Matter of Hall v Prack
2012 NY Slip Op 32808(U)
November 14, 2012
Supreme Court, Franklin County
Docket Number: 2012-448
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
TYRONE HALL, #09-B-0102,
Petitioner,

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

-against-

ALBERT PRACK, Director,
Special Housing,
Respondent.

DECISION AND JUDGMENT
RJI #16-1-2012-0213.50
INDEX # 2012-448
ORI #NY016015J

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Tyrone Hall, verified on May 22, 2012 and filed in the Franklin County Clerk's office on May 24, 2012. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility and concluded on December 13, 2011. An Order to Show Cause was issued on May 30, 2012. The Court has since received and reviewed respondent's Answer and Return, verified on July 20, 2012 and supported by the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated July 20, 2012. The Court has also received and reviewed additional correspondence from Assistant Attorney General Michaels, dated October 19, 2012. No Reply has been received from petitioner.

As the result of an incident that occurred at the Upstate Correctional Facility on November 28, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (direct order), 124.10 (mess hall policy) and 107.10 (interference). Specific details with respect to such charges are not relevant to the

disposition of this proceeding. A Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on December 12, 2011. At the conclusion of the hearing, on December 13, 2011, petitioner was found guilty as charged and a 5-day restricted diet penalty was imposed. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on December 13, 2011 were affirmed. This proceeding ensued.

Petitioner advances several arguments in support of his ultimate contention that the results and disposition of the Tier III Superintendent's Hearing concluded on December 13, 2011 must be overturned. One argument in particular, as discussed below, resonates with the Court. Petitioner contends that he was unlawfully denied the right to call Inmate Page as a witness on his behalf. Petitioner originally requested the testimony of Inmate Page when he met with his assistant and the record reflects that Inmate Page agreed to testify when first approached by petitioner's assistant. When the testimony of Inmate Page was actually sought during the course of the superintendent's hearing, however, it became apparent that Inmate Page was refusing to testify. The Hearing Officer initiated an on-the-record interview of the prospective escort officer, Correction Sergeant Eddy. Sergeant Eddy testified that Inmate Page " . . . refused [to testify] and didn't want to come, he changed his mind." When questioned by the hearing officer as to whether he advised Inmate Page that the hearing officer was requesting to interview him on the record as to why he changed his mind, Sergeant Eddy replied "[n]ot in those particular words." The following colloquy then occurred:

"Bullis
[Hearing Officer]: Okay, pursuant to a court ruling, (inaudible) I can't go down the gallery per facility policy, I need to uh, make it clear for the record that I am requesting that I am requesting for him [Inmate Page] to be interviewed on the record as

	to why he changed his mind. But did he indicate to you [Sergeant Eddy] . . .that he was . . .being influenced by anyone to make him change his mind?
Sergeant:	No, absolutely not.
Bullis:	Did he tell you that he was suffering from mental or physical disabilities that would interfere with him coming to the hearing at this time?
Sergeant:	No, absolutely not.
Bullis:	The hearing will be adjourned so that I can clarify this issue. The hearing is hereby adjourned."

After an unspecified period of time had elapsed the hearing was reconvened and the following colloquy occurred:

"Bullis:	The hearing was adjourned I wanted to clarify an issue regarding inmate Page changing his mind to testify and I requested the Sergeant to clarify the issue to go to the cell of inmate Page and make it clear to Mr. Page that I was requesting as a hearing officer for him to come to the hearing not to testify, but at least to clarify to me on the record as to why he is changing his mind. Can you tell me Sergeant, did you return to the cell of Inmate Page to address the issue of me requesting that he come to the hearing to be interviewed on the record as to why he is changing his mind to testify.
Eddy:	I returned to Charlie 1 where Mr. Page is currently housing at, Rephrased the request, gave the inmate a direct order to come to the office, the hearing office to testify why he wasn't gonna um, why

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	he wasn't going to testify [at] the hearing.
Bullis:	To be interviewed by me?
Eddy:	Yes, to be interviewed by you, yes.
Bullis:	And what did he do, what did he say then?
Eddy:	He refused, he said he's not coming.
Bullis:	I'm going to find then, that I have made reasonable efforts then to interview Mr. Page on the record as to why he suddenly changed his mind as to not testify. Mr. Page uh, corroborated by the testimony of the Sergeant was refusing to come to the hearing to explain to me why he changed mind."

The petitioner immediately stated for the record that he was objecting to the denial of his inmate witness.

According to the Appellate Division, Third Department, "[w]hen an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate's unwillingness to testify . . . A witness's statement that he '[did] not want to be involved' is not a sufficient reason to excuse a personal interview by the hearing officer . . . However, when the hearing officer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected." *Hill v. Selsky*, 19 AD3d 64, 67 (citations omitted) (emphasis added). In the case at bar the hearing officer's personal inquiry as to the reason underlying Inmate Page's refusal to testify was clearly required. The Court finds, moreover, that the hearing officer's obligation to personally inquire into the reason underlying the refusal was not satisfied since the inmate's purported

unwillingness to discuss his refusal with the hearing officer was established solely through the testimony of Sergeant Eddy. As noted by the *Hill* court, the right of an inmate at a Tier III Superintendent's Hearing ". . . to call witnesses was not adequately protected by third-person interviews because the Hearing Officer lacked the opportunity to judge the authenticity of the witnesses' refusals." *Id.* at 67. This Court further finds that the petitioner interposed a clear objection to the denial of his request that Inmate Page be called to testify on his behalf.

The hearing officer's failure to personally interview inmate Page with the respect to the authenticity of his refusal to testify, after the prospective witness had previously indicated to petitioner's employee assistant that he was willing to testify, constituted a violation of petitioner's fundamental due process rights for which expungement is the proper remedy. *See Alvarez v. Goord*, 30 AD3d 118, *Hill v. Selsky*, 19 AD3d 64 and *Contras v. Coughlin*, 199 AD2d 601.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Hearing concluded on December 13, 2012 are vacated, the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records, and the respondent is directed to reimburse petitioner's inmate account for any mandatory surcharge imposed upon disposition of such hearing.

Dated: November 14, 2012 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice