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| Matter of Holmes v Rodriguez |
| 2018 NY Slip Op 32064(U) |
| August 22, 2018 |
| Supreme Court, Clinton County |
| Docket Number: 18-0005 |
| Judge: S. Peter Feldstein |
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**STATE OF NEW YORK
SUPREME COURT****COUNTY OF CLINTON**

In the Matter of the Application of
DARNELL HOLMES, #16-A-3357,
Petitioner,

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

DECISION AND JUDGMENT
RJI #09-1-2018-0009.03
INDEX #18-0005

-against-

**A. RODRIGUEZ, Acting Director of
Special Housing,**
Respondent.

This proceeding was originated by the Petition filed by Darnell Holmes (hereinafter referred to as “Petitioner”), sworn to on December 22, 2017 and filed in the Clinton County Clerk’s Office on January 2, 2018. Petitioner, who is an inmate at the Clinton Correctional Facility, is challenging the determination of Tier III Superintendent’s Disciplinary Hearing.

This Court issued an Order to Show Cause on January 10, 2018. In response thereto, the Court has considered the Answer and Return, together with a Letter-Memorandum by Christopher J. Fleury, Esq., Assistant Attorney General, dated April 17, 2018¹, as well as a Supplemental Return received on May 9, 2018². The Court has considered the Reply received from the Petitioner on May 29, 2018.

On August 28, 2017, the Petitioner was served with an Inmate Misbehavior Report charging the Petitioner with rule violations 106.10 (disobeying a direct order) and 118.22 (unhygienic act). A description of the incident reads as follows:

¹ Upon request dated March 26, 2018, Respondent was granted an extension until April 20, 2018 to submit responsive papers and, in turn, the Petitioner was granted an extension until May 4, 2018 to file a Reply, if any.

² The Supplemental Return was a DVD purportedly of the incident which is the subject of the inmate misbehavior report. Unfortunately, the video did not contain the actual incident but the subsequent placing of a spit-shield in front of a cell, and therefore, holds no relevance to the proceeding.

“On [8/25/17 at approx. 7:40 a.m.] I C.O. L. Genovese was about to conduct the morning go-around. While in the CAR Pit area I gave Inmate Holmes (16A3357) multiple direct orders to pull his hands in so his hatch could be secured. Then Inmate Holmes bent down by the hatch and spit on me, striking me in the face and upper torso. My area supervisor was notified.” Res. Ex. A.

On August 28, 2017, the Petitioner chose an Inmate Assistant who met with the Petitioner on August 29, 2017. At that time, the Petitioner requested the testimony of four (4) inmate witnesses: Creer (17A0058), Henderson (12A4732), Clennon (13A0318) and Jamie (17A0321). On September 5, 2017, a Tier III Superintendent’s Disciplinary Hearing commenced. The Petitioner pled guilty to the charge of refusing a direct order and pled not guilty to the charge of unhygienic act. Two of the requested inmate witnesses testified, to wit: Creer and Jamie. In addition, the Hearing Officer called for testimony from the ORC Staff and the author of the misbehavior report. The hearing concluded on September 8, 2017 at which time the Hearing Officer found the Petitioner guilty of the rule violation of unhygienic act. The Petitioner received a sanction of 90 days of Special Housing Unit (SHU), as well as 90 days loss of packages, commissary and phone privileges. The Petitioner filed a timely appeal and the Superintendent’s Hearing was affirmed by the Respondent on November 9, 2017.

Petitioner challenges the determination and asserts that he was improperly denied his right to receive requested testimony. Petitioner argues that the Inmate Assistant had contacted both Inmates Henderson and Clennon, and both agreed to testify on the Petitioner’s behalf, but neither was allowed to testify. Petitioner also asserts that the Hearing Officer failed to obtain witness refusal forms from Inmates Henderson and

Clennon. In the alternative, Petitioner further argues that the Hearing Officer failed to allow the witnesses to testify and failed to provide a reason for the denial.

In response thereto, the Respondent argues that the Petitioner failed to preserve his objection to the “denial” of Henderson and waives such argument on appeal. Respondent also argues that the Petitioner initially waived the appearance of both Henderson and Clennon, although he subsequently changed his mind about requesting Clennon. Respondent asserts that the Hearing Officer determined that the testimony of Clennon was redundant in light of the testimony of Inmates Creer and Jamie, particularly as Clennon was not as close in proximity to the event as the other inmates who did testify. Respondent seeks dismissal of the petition.

Upon review of the hearing transcript, the following colloquy occurred between the Hearing Officer and the Petitioner:

“HATHAWAY: OKAY, THE RECORD FURTHER INDICATES THAT YOU CHOSE WITNESSES TO APPEAR OKAY INMATE CREER 17A0058 WHO IS LOCATED IN CAR 130, INMATE HENDERSON DIN NUMBER 12A4732 HE IS LOCATED AT CAR 132

HOLMES: I DON’T WANT HIM

HATHAWAY: YOU DON’T WANT HENDERSON, OKAY SO WE WILL STRIKE HENDERSON FROM THE WITNESS, IT LOOKS LIKE CLENNON 13A0318 CAR 316 AND THEN IT LOOKS LIKE INMATE JAMES 17A0321 CAR 213, SO A TOTAL OF FOUR AND YOU RESCINDED INMATE HENDERSON AS A WITNESS, SO THAT LEAVES THREE MORE, HOW MANY OF YOUR WITNESS WERE ACTUALLY NEAR THE INCIDENT WHEN IT HAPPENED? THE CELL RIGHT NEXT TO YOU, 130?

* * * *

HATHAWAY: OKAY, OUT OF YOUR WITNESSES, OUT OF THOSE THREE LEFT WHICH ONES DO YOU THINK UM, WILL HAVE THE MOST OBVIOUSLY THEIR TESTIMONY WILL HELP YOUR HEARING

HOLMES: INMATE CREER,

HATHAWAY: CREER? CREER'S AT 130

HOLMES: YEAH CREER'S AT 130, AND JAMIE HE IS IN 118 RIGHT ACROSS

HATHAWAY: HE WAS AT 118 NOW HE IS AT 213 THOSE TWO WOULD ACTUALLY BE THE MOST VIABLE WITNESSES

HOLMES: CORRECT

HATHAWAY: SO HOW ABOUT I FORWARD YOU THOSE TWO WITNESSES, YOU STRUCK HENDERSON FROM THE RECORD AS A WITNESS AND CLENNON AS A WITNESS

HOLMES: ALRIGHT

HATHAWAY: ALRIGHT SO I'LL GIVE YOU UH LET'S SEE SO I'LL GIVE YOU JAMIE AND CREER ALRIGHT WE HAVE LISTED ALL EVIDENCE YOU WANT WE HAVE LISTED YOUR REQUEST FOR WITNESSES, SO UH AS IT STANDS NOW WE WILL CALL, I'LL GET AHOLD OF CREER AND JAIME AND THEN UH WE WILL LOOK THROUGH THE REQUEST FOR EVIDENCE WHICH IS THE VIDEO WHICH I HAVE RIGHT HERE TODAY, OKAY

HOLMES: ALRIGHT” (Res. Ex. E, pp.2-4³)

Towards the end of the hearing, the Petitioner changed his position and wanted to call Inmate Clennon as a witness. The Hearing Officer denied the testimony of Inmate Clennon as redundant as two of the inmates who were closer in proximity to the Petitioner testified and the Hearing Officer determined that Inmate Clennon would not add any additional facts to the hearing.

“HATHAWAY: OKAY UM INMATE HOLMES YOU HAVE OTHER EVIDENCE OR OTHER DOCUMENTATION EVIDENCE YOU WANT TO ENTER.

HOLMES: YEAH THAT’S WHAT I WANTED TO ASK YOU ON MY ASSITANT (*sic*) FORM IT SAYS I HAVE I JUST WENT OVER IT (INAUDIBLE) YOU GOT CREER AND JAMIE TESTIFYING I REFUSED FOR HENDERSON BUT I WANT CLENNIN (*sic*)

HATHAWAY: I ASKED YOU WHAT ONE WOULD HAVE MORE BEARING ON YOUR TESIMONY (*sic*) AND YOU SAID CREER AND JAMIE

HOLMES: YEAH BECAUSE CREER IS RIGHT NEXT TO ME AND JAMIE IS RIGHT ACROSS FROM ME

HATHAWAY: RIGHT

HOLMES: RIGHT AND CLENNON HE IS RIGHT BESIDE ME LIKE 2 OR 3 CELLS DOWN

HATHAWAY: IT’S GOING TO BE REDUNDENT (*sic*) TESTIMONY AND THA (*sic*) WAS WHEN HE STARTED THE

³ The transcript pages were unnumbered as provided. The Court added page numbers for convenience.

HEARING YOUR (*sic*) CLARIFIES YOU WANTED HENDERSON AND CLENNON OFF CREER AND JAMIE CAN AND TESTIFED (*sic*) AND THAT WAS SATISFACTORY TO THIS HEARING DO YOU WANT ME TO LOOK AT YOUR DOCUMENTARY EVIDENCE?” (Res. Ex. E, p.18)

Inasmuch as the Petitioner rescinded his request for the testimony of Inmate Henderson, any objection to the failure to produce Inmate Henderson is without merit. Although in the petition it is alleged that Inmate Henderson was going to admit that he was the actual culprit, such characterization is belied by the transcript. Similarly, as Inmate Henderson was not requested to testify, the argument that there was not an inmate refusal form submitted is specious. Clearly, a reading of the transcript negates the Petitioner’s argument that he was improperly denied the testimony of witness Inmate Henderson. *See, Davis v. Goord*, 34 Ad3d 1027.

As relates to the denial of witness Inmate Clennon, although the Petitioner initially consented to rescind the request, he timely requested Inmate Clennon’s testimony during the hearing. However, the Hearing Officer was within his province to deny the testimony of Inmate Clennon as redundant, particularly as Inmate Clennon was not in the immediate proximity of the subject incident and his testimony may have proved to be irrelevant as well. *See, Pettus v. West*, 28 AD3d 907.

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 22, 2018 at
Lake Pleasant, New York.

S. Peter Feldstein
Acting Supreme Court Justice