Matter of Stallone v Fischer

2012 NY Slip Op 32533(U)

October 1, 2012

Sup Ct, Franklin County

Docket Number: 2011-1212

Judge: S. Peter Feldstein

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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
JEROME STALLONE, #97-A-1248,
Petitioner,

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

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision,
Respondent.

DECISION AND ORDER
RJI #16-1-2011-0539.105
INDEX # 2011-1212
ORI #NY016015J

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jerome Stallone, verified on December 15, 2011 and filed in the Franklin County Clerk's office on December 19, 2011. Petitioner, who is an inmate at the Elmira Correctional Facility, challenged the results of two Tier II Disciplinary Hearings held at the Franklin Correctional Facility and concluded on November 22, 2011 and November 24, 2011, respectively. The Court issued an Order to Show Cause on December 22, 2011 and received and reviewed respondent's Notice of Motion to dismiss, supported by the Affirmation of Cathy Y. Sheehan, Esq., Assistant Attorney General, dated February 23, 2012. The Court also received and reviewed petitioner's Notice of (Cross) Motion, supported by his affidavit sworn to on March 1, 2012. Petitioner's papers were filed in the Franklin County Clerk's office on March 5, 2012.

Respondent's motion papers sought, in effect, an order of this court severing and dismissing petitioner's challenge to the results and disposition of the Tier II Disciplinary Hearing concluded on November 22, 2011 based upon the alleged failure to exhaust administrative remedies. Respondent's motion papers also sought an order of this Court

transferring petitioner's remaining challenge to the results and disposition of the Tier II Disciplinary Hearing concluded on November 24, 2011 to the Appellate Division, Third Department. By Decision and Order/Order of Transfer dated April 30, 2012 the Court, relying on *Rossi v. Portuando*, 275 AD2d 823, denied respondent's motion to dismiss petitioner's challenge to the results and disposition of the Tier II Disciplinary Hearing concluded on November 22, 2011 and directed that this proceeding in its entirety, be transferred for disposition to the Appellate Division, Third Department.

Petitioner now moves for leave to reargue with respect to the Decision and Order/Order of Transfer of April 30, 2012. In his motion papers it is asserted that the "substantial evidence" issue was not effectively raised and, therefore, that this Court should have disposed of the entire proceeding without transfer to the Appellate Division. No opposing papers were received from respondent.

On November 7, 2011 petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 106.10 (failure to obey direct order). The inmate misbehavior report, authored by C.O. Cecot, alleged, in relevant part, that petitioner was told to buff the floors in the day room and was given instructions as to how this was to be done. According to the inmate misbehavior report, petitioner " . . . refused to do it as instructed, he was then given several direct orders and he still refused to comply . . .Stallone was placed on full bed pending." A Tier II Disciplinary Hearing was commenced with respect to the direct order charge on November 10, 2011 but was adjourned and ultimately not completed until November 24, 2011.

In the meantime, as a result of an incident that occurred on November 18, 2011 petitioner was issued a second inmate misbehavior report charging him with violations of inmate rules 109.10 (out of place) and 181.10 (non-compliance with hearing disposition). The second inmate misbehavior report, authored by C.O. Ellsworth, alleged,

in relevant part, as follows: " . . . I observed inmate Stallone . . . who is presently on full bed pending leave the bathroom area and walk into phone booth #1. I ordered him to exit the phone booth which he complied with no further incident . . ." A Tier II Disciplinary Hearing was held with respect to the charges set forth in the second inmate misbehavior report on November 22, 2011. Following the hearing petitioner was found not guilty of violating inmate rule 181.10[1] but guilty of the remaining charge. A disposition was imposed confining petitioner on keeplock status for 30 days and directing the loss of various privileged for a like period of time. Whether or not petitioner took an administrative appeal from the results and disposition of the November 22, 2011 hearing was at issue in this proceeding.

On November 24, 2011, upon completion of the hearing commenced on November 10, 2011, petitioner was found guilty of violating inmate rule 107.10 and a disposition was imposed confining him on keeplock status for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing and concluded on November 24, 2011 were affirmed.

Among the various arguments advanced by petitioner in this proceeding was the assertion that "[t]he way these hearings progressed drew a reasonable inference that it did not matter what petitioner offered as proof he did not violate any rule. The mode and operation of those hearings were geared to find petitioner guilty, and put him in the special housing unit." The Court, moreover, read this assertion against the backdrop of petitioner's assertion that both of the inmate misbehavior reports were "unfounded" and issued for the purpose of "retaliation and revenge" after his cooperation in the DOCCS

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[1] The presiding hearing officer found that the inmate rule 181.10 charge was "not substantiated,"presumably because petitioner's full bed pending status was not the result of a hearing disposition.

Inspector General's investigation of an alleged assault by Franklin Correctional Facility staff on another inmate (see paragraph 22 of the petition). Although the *pro se* inmate petitioner did not specifically raise the "substantial evidence" question, as specified in CPLR §7803(4), the Court's examination of the petition led it to conclude that such issue had sufficiently, though inartfully, been raised. *See Abreu v. Coughlin*, 157 AD2d 1028. In this regard the Court found the claim that the inmate misbehavior reports were written in retaliation for petitioner's cooperation with the Inspector General's investigation called into question the sufficiency of the evidence upon which the determinations of guilt were based and, therefore, implicated the substantial evidence question. *See Bonez v. Commissioner*, 65 AD3d 1411. Accordingly, this proceeding, in its entirety was already transferred to the Appellate Division, Third Department.

A motion for leave to reargue ". . . shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court . . ." CPLR §2221(d)(2). Such a motion is directed to the sound discretion of the Court. *See Loris v. S&W Realty Corp*, 16 AD3d 729. In his motion for leave to reargue petitioner asserts that the references to "retaliation and revenge" in his petition were not part of the hearing record or record on administrative appeal but, rather, presented merely as background information with respect to the incidents underlying the issuance of the two inmate misbehavior reports. In this regard petitioner asserts in paragraph two of his Affidavit in Support for Rearguement and Reconsideration that "[t]he sole issues that the administrative appeals and hearing records were founded upon petitioner's assertions that the hearing officer was not fair or impartial."

While petitioner is correct in the assertion that his cooperation with the DOCCS Inspector General's investigation of an alleged assault by Franklin Correctional Facility staff on an inmate was not discussed at either of the underlying hearings, he is incorrect

in his assertion that the issue was not raised on administrative appeal. In paragraph three petitioner's administrative appeal from the results and disposition of the hearing concluded on November 24, 2011 the following: "It is stated this disposition was had as a result of retaliation, for my co-operation statement to NYS Insp. Gen. Investigator Murphy's investigation of an assault of an inmate, by a staff member, at L-2." In addition, in paragraph six of the document purported to be administrative appeal from the results and disposition of the hearing concluded on November 22, 2011 the following is asserted: "This inmate state the sanction was imposed due to his statement of cooperation with NYS Isp. Gen. Investigator Murphy's assault investigation which I, and several others witnessed a C.O. assault an inmate L-2."

The respondent did not seek an order of this Court dismissing petitioner's retaliation defenses based upon an assertion that the issue was not preserved for review in this proceeding. Since the retaliation defense was raised on administrative appeal and, in this Court's opinion, in this proceeding (albeit in an inartful manner) the Court finds no basis to dismiss the substantial evidence/retaliation claim *sua sponte* based on petitioner's arguable failure to preserve the issue for judicial review. In view of the foregoing the Court is not persuaded that any matter of fact or law was overlooked or misapprehended in connection with the issuance of the Decision and Order/Order of Transfer of April 30, 2012.

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

ORDERED, that petitioner's motion for leave to reargue is denied.

Dated: October 1, 2012 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice