Matter of Henegan v Fischer
2013 NY Slip Op 33102(U)
December 3, 2013
Supreme Court, Franklin County
Docket Number: 2013-507
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
HENRY HENEGAN, #94-A-1017,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2013-0243.69
INDEX # 2013-507
ORI #NY016015J

-against-

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

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Henry Henegan, verified on June 3, 2013 and filed in the Franklin County Clerk's office on June 11, 2013. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Great Meadow Correctional Facility and concluded on March 12, 2013. The Court issued an Order to Show Cause on June 17, 2013 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on September 27, 2013 and supported by the Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, dated September 27, 2013. The Court has also received and reviewed petitioner's Reply thereto (denominated "REBUTTAL"), sworn to on October 25, 2013 and received directly in chambers on October 30, 2013.

As the result of an incident that occurred at the Great Meadow Correctional Facility on February 27, 2013 petitioner was issued an inmate misbehavior report charging him

with violations of inmate rules "100.10 - ASSAULT ON STAFF,[1]" 104.11 (violent conduct), 106.10 (direct order), 113.10 (weapon possession), 114.10 (smuggling) and 115.10 (frisk procedure). The inmate misbehavior report, authored by C.O. Segovis and endorsed by C.O. Archambeault, alleged, in relevant part, as follows:

> " . . . I [C.O. Segovis] . . . was performing a pat frisk on Inmate Henegan . . . Inmate Henegan suddenly turned to his left and assaulted me by striking me with his closed right fist on the left face/head area.
>
> Present staff used force to control the violent inmate. After staff gained control, the inmate was assisted to his feet, when I noticed a shinny object fall from the inmate's waist area and land on . . . floor. I recovered the object upon examination it was a homemade shank type weapon sharpened to a point."

A Tier III Superintendent's Hearing was commenced at the Great Meadow Correctional Facility on March 7, 2013. At the conclusion of the hearing, on March 12, 2013, petitioner was found guilty of violating inmate rule "100.10 ASSAULT ON INMATE" as well as the five additional charges. A disposition was imposed confining him to the special housing unit for 12 months, denying him various privileges for a like period of time and recommending the loss of one year of good time. On March 28, 2013 the Superintendent of the Great Meadow Correctional Facility directed the dismissal of the finding of guilt with respect to the charge that petitioner violated inmate rule "100.10 - ASSAULT ON INMATE." The superintendent did not direct any change in the dispositional penalties. Upon administrative appeal the determination that petitioner violated inmate rule 106.10 (direct order) was reversed by the commissioner's designee but, again, no change in dispositional penalties was ordered. This proceeding ensued.

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[1] This charge was problematic from the outset since inmate rule 100.10 does not proscribe assault on staff. Rather, inmate rule 100.10 states, in relevant part, that "[a]n inmate shall not assault . . . any other inmate." Inmate rule 100.11, which is not mentioned in the inmate misbehavior report, states, in relevant part, that "[a]n inmate shall not assault . . . any staff member."

The incident described in the inmate misbehavior report occurred on the heels of a separate incident in the facility yard. Two other inmates were observed fighting and petitioner was allegedly observed moving towards the altercation. He was directed to stop and he complied. When order was restored the two inmates engaged in the fight were brought to the facility hospital for medical examination. Petitioner, in restraints, was also brought to the hospital area apparently for interrogation purposes. The incident described in the inmate misbehavior report allegedly occurred immediately after petitioner's restraints were removed. At the Tier III Superintendent's Hearing petitioner took the position that the incident described in the inmate misbehavior report simply did not take place. According to petitioner's testimony, he was assaulted by various correction officers while still in restraints.

In this proceeding petitioner first argues that "[o]nce the 'Assault on Inmate' charge was dismissed [by the facility superintendent] the charges: violent conduct, refusing strip or frisk, and refusing direct order were supposed to be dismissed since these charges stem from the 'Assault on Staff' charge, in the misbehavior report in which petitioner was never found guilty of. Petitioner appealed their decision to Albany where they dismissed yet another charge (106.10 - Direct Order) but didn't reduce the penalty, this is yet another violation of my due-process." Such argument notwithstanding, the Court is not persuaded that the dismissal of the assault on inmate charge necessitated the dismissal of any of the remaining charges. Although the hearing officer made a written finding that petitioner assaulted C.O. Segovis, that factual finding was erroneously characterized as supporting a finding of guilt with respect to the charge of assault on inmate (inmate rule 100.10). Obviously, the finding that petitioner assaulted a correction officer does not support a determination that petitioner assaulted an inmate and thus, for technical reasons, that charge was dismissed. Giving the hearing officer's specific findings

of fact, however, petitioner's conduct could properly be viewed as constituting violations of inmate rules 104.11 (violent conduct), 113.10 (weapon possession), 114.10 (smuggling) and 115.10 (frisk procedure). The dismissal of the direct order charge (inmate rule 106.10) on direct appeal apparently represented a conclusion that there was nothing in the inmate misbehavior report and/or testimony to suggest that petitioner had been given, but disobeyed, a direct order. As far as the dispositional penalties are concerned, the Court finds no basis to overturn the ultimate determination not to reduce such penalties to spite the dismissal of the assault on inmate and direct order charges. The findings the guilt with respect to the other charges, particularly the violent conduct and weapon possession charges, adequately support the retained dispositional penalties.

Petitioner next argues, in effect, that the hearing officer committed reversible error in viewing various security videotapes prior to the commencement of the superintendent's hearing. In this regard it is noted that at the outset of the hearing petitioner testified that he had asked his assistant to secure the " . . . video tape from the yard . . . And I asked for the . . . tape that escorting [inaudible] to the hospital [inaudible] And I asked for the videotape [inaudible] they had in the room." The hearing was subsequently adjourned and when it was recommenced on March 12, 2013 the hearing officer made the following statement:

> "You [petitioner] had asked about video tapes of the yard, the escort, the infirmary. Um I've gone down and checked, excuse me, there is a video of the yard available . . . [I]t was saved because of the fight between the two inmates that are involved and there is the video tape of you at the infirmary when Sergeant Tilley came in and put you on camera and I've reviewed that tape. Uh there was no escort from the yard to the medical unit. There's no tape of that because you weren't, you hadn't been involved in any use of force or anything at that time. So there was no reason to have a video tape of that. But the other two tape[s] are available and I have watched about the first 20 to 25 [minutes] of the infirmary tape. Um, and then fast forward through the rest of it just to see if anything was happening. Um, uh, the first 20 to 25 minutes you were being held by Officer Mulligan and

> then a different Officer took over at that time while Officer Mulligan and another Officer and Sergeant Tilley uh attempted to get you calmed down. You were excited and uh upset at that point and then eventually you did calm down and the [medical] examination took place. Um. So, uh, I did watch that at that point."

Although it is certainly arguable that the Hearing Officer should not have viewed the infirmary tape outside the presence of petitioner, the Court finds that any error is ultimately harmless since the tape in question - which has been viewed by the Court - only depicts the interaction between petitioner and DOCCS staff after the physical altercation described in the inmate misbehavior report. It is clear, moreover, that the DOCCS staff members shown on the infirmary tape are not the same staff members who were previously involved in the physical altercation with petitioner.

The only other purported "ground warranting reversal" is set forth in paragraph eight of the petition. In that paragraph petitioner simply references 7 NYCRR §251-3.1(b) which provides as follows: "The misbehavior report shall be made by the employee who has observed the incident or who has ascertained the facts of the incident. Where more than one employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees." Although the petitioner does not specify how the inmate misbehavior report in the case at bar fails to comply with the above-quoted regulation, the Court notes that the report was written by C.O. Segovis and endorsed by C.O. Archambeault. The preliminary Unusual Incident Report, which was read into the hearing record by the hearing officer, suggested that in addition to C.O. Segovis and C.O. Archambeault, C.O. Deluke was also present during the physical altercation that was the subject of the inmate misbehavior report. Although C.O. Deluke thus should have endorsed the inmate misbehavior report or filed a report of his own, the Court notes that

C.O. Deluke - along with C.O. Segovis and C.O. Archenbault - was called as a witness by petitioner and testified during the course of the superintendent's hearing. Under such circumstances petitioner was not prejudiced by the failure of C.O. Deluke to endorse the inmate misbehavior report or submit an inmate misbehavior report of his own and, therefore, any error is harmless. *See McGowan v. Fischer*, 88 AD3d 1038, *Pante v. Goord*, 73 AD3d 1394 and *Hernandez v. Selsky*, 50 AD3d 1340.

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: December 3, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice