Matter of Wilson v Fischer
2013 NY Slip Op 32659(U)
October 10, 2013
Supreme Court, Albany County
Docket Number: 2910-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ROBERT WILSON, 97-A-3481

Petitioner,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

-against-

BRIAN FISCHER, Commissioner, NYS
Department of Corrections and Community
Service,

Respondent,

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4691 Index No. 2910-13

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate in the custody of the New York State Department of Corrections and Community Supervision ("NYSDOCCS"), commenced the instant CPLR Article 78 proceeding to review a Tier III disciplinary determination dated November 6, 2012

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in which he was found guilty of violating prison rules. Specifically, the petitioner was found guilty of Rule 113.25, possession of drugs; Rule 114.10, smuggling; and Rule 121.12, phone program violation. The misbehavior report dated October 26, 2012 recites as follows:

> "As part of an ongoing investigation being conducted by the NYSDOCCS Inspector Generals Office it was determined that Inmate Robert Wilson 97A3481 did conspire with several persons to have marijuana smuggled into him at the Shawangunk Correctional Facility. Specifically inmate Wilson did direct his wife Arlene Wilson to meet a person at her residence and then provide marijuana to that person so that it could be smuggled into the facility at a later date. Inmate Wilson did engage in this conduct for monetary gain. Inmate Wilson utilized the inmate phone system to further and facilitate this conduct."

The Hearing Officer imposed a penalty which included an eighteen month confinement in the special housing unit, and eighteen month loss of the following privileges: receipt of packages; commissary, and telephone. Upon administrative appeal, the duration of all the foregoing penalties was modified to twelve months.

The sole issue is whether the petitioner's right to call a witness at the disciplinary hearing was violated. "It is well settled that an inmate has a conditional right to call witnesses at a disciplinary hearing provided their testimony would not jeopardize institutional safety or correctional goals" (Matter of Morris-Hill v Fischer, 104 AD3d 978, 978 [3d Dept., 2013], citing 7 NYCRR 254.5 [a]; Matter of Lopez v Fischer, 100 AD3d 1069, 1070, 952 N.Y.S.2d 694, 695 [2012]; Matter of Santiago v Fischer, 76 AD3d 1127, 1127, 908 N.Y.S.2d 139 [2010]). It is also 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 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 Hines v Prack, ___ AD3d ___, 2013 NY Slip Op 5939, [3d Dept., September 19, 2013]; Matter of Tafari v Fischer, 94 AD3d 1324, 1325 [3d Dept., 2012]; Matter of Smalls v Fischer, 89 AD3d 1294 [3d Dept., 2011]).

The petitioner wished to call Correction Officer Calabrese as a witness. C.O. Calabrese is claimed to have first hand knowledge of the incident in question, which could exonerate the petitioner of the charges. The Hearing Officer made several attempts to contact C.O. Calabrese. He finally reached him by telephone, however C.O. Calabrese refused to testify. The Hearing Officer's witness interview notice for C.O. Calabrese recites as follows:

> "Permission to call the requested witness is denied.
>
> "Date: 11-5-12 Explanation: This witness is a suspended employer, who upon being polled by this hearing officer, refused on record to testify. This is the person identified by Inv. Nunez as having been given the marijuana to bring in to inmate Wilson."

The petitioner maintains, *inter alia*, that the Hearing Officer erred in not making a specific finding that the witness or testimony would jeopardize institutional safety or correction goals; or that the testimony was cumulative and redundant; or that C.O. Calabrese had no direct knowledge of the subject incident.

In Matter of Morris-Hill v Fischer (104 AD3d 978 [3d Dept., 2013]) a Hearing Officer did not attempt to secure the testimony of a correction officer because he had retired. The Appellate Division found "the Hearing Officer should have made further inquiry to

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determine if the correction officer would testify even though he was retired." (id., at 979). The situation here is close to that in Morris-Hill, from the standpoint that C.O. Calabrese was suspended from state employment. However, in the instant case, the Hearing Officer made actual contact with C.O. Calabrese, and inquired if he was willing to testify, which he was not.

The Court is mindful of a line of cases, generally applied to inmate witnesses, that requires the Hearing Officer to verify the reason why an inmate witness has refused to testify (see Matter of Hill v Selsky, 19 AD3d 64 [3rd Dept., 2005]; Matter of Moye v Fischer, 93 AD3d 1006 [3d Dept., 2012]). Where an inmate witness refuses to testify, it is incumbent upon the Hearing Officer, to conduct a personal inquiry into the reason why, unless a genuine reason for the refusal is apparent from the record and the Hearing Officer has made a sufficient inquiry into the facts surrounding the refusal to ascertain its authenticity (see Matter of Abdur-Raheem v Prack, 98 AD3d 1152 [3d Dept., 2012]). Here, the Court spoke directly to C.O. Calabrese , who indicated he would not testify. Also, there is sufficient information in the record to provide a genuine reason why C.O. Calabrese would refuse to testify (which includes an investigation conducted by the Inspector General's Office into the incident; the suspension of Officer Calabrese from employment; and the prospect of criminal charges being lodged against him). Under such circumstances, there was no need for the Hearing Officer to inquire concerning the reason underlying Officer Calabrese's refusal to testify. The Court concludes that the petition must be dismissed.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

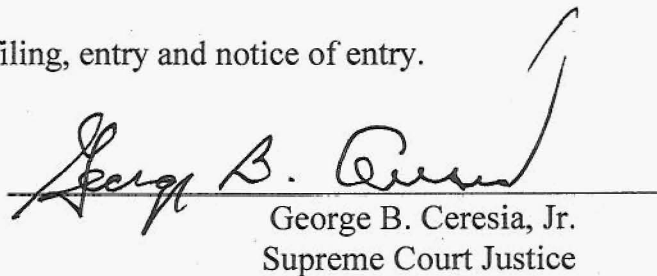
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. 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: October 16, 2013
Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated May 24, 2013, Petition, Supporting Papers and Exhibits
2. Answer Dated July 19, 2013, Supporting Papers and Exhibits
3. Reply Affirmation of Charles Z. Feldman, Esq. Dated July 25, 2013