

Matter of Pressley v Annucci
2016 NY Slip Op 31547(U)
August 12, 2016
Supreme Court, Franklin County
Docket Number: 2016-140
Judge: S. Peter Feldstein
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
QURAN PRESSLEY, #14-A-4456,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2016-0091.23
INDEX # 2016-140**

-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 of Quran Pressley, verified on February 24, 2016 and filed in the Franklin County Clerk's Office on March 14, 2016. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's hearing held at Upstate on November 20, 2015.

The Court issued an Order to Show Cause on March 17, 2016. The Court has received and reviewed the respondent's Answer and Return, together with exhibits including two (2) DVDs and the confidential portion of the hearing transcript, as well as a letter-memorandum dated May 20, 2016 from Christopher J. Fleury, Esq., Assistant Attorney General. In further support of the petition, the Court has received and reviewed the petitioner's reply together with exhibits dated May 26, 2016 and received by the Franklin County Clerk on June 9, 2016.

On November 11, 2015, the petitioner was being escorted by correction officers to the infirmary for a mental health observation when the officers alleged that the petitioner

became verbally abusive and physical towards the officers. The petitioner was served with a misbehavior report charging him with violating inmate rules 104.11 (violent conduct) and 106.10 (direct order). Petitioner completed an Assistant Selection Form and Correctional Officer M. Morris was appointed to assist the petitioner on November 13, 2015. On November 18, 2015, petitioner requested that Employee Assistant Morris obtain a copy of the OMH Log Book for November 11, 2015 and "Chapter 5" as well as the DVD(s) of the incident. Petitioner also requested the potential witness testimony of C.O. Mitchell, the author of the misbehavior report as evidenced by the Assistant Form. *See, Resp. Ex. D.* The petitioner refused to sign the Assistant Form acknowledging receipt of assistance.

A Tier III Superintendent's Disciplinary Hearing commenced on November 20, 2015. The Hearing Officer viewed the videos of the incident with the petitioner in the room. The petitioner asserted that he requested the Use of Force Report from the Employee Assistant but was not provided with same.¹ The petitioner requested the Use of Force Report as evidence in the hearing as well as the OMH log book entry which both the Employee Assistant and the Hearing Officer advised did not exist. The Hearing Officer denied the request for the Use of Force Report at the hearing as he indicated that the report was irrelevant in light of the video showing the incident. During the hearing, the petitioner objected to the failure to provide the Use of Force Report as well as to the failure to provide the log book entry. At the hearing, the petitioner did not raise an issue of ineffective employee assistance or the inability to call and question witnesses. It is noted, however,

¹ It is noted that the Use of Force Report was not listed as a requested document on the Assistant Form. *Resp. Ex. D.*

that the petitioner repeatedly objected to the hearing proceeding as he felt the Hearing Officer was biased against him.

At the conclusion of the Tier III hearing, the Hearing Officer found the petitioner guilty of both charges and imposed a penalty of ninety (90) days in the Special Housing Unit to commence on February 3, 2016 and concluding on May 4, 2016. Petitioner filed a timely appeal on November 20, 2015 wherein he alleged (1) he was denied effective employee assistance insofar as he was not provided with the log book entry; (2) he was denied a fair and impartial hearing when the Hearing Officer continued to conduct the hearing over his objection for ineffective assistance and that the misbehavior report was retaliatory; and (3) that he objected to Hearing Officer Lt. Rowe conducting the hearing as the petitioner alleges the assignment was intended to intimidate the petitioner. The disposition of the Superintendent's Hearing was affirmed by D. Venettozzi, Director, Special Housing/Inmate Disciplinary Program on February 4, 2016.

In this proceeding, the petitioner asserts that he was not afforded minimal due process at the Tier III hearing and argues that he was denied: (A) the right to have assistance; (B) the right to request and have documentary evidence to create a defense; (C) the right to hear and review all evidence against him; and, (D) the right to a fair and impartial hearing. Specifically, the petitioner argues in the petition that despite advising the Hearing Officer that he had not received employee assistance and requesting same, the Hearing Officer denied the petitioner's request and continued to conduct the hearing over the petitioner's objection. Similarly, the petitioner alleges that the Hearing Officer denied the request for documents and the testimony of Correction Officer Mitchell without providing any reason for the denial. The petitioner also challenges that the Hearing Officer

solely relied on only the video of the incident and the misbehavior report which the petitioner asserts are conflicting. Finally, the petitioner alleges that the Hearing Officer failed to conduct a fair and impartial hearing.

Respondent argues as a matter of law that the petitioner failed to exhaust his administrative remedies prior to commencing this action and, as such, the petition should be dismissed. Respondent asserts that the specific objections that the petitioner now raises were not raised at the hearing and therefore, were not preserved for appellate review. In addition, the petitioner failed to raise these same objections in his administrative appeal to the Superintendent. “A petitioner must exhaust all administrative remedies before seeking judicial review unless he or she is challenging an agency's action as unconstitutional or beyond its grant of power, or if resort to the available administrative remedies would be futile or would cause the petitioner irreparable harm.” *Abdullah v. Girdich*, 297 AD2d 844, 845.

Upon review of the hearing transcript, it is clear that the petitioner asserted his demand for the Use of Force Report and the log book entry repeatedly. However, his objections regarding the denial of same were not specifically raised in his administrative appeal therefore those objections are not preserved for this petition. *See Wood v Fischer*, 82 AD3d 1443; *Valdez v Fischer*, 74 AD3d 1596. Similarly, the administrative appeal failed to allege that the petitioner was improperly denied his right to hear and review all evidence against him or that the misbehavior report was insufficiently specific. “Inasmuch as these claims are fact-dependent and their resolution requires the development of an administrative record, they should first be addressed to the agency having responsibility.” *Hyatt v. Annucci*, 134 AD3d 1359, 1359.

Despite listing him on the Assistant Form, the petitioner did not call Correction Officer Mitchell to testify at the hearing. The Hearing Officer's reliance upon the misbehavior report authored by Mitchell without examination was not challenged at the hearing. "Petitioner raised no objection in this regard, nor did he subsequently renew his request for this witness. Under such circumstances, petitioner has failed to preserve this issue for our review." *Russell v. Selsky*, 50 AD3d 1412, 1413; see also *Benston v. Fischer*, 67 AD3d 1139.

While the petitioner alleges that he was denied effective employee assistance, the petitioner is unclear as to what more the assistant could have done. Although during the hearing the petitioner claimed that the employee assistant failed to provide the OMH log entry, inasmuch as it did not appear that same existed or, more importantly, would have been relevant, the petitioner's claims to inadequacy of the employee assistant are without merit. See *Hamid v. Goord*, 25 AD3d 1041; see also *Maya v. Goord*, 272 AD2d 724.

Although the petitioner repeatedly asserted at the hearing, in his administrative appeal and in this petition his belief that the Hearing Officer was biased against him, the petitioner has failed to assert any proof of same. Indeed, upon review of the hearing record, there has not been a demonstration of any bias by the Hearing Officer. See *Lewis v. Goord*, 43 AD3d 1223.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ADJUDGED**, that the petition is dismissed.

Dated: August 12, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice