Matter of Henson v Prack
2015 NY Slip Op 31510(U)
August 3, 2015
Supreme Court, Franklin County
Docket Number: 2015-142
Judge: S. Peter Feldstein

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

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In the Matter of the Application of
BRUCE HENSON, #09-A-1436,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0082.20
INDEX # 2015-142
ORI #NY016015J

ALBERT PRACK, Director,
Disciplinary,
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 Bruce Henson, verified on February 2, 2015 and filed in the Franklin County Clerk's office on February 18, 2015. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Elmira Correctional Facility on November 25, 2014. The Court issued an Order to Show Cause on March 2, 2015 and has received and reviewed respondent's Answer and Return, verified on April 20, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 20, 2015, as well as by the April 17, 2015 Affirmation of James Esgrow, Esq., a DOCCS employee and the presiding hearing officer at the Tier III Superintendent's Hearing that is the subject of this proceeding (the Esgrow Affirmation). The Esgrow Affirmation is annexed to respondent's Answer and Return as Exhibit L thereto. The Court has also received and reviewed petitioner's Reply (denominated Answer), sworn to on May 7, 2015 and filed in the Franklin County Clerk's office on May 15, 2015.

As the result of an incident that occurred at the Elmira Correctional Facility on November 19, 2014 (at 1:45 PM) petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 102.10 (threats), 105.13 (gangs) and 100.10 (conspiracy to assault inmate). The November 19, 2014 inmate misbehavior report, authored by ORC Woodward, alleged, in relevant part, as follows[1]:

> "After conducting an ongoing investigation and interviewing a reliable confidential resource, it has been determined that Henson . . . authored a letter that was found by C.O. Taylor in a common area in the Fieldhouse. C.O. Taylor gave the letter to this writer for review. The letter contained gang related material specific to the 'bloods.' Different blood sets were also mentioned in the letter (i.e. Hats, Hounds, and Maks) which are Brim sets. The content of the letter is regarding a request to assault another inmate. The terms 'shoot' and 'plotted on' are referenced specifically. When questioned by Officer Taylor if he was know as Redside, Henson . . . admitted he was. The note that is in question was signed by Mr. Redside."

As the result of an incident that occurred at the Elmira Correctional Facility on November 20, 2014 (at 12:10 PM) petitioner was issued an additional inmate misbehavior report charging him with violations of inmate rules 113.10 (contraband weapon) and 114.10 (smuggling). The November 20, 2014 inmate misbehavior report, authored by C.O. O'Rourke, alleged that during the course of a strip frisk a weapon was found concealed on petitioner's body. The weapon was described in the report as follows: "The weapon measured 6" long by ½" wide plastic messhall spoon sharpened to a point on one end with a sheath and a black string on the other end as a handle."

A single Tier III Superintendent's Hearing was conducted at the Elmira Correctional Facility on November 25, 2014 with respect to the charges set forth in both inmate misbehavior reports . At the conclusion of the hearing petitioner was found guilty

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[1] The copy of the November 19, 2014 inmate misbehavior report annexed to respondent's Answer and Return as part of Exhibit A is illegible. The text of the inmate misbehavior report, as quoted above, is taken from page two of the April 20, 2015 Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General.

of all five charges and a disposition was imposed confining him to the special housing unit for 12 months (with one month suspended and deferred) 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 of November 25, 2014 were affirmed. This proceeding ensued.

The transcript of the Tier III Superintendent's Hearing of November 25, 2014 indicates that petitioner pled guilty to all five charges. In this proceeding he first argues that his guilty pleas were entered "under duress." According to petitioner, the hearing officer gave him an off-the-record ultimatum " . . . of pleading guilty to the charges of assault, weapons, gangs, threats & smuggling, to which hearing officer promised a sentenced [sic] of a year in SHU with a month differred [sic] and no loss of good time, or fight charges and receive the max of each charge consecutively . . . Petitioner pled guilty under duress to obtain the promise of Hearing Officer, set forth in Hearing Officer's altimatum [sic] (off record) for weapon and smuggling. But disposition reads differently stating 5 charges to which is contradictive . . . to the Hearing Officer's promised altimatum [sic] . . ."

The Court first notes that petitioner interposed no objection during the course of the hearing with respect to any alleged improper plea ultimatum on the part of the hearing officer. In addition, the issue of the alleged improper plea ultimatum was not raised by petitioner on administrative appeal. Under these circumstances the Court agrees with respondent that such issue has not been preserved for judicial review in this proceeding. *See Correnti v. Prack*, 93 AD3d 970, and *Corona v. New York State Department of Correctional Services*, 2 AD3d 1118. In any event, even if this Court reached the merits of petitioner's improper plea ultimatum argument, it would find no evidence in the record supporting his bald, self-serving assertions.

Petitioner also argues, in effect, that the result and disposition of the Tier III Superintendent's Hearing of November 25, 2014 must be overturned due to a defective written disposition. In this regard the Court notes that the Superintendent Hearing Disposition Rendered document/printout, annexed to respondent's Answer and Return as Exhibit I thereof, includes a computer-generated entry as follows: "INCIDENT DATE & TIME: 11/20/14 01:45 PM." This purported reference to the date and time of the incident underlying the superintendent's hearing is obviously incorrect in several respects. As described previously, the five charges under consideration at the hearing were set forth in two separate inmate misbehavior reports based upon incidents that occurred on November 19, 2014 at 1:45 PM and November 20, 2014 at 12:10 PM. The computer-generated entry referenced by petitioner, however, only specifies November 20, 2014 as the incident date and incorrectly specifies the time of the November 20, 2014 incident as 1:45 PM rather than 12:10 PM. The Court notes that it was the November 19, 2014 incident that occurred at 1:45 PM.

Focusing upon the incorrect computer-generated entry noted in the preceding paragraph, petitioner asserts as follows: "Disposition Date only speaks of misbehavior report written on 12/20/2014, not to mention time on disposition is wrong . . . Secondly incident date of 12/20/14 misbehavior report only describes 2 charges [weapon and smuggling] . . . Procedure states incident must be recorded accurately & the important parts of these recordings are incident(s) Date & time, N.Y.C.R.R. . . . [§] 251.3(a)(b)(c)(d) . . . [N]o incident occurred on 12/20/14, 1:45 PM. That alone causes automatic reversal & expungement of charges, and release from S.H.U"

The Court first notes that petitioner's reliance on 7 NYCRR §251-3.1 is misplaced since that regulatory provision - specifically 7 NYCRR §251-3.1(c) - sets forth to the necessary notice components of an inmate misbehavior report rather than a disposition

sheet. Advanced written notice to an inmate facing serious disciplinary charges, in order to inform him/her of the particulars of the charges and to enable him/her to marshal the facts and prepare a defense, constitutes a fundamental due process right. *See Wolff v. McDonnell*, 418 US 539 at 564. The measure of a misbehavior report's legal sufficiency is whether it provides the inmate with sufficient particulars of the charge to enable him/her to make an effective response. *See Abdur-Raheem v. Mann*, 85 NY2d 113 at 123 and *Faison v. Senkwski*, 255 AD2d 625, *app dis* 93 NY2d 847. In the case at bar, any defect/inaccuracy in the written Superintendent Hearing Disposition Rendered document, issued to the petitioner upon conclusion of the superintendent's hearing, obviously did not impact petitioner's constitutional and/or regulatory right to advance notice of the disciplinary charges against him. In any event, a defect/inaccuracy in a misbehavior report is not fatal where the inmate is not prejudiced by reason of the defect/inaccuracy. *See Costa v. Connolly*, 94 AD3d 1322, *Linares v. Fischer*, 59 AD3d 761, *lv denied* 12 NY3d 709, and *DiRose v. New York State Department of Correctional Services*, 270 AD2d 675.

In *Wolff v. McDonnell*, 418 US 539, the Supreme Court of the United States also identified an inmate's fundamental due process right to a written statement setting forth the evidence relied upon by the fact finder and the reason(s) for the disciplinary action taken. *Id*. at 564-565. In this regard the *Wolff* noted that "[w]ritten records of [disciplinary] proceedings will . . . protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been

abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others." *Id.* at 565. Notwithstanding the foregoing, the Court finds it appropriate to apply the same, previously-discussed prejudice test with respect to claimed defects/inaccuracies in an inmate misbehavior report to claimed defects/inaccuracies in a written disposition.

In the case at bar the Court finds no basis to conclude that petitioner was in any way prejudiced by the previously-noted defect/inaccuracy in one pre-printed entry on the Superintendent's Hearing Disposition Rendered document. In this regard it is noted that the document in question specifies findings of guilt with respect to each of the five charges specified in the two inmate misbehavior reports. In addition, the Hearing Officer's Statement of Evidence Relied Upon and Reasons for Disposition - both of which are set forth as part of the Superintendent's Hearing Disposition Rendered document, states, in relevant part, as follows:

> "A. STATEMENT OF EVIDENCE RELIED UPON: The misbehavior report by C[O] O'Rourke stating that upon admission to SHU, a weapon consisting of a 6" x ½" plastic messhall spoon sharpened to a point was discovered on your person . . . [A]lso your testimony that you had the weapon as alleged. [A]lso the MBR [Misbehavior Report] by ORC Woodward stating that you authored a document which was found in the field house. Said document contained material related to the gang 'the Bloods' and further contained a request to assault another inmate. [A]lso the testimony of ORC Woodward describing his investigation and explaining the meaning and implication of the language in the document. [A]lso your plea of guilty to all charges. [A]lso a copy of the document and samples of your handwriting. I have made an independent assessment of the handwriting of the alleged gang material. I find that there are sufficient similarities in the handwriting to support the allegation that you authored the document.
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> B. REASONS FOR DISPOSITION: Possession of a weapon on person, assault, gang and threats create a serious threat to facility['s] safety and

> security. As mitigating circumstances I note your willingness to take responsibility for your action. [A]s aggravating circumstances I note prior violations of 114.10, 105.13 and 102.10 in your disciplinary history. Smuggling of a weapon within a facility increases the likelihood of serious injury to inmates and staff alike and cannot be tolerated."

In view of all of the foregoing the Court finds no basis to conclude that petitioner's due process or regulatory (7 NYCRR §254.7(a)(5)) rights with respect to the receipt of a written disposition were violated by reason of the previously-referenced defect/inaccuracy in one pre-printed entry on the Superintendent's Hearing Disposition Rendered document.

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: August 3, 2015 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice