

Matter of Rodriguez v Selsky
2007 NY Slip Op 31957(U)
July 5, 2007
Supreme Court, Albany County
Docket Number: 0017107/2007
Judge: George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of
JONATHAN RODRIGUEZ, 01-R-4311,

Petitioner,

-against-

DONALD SELSKY, Director, Special
Housing/Inmate Disciplinary Program,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-07-ST7402 Index No. 171-07

Appearances: Jonathan Rodriguez
Inmate No. 01-R-4311
Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Orleans Correctional Facility, commenced the instant CPLR Article 78 proceeding to review the determination of several misbehavior reports. The petition alleges that petitioner was not allowed to attend the hearing on the charges, that Tier I or II charges were improperly combined with Tier III charges, that he was charged with contraband but the misbehavior report does not indicate what, if any, contraband was found, that the misbehavior report was not endorsed by the other officers involved, that he was found guilty of “excess tobacco” even though such violation was not charged, that the Hearing Officer requested the presence of the authors of the misbehavior reports but did not call them as witnesses, that the tape of the hearing indicates that the Hearing Officer did not view the video tape and that petitioner was not provided with a copy of the disposition within 24 hours as required.

The record indicates that petitioner refused to attend the hearing. The Hearing Officer took testimony from the Correctional Officer who had attempted to escort petitioner to the hearing. Such officer testified that the petitioner refused to attend the hearing, did not provide any reason for the refusal and refused to sign the “Inmate Refusal to Attend” form. Moreover, petitioner grieved such issue. The grievance was denied as unsubstantiated. Administrative determinations, such as the outcome of the disciplinary and grievance proceedings, carry a presumption of regularity (see Altamore v Barrios-Paoli, 90 NY2d 378, 386 [1997]; Nehorayoff v Mills, 282 AD2d 932 [3d Dept 2001]). The petitioner must

overcome such presumption by submission of “factual allegations of an evidentiary nature or other competent evidence tending to establish his or her entitlement to the requested relief” (Matter of Rodriguez v Goord, 260 AD2d 736, 736-737 [3d Dept 1999]; see also Matter of Barnes v La Vallee, 39 NY2d 721 [1976]; Matter of Tebout v Goord, 290 AD2d 833 [3d Dept 2002]; Matter of Vandermark-Crayne v New York State Dept. of Civ. Serv., 225 AD2d 979 [3d Dept 1996]; Matter of Reynoso v Le Fevre, 199 AD2d 886 [3d Dept 1993]; Matter of Bogle v Coughlin, 173 AD2d 992 [3d Dept 1991]); Matter of Malik v Berlinland, 158 AD2d 836 [3d Dept 1990]). Conclusory assertions do not meet that burden and fail to overcome the presumption of regularity. The petition contains only the most conclusory assertions that he was not allowed to attend the hearing and his grievance submissions, which contain more factual detail, are not sworn to and are thus not admissible proof of his claims. As such, petitioner has failed to establish that he was not allowed to attend the hearing.

While the facts of the instant proceeding appear indistinguishable from Matter of Tafari v Selsky, (___ AD3d ___, 2007 NY Slip Op 03812 [3d Dept 2007]), in which it was held that an inmate must be advised of his right to attend the hearing and the consequences of his refusal to appear, petitioner did not raise such objection in his administrative appeal. Such issue has thus been waived and is not preserved for judicial review (see Matter of Faraldo v Senkowski, 275 AD2d 833 [3d Dept 2000]; Matter of Walton v Selsky, 251 AD2d 798 [3d Dept 1998]). Moreover, petitioner has not directly raised such issue in his

petition. He has therefore failed to show any impropriety with respect to conducting the hearing in his absence.

It is well settled that a failure to raise a procedural objection at the hearing when it could be corrected waives the objection (see Matter of Shell v Goord, 296 AD2d 753 [3d Dept 2002]; Matter of Cowart v Coughlin, 194 AD2d 1036 [3d Dept 1993]; Matter of Eleby v Coughlin, 180 AD2d 931 [3d Dept 1992]). It is further clear that an inmate's refusal to attend a disciplinary hearing and consequent failure to raise any objections waives all right to challenge the results based upon alleged procedural irregularities (see Matter of Tafari v Selsky, 37 AD3d 887 [3d Dept 2007]; Matter of Gathers v Goord, 31 AD3d 1085 [3d Dept 2006]; Matter of Johnson v Racette, 282 AD2d 899 [3d Dept 2001]). Petitioner has therefore waived his objections that the Tier I or II charges were improperly consolidated with Tier III charges, that the misbehavior report was not endorsed by other involved officers, that the Hearing Officer did not take any testimony from the authors of the misbehavior reports and that the record does not reflect that the Hearing Officer actually viewed the video tape.

In any event, the courts have regularly refused to interfere with the discretion of the review officer in designating the tier level of disciplinary proceedings (see Matter of Gathers v Goord, 31 AD3d at 1085-1086; Matter of Pettus v Selsky, 28 AD3d 1043 [3d Dept 2006]; Matter of Allende v Selsky, 302 AD2d 764 [3d Dept 2003]; Matter of Cliff v Kingsley, 293 AD2d 954 [3d Dept 2002]). Petitioner has not shown that it was arbitrary, capricious or an abuse of discretion to consolidate the three misbehavior reports for one hearing.

Petitioner contends that the misbehavior report failed to comply with the requirements of 7 NYCRR 251-3.1 (b) in that each employee who helped conduct the cell search did not endorse the misbehavior report. While it appears that the misbehavior report was not in strict compliance with the regulation, in the absence of prejudice caused by the failure to comply the error is harmless and does not warrant any relief (see Matter of Davis v Goord, 21 AD3d 606, 609 [3d Dept 2005]; Matter of Bolling v Coombe, 234 AD2d 730 [3d Dept 1996]). Moreover, since petitioner has not raised a substantial evidence question, issues concerning the testimony of the authors and the video tape also would not warrant any relief.

Petitioner's objection to the charge of smuggling is well founded. The misbehavior report authored by Correction Officer Ludtka charges petitioner with a violation of rule 113.23, contraband. However, the misbehavior report does not contain any factual basis for the charge nor does it state that anything which could be construed as contraband was found. 7 NYCRR 251-3.1 (c) (1) requires that a misbehavior report contain "a written specification of the particulars of the alleged incident of misbehavior involved." The misbehavior report herein deviates from such requirement. However, given the other two contemporaneous misbehavior reports, which were consolidated for a single hearing and which included specific charges of possession of tobacco, any error was harmless and did not prejudice petitioner's defense, as above.

Petitioner also contends that he was found guilty of possession of excess tobacco, even though he was never charged with such violation. The misbehavior report charges a

violation of rule 113.19, designated in the report as “possession of tobacco.” Inmate rule 113.19 provides “[a]n inmate shall not possess tobacco products in excess of an amount authorized by the facility.” The fact that the Hearing Officer categorized the violation as “excess tobacco,” as contained in the body of the rule, and as historically designated (see Matter of Harrison v Carpenter, 201 AD2d 848, 849 [3d Dept 1994]) does not provide any basis for relief.

Finally petitioner contends that he was not provided a copy of the disposition within 24 hours as required by 7 NYCRR 254.7 (a) (5). Petitioner’s conclusory assertions to that effect are supported by a letter to the Superintendent seeking a copy of the disposition following the hearing. Respondent has not offered any proof as to when the disposition was provided to petitioner. It thus appears that respondent violated the regulation. However, petitioner has not shown any prejudice occasioned by the delay (see Matter of Pennington v Selsky, 27 AD3d 804, 805 [3d Dept 2006]). As such, the error is harmless and does not warrant any relief.

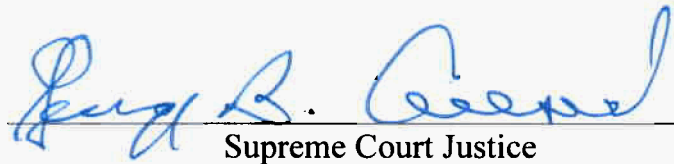
Accordingly it is

ORDERED and ADJUDGED, that the petition is hereby dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the Respondent who is directed to enter this Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: July 5, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated January 18, 2007;
2. Petition verified December 19, 2006 with Exhibit B annexed;
3. Answer verified April 6, 2007;
4. Affirmation of Bridget E. Holohan, Esq. dated April 6, 2007 with Exhibits A-C annexed.