

<b>Matter of Tafari v Fischer</b>
2013 NY Slip Op 31426(U)
June 27, 2013
Supreme Court, Franklin County
Docket Number: 2012-830
Judge: S. Peter Feldstein
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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**  
**X**

In the Matter of the Application of  
**INJAH TAFARI, #89-A-4807,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #16-1-2012-0390.90**  
**INDEX # 2012-830**  
**ORI #NY016015J**

-against-

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

**X**

This proceeding was originated by the Petition of Injah Tafari, verified on September 12, 2012 and filed in the Franklin County Clerk's office on September 17, 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 June 29, 2012. The Court issued an Order to Show Cause on September 21, 2012 and has received and reviewed respondent's Answer, verified on November 9, 2012 and supported by the November 9, 2012 Affirmation of Laura A. Sprague, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply Memorandum of Law, dated November 14, 2012 and filed in the Franklin County Clerk's Office on November 16, 2012.

On June 6, 2012 an inmate misbehavior report was issued charging petitioner with a violation of inmate rule 107.20 (inmates shall not lie). The misbehavior report, authored by Senior Investigator Misercola of the DOCCS Inspector General's office, specified an incident date of June 6, 2012 and read as follows:

“During the course of an official investigation being conducted by the office of the Inspector General, inmate Tafari. . . was interviewed by this writer on 06/05/12. During that interview inmate Tafari. . . alleged that on 04/28/12 he was sexually assaulted by staff in a visit frisk stall. Inmate Tafari...stated that the frisking officer pulled down his (Tafari’s) pants and underwear and inserted his fingers into his (Tafari’s) anus. I [sic] review of the Loronix video reveals that inmate Tafari lied when he stated the officer pulled his pants and underwear down and inserted fingers into his anus. The officer did not pull down Tafari’s. . . pants nor touch his anus. It should be noted that inmate Tafari. . . signed his statement of allegation of sexual assault.”

A Tier III Superintendent’s Hearing was commenced at the Upstate Correctional Facility on June 21, 2012. At the conclusion of the hearing, on June 29, 2012, petitioner was found guilty as charged and a disposition was imposed confining him to the Special Housing Unit for four months and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier III Superintendent’s Hearing concluded on June 29, 2012 were affirmed. This proceeding ensued.

Before discussing what took place during the superintendent’s hearing, reference must be made to events that transpired after the alleged sexual assault incident of April 28, 2012 but prior to the commencement of the hearing. In petitioner’s September 12, 2012 Memorandum of Law, which was filed together with his petition, it is alleged that an April 28, 2012 memorandum of complaint with respect to the April 28, 2012 incident was sent to the respondent. A copy of that memorandum was annexed by petitioner to his Memorandum of Law as Exhibit C/D. After the alleged sexual assault is described in the memorandum of complaint, without reference to the specific time of the alleged assault, the petitioner concludes by stating “. . . that the video tape in the strip stale [sic, presumably meant stall] at approx. 3:00 pm be held as my witness. . .” Thus, on the date of the alleged sexual assault of April 28, 2012 petitioner, in his written complaint, indicated that such assault occurred at approximately 3:00 PM.

After having been served with the inmate misbehavior report petitioner requested in writing that his employee assistant “[l]ocate and interview inmate and visitor witnesses in the visiting room strip stale [sic] area upon complexion [sic, presumably meant completion] of visit (‘Inmates’) and section A, B, and C (‘Visitors’) who was watching through the door on 4/28/12 at Approx: 3:00 pm.” Thus, while petitioner’s written request to his employee assistant does not, in and of itself, establish that the security video depicting the strip room stall on April 28, 2012 at approximately 3:00 PM was sought<sup>1</sup>, such request certainly suggests petitioner’s position that the alleged sexual assault of April 28, 2012 took place at approximately 3:00 PM. For what it is worth, the Court notes that adjacent to the above-quoted portion of petitioner’s written request to his hearing assistant is the entry, presumably in the handwriting of the assistant, “couldn’t identify anyone.”

Turning to the Tier III Superintendent’s Hearing concluded on June 29, 2012, petitioner, after detailing his written request to his employee assistant, testified as follows: “My employee assistance [sic] returned and told me . . . [t]hat the video tape from 4/28/12 at approximately 3 PM, they don’t have. But they do have a video from 4/28 earlier that day. And, uh, I was, she said, uh, any witnesses I would have to locate them myself.” Notwithstanding the foregoing, petitioner subsequently testified at the hearing as follows: “And I asked that my employee assistant locate them [inmates/visitors in or near the strip stall] by reviewing the video tape. She told me when I get to the hearing there are inmates on the tape and I’ll be able to see then who that is and we’ll be able to identify ‘em at the hearing. This what Mrs. Cook told me. Now I specifically asked

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<sup>1</sup> The Court notes, however, that on the “ASSISTANT FORM” prepared in anticipation of the superintendent’s hearing it is indicated that a DVD (security video) request was submitted by the assistant on June 7, 2012. Although the Court presumes that the employee assistant requested the security video showing the strip frisk stall on April 28, 2012, there is nothing in the record to indicate whether or not such request specified a particular time of day.

(paused) uh, you know, who was watching through the door on 4/28/12 at approximately 3 PM. That's when the incident happened." Still later, petitioner testified that after meeting with his employee assistant she came back and told him that "... she di [sic], she view the, she reviewed the video tape. The video tape had inmates in it that I could, um, call them up at the hearing."

In the meantime, after the hearing officer and petitioner viewed the security video/DVD of the strip stall that was actually produced at the superintendent's hearing, petitioner responded as follows:

"That's not the video tape. The video tape is at 3 PM when I was returning from the visit being strip frisked. That incident right there was the second. That day I experienced 3 incidents in the visit room. The 1<sup>st</sup> one was officer Ramsdell. Once I, that was the 1<sup>st</sup> incident. The 2<sup>nd</sup> incident was with officer Bilow about using a pen. They brought me out, that video that we just looked at, with them bringing me out searching for a, uh, writing pen. That was the 2<sup>nd</sup> incident at 12, about 12:30, 12:45 PM. The 3<sup>rd</sup> incident is at 3 PM, which I requested on my employee assistance request form. I asked for the video tape at 3 PM, the time of the incident when I was being strip frisked returning from the visit. Now I found one complaint, which is under grievance number 49 of 1512, and it goes into being taken out of (inaudible) 1<sup>st</sup> into the visit room being verbally, uh, harassed by officer Ramsdell. Right? The 2<sup>nd</sup> one was while enjoying my family visit I was ordered out of the visit room into the strip room to be pat frisked because I was writing on a paper with a pen. That was the 2<sup>nd</sup> incident. Kay? I, I, I spoke in terms of that. Now that's under that grievance and that the video we just looked at was based on this grievance. Now the incident that transpired in my complaint is, was after that incident which I'm alleging in my complaint that following the completion of my visit I told my visitor to make sure he filed a complaints [sic] by phone and in writing. CO Bilow stated to me for what ain't nothing gonna happen, this is Upstate we do what we wanna do. Richard<sup>2</sup> you belong to me. When I got into the strip stall area CO Bilow ended [sic, perhaps should read "entered"]. I was, I was told turn around, CO Bilow began pat frisking me, opened my pants and that's when I was sexually assaulted. This happened at 3 PM. You got the wrong video tape and I'm asking for the correct video tape so that you could see what happened. That's not the video tape."

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<sup>2</sup> Before legally changing his name to Injah Tafari, petitioner was know as Richard Foust.

Notwithstanding all of the foregoing, there is nothing in the record indicating that the hearing officer ever inquired into the availability of the security video showing the strip frisk stall on April 28, 2012 at 3:00 PM. The hearing officer's decision in this regard can perhaps be better understood in the light of the testimony of Investigator Misercola, the author of the inmate misbehavior report. The investigator interviewed petitioner on June 5, 2012 and, according to his testimony, petitioner stated at that time that the alleged April 28, 2012 sexual assault took place "... some time between 10 AM and 11 AM." According to investigator Misercola's testimony, petitioner stated that "... he was taken from the visit room and brought into the strip frisk area because he had a pen, which he was apparently not authorized to have. And he said at that time that uh, he accused staff of physically assaulting him by punching him and kneeling him, uh, and that an officer pulled his pants down and inserted fingers into his anus." Investigator Misercola also testified with regard to a written statement, allegedly signed by petitioner, prepared in connection with his investigation into the April 28, 2012 incident. Investigator Misercola loosely read into the record a portion of the written statement<sup>3</sup> as follows:

"... on April 28, 2012 around 10 AM to 11 AM sexually assaulted by officer Bilow. Visiting room visiting with wife (inaudible) I think I was in high tank at seat 5 or 6. And then it [presumably the statement] goes on to say, uh, visit room officer came over at one [sic], don't know his name and that he was then taken into the strip frisk room and I'm not gonna identify the staff, I can do that via confidential tape if we need to, but it says that at that time were [sic] there was an incident over the pen that he had and he was pat frisked and assaulted by staff who punched him and kneed him and that an officer pulled his pants and underwear down and inserted fingers into

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<sup>3</sup> At the request of the Court, counsel for the respondent provided chambers with a copy of the written statement referenced by Investigator Misercola in his testimony. The document was submitted for *in camera* review only. While it was hoped that the Court's review of the written statement would shed some light on the difficult record in this proceeding, the Court is ultimately persuaded that since the statement was never offered or received into evidence at the underlying superintendent's hearing, it may not be considered in this proceeding.



TAFARI: No sir.

LT KING: So.

TAFARI: No sir. I, I've got, look, uh, he, yeah, maybe it's, maybe it's true why he wrote the misbehavior report, I'm not disputing that. He, he got things really mixed up and confused. And like I told you in the hearing I came in the hearing and told you 3 incidents occurred on April 28<sup>th</sup>, 2012 with myself in the visiting room . . . The last one was anywhere between 3 and 3:30 . . . They got, y'all got this whole thing messed up. That video tape [the security video already viewed at the hearing and described by Investigator Miscercola] was from the pen [petitioner's alleged second encounter with staff], like I told you. I never dispute that.

LT KING: Exactly it is from the pen, you, when we watched the DVD last week you told us that was the incident.

TAFARI: I said what?

LT KING: The incident we were watching, the DVD time, dealt with, they pulled you out for the pen as Investigator Miscercola stated, you signed he affidavit with Mr. Miscercola saying that was the time you were assaulted sexually.

TAFARI: No sir. No sir.

LT KING: He just stated that on the record.

TAFARI: No sir.

LT KING: So.

TAFARI: No sir. No sir. That's not the video."

After continuing to re-hash this issue, seemingly without resolution, the hearing officer asked petitioner if all the witnesses he wanted to call had been heard. Petitioner



responded “No. I want witnesses. I want the inmates that was present [presumably at 3:00 PM] . . .” The hearing officer ultimately adjourned the hearing at 10:40 AM on June 29, 2012 to “ . . . further investigate if the inmates that were there during the day of the incident for Tafari are available.” Six minutes later, at 10:46 AM on June 29, 2012, the hearing was reconvened and the hearing officer stated as follows: “At this time Tafari I’m going to deny your request for those witnesses due to the fact I feel that they’re, um, have no bearing to the incident which occurred on 4/28/12.” Testimony was closed at that time and petitioner was ultimately provided with a written statement that the unidentified “Inmates in Visit Room” that he requested as witnesses were “ . . . not relevant to this misbehavior report or incident.” While the record is frustratingly unclear with respect to the basis of the hearing officer’s determination that the requested witnesses were not relevant, the Court presumes that such determination was premised upon a finding that potential witnesses to what transpired in the strip frisk stall at 3:00 PM on April 28, 2012 would shed no light on what transpired in the stall between 10:00 AM and 11:00 AM on that date.

The record before the Court in this proceeding is disturbing. It would appear to the Court that the focus of the investigation of petitioner’s sexual assault allegations would be on the broader issue of whether or not such an assault, in fact, occurred rather than the narrower issue of whether it occurred at the time petitioner allegedly told inspector Misercola that it occurred. In this regard the Court notes that this is not a case were an inmate claimed to have been assaulted at a particular time and place but, when confronted with security videotape evidence demonstrating that no assault occurred at that time, changed his story to allege that the assault occurred during a later interaction with staff. Rather, commencing with his memorandum of complaint dated April 28, 2012 - the actual date of the alleged sexual assault - petitioner indicated that the alleged sexual

assault took place in the visiting room strip frisk stall at approximately 3:00 PM. Indeed, Investigator Miscercola was presumably investigating that very allegation when, according to his testimony, he took a statement from petitioner that the sexual assault took place in a strip frisk stall between 10:00 AM and 11:00 AM. There is nothing in the record of this proceeding, however, to suggest that the investigator ever questioned petitioner with respect to the apparent contradiction between his original April 28, 2012 memorandum of complaint and his June 5, 2012 statement (was the apparent contradiction indicative of a falsehood or the product of petitioner's confusion). In addition, while the investigator viewed the security video tape showing the strip frisk stall between 10:00 AM and 11:00 AM on April 28, 2012, there is nothing in the record to suggest that he, or any other DOCCS official, ever attempted to view the security video showing the strip frisk stall at 3:00 PM on that date. Since petitioner indicated as early as April 28, 2012 that they alleged sexual assault took place in the strip frisk stall at 3:00 PM, in the absence of some reasonable explanation it is difficult for the Court to understand why the security video of the strip frisk stall at that time was not preserved for investigative purposes.

In view of the foregoing, and in view of the fact that petitioner appears to have indicated to his employee assistant that potential witnesses to the alleged sexual assault might be identified by viewing the security video of the strip frisk stall at 3:00 PM on April 28, 2012, the Court finds the hearing officer's failure to make any effort to ascertain the availability of such videotape, despite petitioner's repeated requests, warrants the reversal of the results and disposition of the Tier III Superintendent's Hearing concluded on June 29, 2012. Other arguments advanced by the petitioner are not reached.

Nothing in this Decision and Judgment should be construed as indicative of any finding, or even suspicion, on the part of the Court that a sexual assault took place at the

strip frisk stall at 3:00 PM on April 28, 2012. Rather, given petitioner's original memorandum of complaint, his request to his hearing assistant and the fact that Inspector Misercola's testimony did not directly address petitioner's original assertion that the assault took place at 3:00 PM, the Court simply finds that it was incumbent upon the hearing officer to ascertain the availability of the security video showing the strip frisk stall at 3:00 PM on April 28, 2012.

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 June 29, 2012 are reversed and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records.

**Dated:** June 27, 2013 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice