slip Op 32719(U)

July 11, 2012

Supreme Court, Albany County

Docket Number: 7577-11

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ANTONIO JONES,

Petitioner,

-against-

BRIAN FISCHER COMMISSIONER NEW YORK STATE DEPARTMENT OF CORRECTION AND COMMUNITY SUPERVISION,

Respondents,

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. 01-11-ST3227 Index No. 7577-11

Appearances: Main Street Legal Services, Inc.
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(Kevin P. Hickey,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

[* 2]

The petitioner, an inmate currently at Auburn Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated June 10, 2011 in which he was found guilty of violating prison rules. He was found to have violated Rule 105.13 involving, as relevant here, possession of gang-related material consisting of four photographs.[1] It is alleged in the petition that during the hearing, the hearing officer infringed upon petitioner's due process right to call a witness who would testify that the four photographs in his possession, had previously been screened and approved by an Investigator employed by the respondent Department of Corrections and Community Service (DOCCS) in the Inspector General's Office. Specifically, it is indicated that in March or April of 2009 an individual identified as Investigator Gessner reviewed the photographs and subsequently returned them to the petitioner after the conclusion of an investigation. The petitioner argues that the photographs would not have been returned to him had they contained gang symbols or hand signs. The hearing officer denied petitioner's request to have Investigator Gessner testify, finding the testimony was not relevant since "[t]here's no proof that these photos were reviewed or that they may have been overlooked."

It is well settled that a hearing officer may properly deny witnesses who would provide testimony which is merely cumulative and redundant to that given by prior witnesses (see Matter of Gomez v Fischer, 74 AD3d 1399, 1400 [3d Dept., 2010]; Matter of McLean

[1]Rule 105.13 recites as follows: "An inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten gang or gang related material." (see 7 NYCRR § 270.2)

[* 3]

v Fischer, 63 AD3d 1468, 1469 [3d Dept., 2009]; Matter of Igartua v Selsky, 41 AD3d 717 [3d Dept, 2007]); or those who have no direct knowledge of the subject incident (see Matter of Tafari v Fischer, 94 AD3d 1324 [3d Dept., 2012]; Matter of Davis v State of New York, 75 AD2d 1022, 1023 [3d Dept., 2010]; Matter of Hernandez v Bezio, 73 AD3d 1406, 1407 [3d Dept., 2010]; Matter of Smith v Martuscello, 85 AD3d 1516 [3d Dept., 2011]; Matter of Knight v Bezio, 82 AD3d 1381, 1382 [3d Dept., 2011]; Matter of Smalls v Fischer, 89 AD3d 1294 [3d Dept., 2011]).

The Court finds that petitioner was entitled to call Investigator Gessner to explain, if he could, whether he reviewed the photographs, for what purpose, and whether or not he noticed or was aware that the photographs contained gang hand signs. Because, however, the Hearing Officer provided a good faith reason for denial of the witness (supra), the Court finds that there was no constitutional violation and, accordingly, the matter must be remitted to the respondent to conduct another hearing (see Matter of Buari v Fischer, 70 AD3d 1147 [3rd Dept., 2010]; Matter of Santiago v Fischer, 76 AD3d 1127 [3rd Dept., 2010]).

In petitioner's second cause of action, petitioner argues that because his request to call Investigator Gessner was denied, he was prevented from raising a defense under the doctrine of res judicata. The petitioner indicates that the photographs at issue in this proceeding were the subject of a 2009 disciplinary proceeding. It is asserted that the defense of res judicata applies by reason that Investigator Gessner's testimony would have established that the petitioner had been found not guilty of possessing gang related material with respect to those

photographs, which include the same ones at issue in the instant proceeding. "Under the doctrine of res judicata, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter" (In Re Hunter, 4 NY3d 260, 269 [2005] citing O'Connell v Corcoran, 1 NY3d 179, 184-185 [2003]; Gramatan Home Invs. Corp. v Lopez, 46 NY2d 481, 485 [1979]; see Comrie, Inc. v Lake Avenue, Inc., 86 AD3d 856 [3d Dept., 2011]). "The rule applies not only to claims actually litigated but also to claims that could have been raised in the prior litigation" (id.). "The rationale underlying this principle is that a party who has been given a full and fair opportunity to litigate a claim should not be allowed to do so again" (id.). The doctrine of res judicata is generally applicable to quasi judicial administrative determinations (see Matter of Josey v Goord, 9 NY3d 386 [2007], citing Ryan v New York Tel. Co., 62 NY2d 494, 499 [1984]). In this case, however, the petitioner has not presented sufficient evidence to establish that the prior disciplinary determination specifically exonerated him of guilt with regard to the four photographs in question here. The Court finds that the cause of action has no merit.[2]

In his third cause of action, the petitioner maintains that he was denied his right to present documentary evidence. One such document was a DOCCS memorandum regarding

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[2]The misbehavior report dated March 19, 2009, while mentioning two pages (front and back) of unauthorized gang related material, does not explicitly mention photographs. The disciplinary determination dated April 2, 2009 found the petitioner guilty of possessing gang related materials based, in part, upon his own admission. On its face, the determination does not appear to exonerate the petitioner of anything.

a Rastafarian hand sign which, he claimed, was the same hand sign depicted in one of the photographs identified in the misbehavior report. From a review of the hearing transcript, it appears that the petitioner indicated during the hearing that he recently had a copy of the memorandum in his possession, but could not locate it because his belongings had been packed up by others when he was removed from his cell. Because the petitioner was evidently aware of the contents of the memorandum, and because he had requested the hearing officer to consider it, the Court finds that the petitioner has not demonstrated how, or in what respect he was prejudiced by the failure to produce it at the hearing.

The petitioner also requested production of training materials with respect to gang hand signs testified to by Counselor Kober. The Hearing Officer denied production of the training materials on grounds that they were "confidential". It was recently held that a witness's explanation that a document was "confidential" was insufficient to support a "bald" claim of confidentiality (see Matter of Crook v Fischer, 91 AD3d 1076 [2d Dept., 2012]). Notably, while such materials might properly be denied on grounds that disclosure would jeopardize institutional safety or correctional goals (see Matter of Cahill v Goord, 36AD3d 997, 998 [3rd Dept., 2007]), that was not expressly stated by the Hearing Officer. Under the circumstances, the Court finds that this, too, supports remittal to the respondent for a new hearing (see Matter of Crook v Fischer, supra).

In view of the foregoing, the Court need not address petitioner's fourth cause of action, which argues that the penalty imposed was excessive.

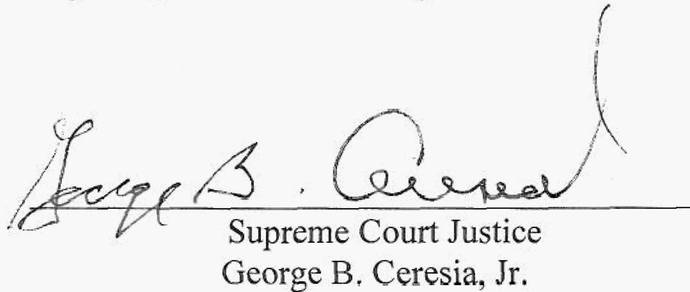
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is granted to the limited extent that the determination dated June 10, 2011 is vacated, and the matter is remitted to the respondent for a new hearing.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the petitioner. 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: July 11, 2012
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Notice of Petition dated December 6, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 1, 2012

Not Considered:

1. Letter dated June 6, 2012 of Antonio Jones