Culbreath v Gleason
2021 NY Slip Op 31861(U)
May 12, 2021
Supreme Court, Seneca County
Docket Number: 53627
Judge: Daniel J. Doyle

STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

JEFFREY CULBREATH, DIN #95B1028,

Petitioner,

-vs-

CAPTAIN GLEASON, FIVE POINTS CORRECTIONAL FACILITY,

Respondent.

Decision and Judgment

Index No.: 53627

Petitioner filed this Article 78 petition following a Tier III disciplinary proceeding during which he pled guilty to a violation of Rule 114.10 (Smuggling) that was held at Five Points Correctional Facility November 12, 2020. There was a Superintendent's review given there was a penalty imposed of more than 30 days, which affirmed the imposition of the penalty of the Hearing Officer. The Petitioner timely appealed the Tier III hearing and the Superintendent affirmed the determination on January 4, 2021. The Petitioner thereafter commenced this Article 78 action by the filing of a petition on August 29, 2019. The Court has reviewed the petition of Petitioner, the Verified Answer and Return submitted by the Assistant Attorney General, Ted O'Brien, Esq., and the Petitioner's reply.

In a misbehavior report, the Petitioner was originally charged with three rules violations: Rule 113.23 (Contraband), Rule 114.10 (Smuggling) and Rule 113.24 (Drug Use). At the hearing, Petitioner pled guilty to Smuggling and not guilty to Contraband and Drug Use. The Petitioner explained that the items he was smuggling were parsley and coodulche (a coconut based powder). After listening to the Petitioner's explanations, the Hearing Officer found the Petitioner guilty of Smuggling and not guilty of Contraband and Drug Use. During the hearing Petitioner requested that the Hearing Officer reduce the level of offense for the Smuggling charge from Tier III to Tier I. The Hearing Officer declined to do so and imposed a penalty of 90 days keeplock time and loss of 90 days of good time.

In an Article 78 challenge to an agency's decision the standard for review is whether the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]). However, when the determination is supported by a rational basis, the Court "must sustain the determination" even

if the Court "concludes that it would have reached a different result than the one reached by the agency" (*Sylvester v Fischer*, 126 AD3d 1330, 1330 [4th Dept 2015]).

The infractions the Petitioner were charged with can vary in severity. Smuggling can be a Tier I, Tier II, or Tier III offense. Contraband can likewise be a Tier I, Tier II, or Tier III offense. Drug Use can be a Tier I or Tier II offense. In rendering his determination, the Hearing Officer specifically found that report of Petitioner's drug use to not be credible, and that after reviewing the photographs submitted at the hearing, the Hearing Officer found there was insufficient evidence to find that the substances found on the Petitioner were contraband materials. Petitioner argues that as he was found not guilty of Drug Use and Contraband, the Hearing Officer should have reduced the Smuggling charge from a Tier III to a Tier I infraction and imposed an appropriate penalty prescribed for Tier I violations.

Petitioner's argument confuses the role of the Hearing Officer and Reviewing Officer. The Reviewing Officer sets the level of offense based upon a review of the misbehavior report (7 NYCRR § 270.3[a]). A court may not substitute its judgment for that of the Reviewing Officer (see *Matter of Pettus v Selsky*, 28 AD3d 1043, 1044 [3d Dept 2006] *Allende v Selsky*, 302 AD2d 764, 765 [3d

Dept 2003] *Cliff v Kingsley*, 293 AD2d 954, 955 [3d Dept 2002]). Here, the Reviewing Officer set the level of offense at a Tier III infraction and a Tier III infraction is what the Petitioner pled guilty to. The penalty imposed by the Hearing Officer was a permissible penalty for a Tier III infraction (7 NYCRR § 254.7).

A court's review of a penalty imposed on an Article 78 petition is limited (see *Gray v LaFountain*, ___ AD3d ___, 2021 NY Slip Op 02624 [4th Dept 2021]). Further, a court will not modify a penalty imposed that has already been served by an inmate (see *Matter of Linares v Fischer*, 119 AD3d 1300, 1301 [3d Dept 2014]). Here, the penalty imposed of 90 days keeplock has already been served. Petitioner also received a penalty of loss of three months good time. The Court finds that the loss of three months good time is "is so disproportionate to the offense" Petitioner pled guilty to, and the substance of that conduct, that the portion of the determination that imposed the loss of good time should be annulled (*Matter of Cookhorne v Fischer*, 104 AD3d 1197, 1198 [4th Dept 2013]). Though Respondent argues that Petitioner has a poor disciplinary record, a review of that record reveals that, though extensive, the imposition of a loss of good time is out of proportion to the other instances of penalties imposed in that

record. In addition, as "neither the... [charge]... of which he is guilty nor the evidence presented at the hearing establishes that petitioner's conduct was a threat to institutional safety and security" the loss of good time here is unduly excessive (*Matter of Kim v Annucci*, 128 AD3d 1196, 1197 [3d Dept 2015]).

Based upon the foregoing, it is hereby

ADJUDGED and DECREED that the Article 78 petition is granted in part and the determination is modified by vacating the penalty of loss of three months good time, and, as modified, the determination of the Respondent is confirmed.

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

Dated: May 12, 2021

The Honorable Daniel J. Doyle
Supreme Court Justice