Matter of Dubois v LaClair
2014 NY Slip Op 33379(U)
December 10, 2014
Supreme Court, Franklin County
Docket Number: 2014-557
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
DONALD DUBOIS, #88-B-1922,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0300.57
INDEX # 2014-557
ORI #NY016015J

-against-

DARWIN LaCLAIR, Superintendent,
Franklin Correctional Facility,
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 Donald Dubois, verified on July 2, 2014 and filed in the Franklin County Clerk's office on July 22, 2014. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Franklin Correctional Facility and concluded on April 25, 2014. The Court issued an Order to Show Cause on July 25, 2014 and has received and reviewed respondent's Answer and Return, verified on September 18, 2014 and supported by the September 18, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's undated Reply thereto, filed in the Franklin County Clerk's office on October 9, 2014. In response to the Court's Letter Order of October 15, 2014 the Court also received and reviewed correspondence from Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated October 15, 2014.

As the result of an incident that occurred at the Franklin Correctional Facility on April 22, 2014 petitioner was issued an inmate misbehavior report charging him with

violations of inmate rules 102.10 (threats), 104.11 (violent conduct), 104.13 (disturbance), 106.10 (direct order), 107.10 (interference) and 107.11 (harassment). The inmate misbehavior report, authored by C.O. Lacey, alleges, in relevant part, as follows:

> " . . . [W]hile sitting at the officer[']s desk writing a misbehavior report on another inmate, from an earlier incident, I was approached at this officer[']s station by inmate Dubois . . . Dubois said in a demanding tone 'I am telling you not to write a fucking ticket on that inmate.' At this time I gave Dubois a direct order to leave my desk area and return to his cube. Dubois ignored my order, pointing and shaking his finger at me in a threatening manner, and stated 'if you don't know how to do your job I will show you.[']I gave Dubois another direct order to leave the area, Dubois refused rasing his voice in a loud manner causing approximately thirty inmates in the dorm to stop doing what they were doing and observe. Dubois getting more aggressive, started shaking his fists and saying 'you don't know what your [sic] doing.' Dubois['] actions at this time started making me feel threatened and uncomfortable. Area supervisor notified, Dubois was escorted off the unit without further incident."

A Tier II Disciplinary Hearing was held at the Franklin Correctional Facility on April 25, 2014. At the conclusion thereof petitioner was found guilty of violations of inmate rules 104.13 (creating a disturbance), 107.10 (interference with employee) and 106.10 (refusing direct order). He was found not guilty with respect to the other three charges. 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 were affirmed. This proceeding ensued.

Petitioner first argues that the hearing officer denied his request for unspecified "documentary evidence" in violation of the provisions of 7 NYCRR §253.6(c), which provides, in a relevant part, that an inmate at a Tier II Disciplinary Hearing " . . . shall be allowed to submit relevant documentary evidence . . . on his behalf."

During the early part of the disciplinary hearing the following colloquy occurred:

"INMATE DUBOIS:	I would also like to um I would also like to know if it would be possible (inaudible)[.]
HEARING OFFICER:	That has nothing to do with this misbehavior. I don't uh I don't get you information. You request information and you.[sic]
INMATE DUBOIS:	No listen[.]
HEARING OFFICER:	You don't request it from me. You request it from the Dep of Security, you request it from someone else. Not my responsibility to get you information.
INMATE DUBOIS:	Alright[.]

There was no further discussion of this issue until the hearing officer, near the end of the hearing, asked petitioner if he had any further testimony or documentary evidence. The following colloquy then occurred:

"INMATE DUBOIS:	What I asked about you already you said get with Deps [of Security] I don't know what else I can say.
HEARING OFFICER:	That's uh providing you with assistance this is a tier two you don't get assistance with a tier two. Anything else?
INMATE DUBOIS:	Documentary evidence yes[.]
HEARING OFFICER:	As long as you have documentary evidence[.]
INMATE DUBOIS:	No I don't. I can't get it I can't get assistance for a tier two[.]

As alluded to previously, the specific nature of the documentary evidence allegedly denied to petitioner at the Tier II Disciplinary Hearing of April 25, 2014 is not spelled out in the petition and cannot be determined by reference to the transcript of the hearing. In petitioner's administrative appeal (Exhibit I annexed to respondent's Answer and Return), however, he asserts that he " . . . asked for any to[/] from reports, and the unusual incident report . . ." Although his answering papers do not concede that the hearing officer acted improperly, respondent maintains that any error that may have been committed was harmless since no Unusual Incident Report or to/from memoranda pertaining to the April 22, 2014 incident existed. In this regard, counsel annexed to her Letter Memorandum of September 18, 2014 the affidavit of Carolyn St. Denis, a DOCCS employee assigned as Inmate Records Coordinator II at the Franklin Correctional Facility, sworn to on September 18, 2014. In her affidavit Ms. St. Denis states that a review of the records indicates " . . . that there is no Unusual Incident Report or any to/from memoranda pertaining to the April 22, 2014 incident (April 25th hearing)." In view of the foregoing the Court agrees that any potential error on part of the hearing officer in failing to attempt to obtain an Unusual Incident Report and/or to/from memoranda was harmless.

The only other argument advanced by petitioner is that his rights under 7 NYCRR §253.5(b) were violated when the hearing officer permitted various witnesses to testify via speaker phone from another location(s) within the Franklin Correctional Facility. In paragraph 10 of the petition the following is alleged: " . . . [A]t no time did hearing officer make a determination that to allow petitioner[']s other requested witnesses to testify in his presence was a security issue, also hearing officer gave no explanation as to why these witnesses testified outside of petitioner[']s presence on the witness interview notice . . ."

7 NYCRR §253.5(b) provides as follows: "Any witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that doing so will jeopardize institutional safety or correctional goals. Where an inmate is not permitted to have a witness present, such witness may be interviewed out of the presence of the inmate and such interview tape recorded. The recording of the witness' statement is to be made available to the inmate at the hearing unless the hearing officer determines that doing so would jeopardize institutional safety or correctional goals." The Appellate Division, Third Department, however, has repeatedly held that a witness's physical presence at a disciplinary hearing is not required and, therefore, the taking of testimony by speaker phone does not constitute error. *See Possert v. Fischer*, 106 AD3d 1350, *Piper v. Bezio*, 81 AD3d 1049, *Davis v. Prack*, 58 AD3d 977 and *Chavis v. Goord*, 45 AD3d 1063. It is apparent to this Court that the proscription against taking testimony outside the presence of the inmate, as set forth in 7 NYCRR §253.5(b) - and, for that matter, 7 NYCRR §254.5(b) - is only applicable where the witnesses testimony is taken at a remote location and not made available to the inmate in real time. In the case at bar, all of the speaker phone testimony was simultaneous transmitted to the hearing room where petitioner was able to hear the testimony and pose his own questions to the witnesses. Thus, petitioner's regulatory rights were not violated.

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 10, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice