STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of VINCENT GONZALEZ,

Petitioner,

-against-

BRIAN FISCHER, Commissioner of the New York State Department of Correctional Services,

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-ST7466 Index No. 1177-07

Appearances: Prisoner's Legal Services of New York
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Elmira Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated July 21, 2006 which found him guilty of violating prison rules. Specifically, the petitioner was found guilty of violation of Rule 113.25, drug possession, and Rule 114.10, smuggling (see 7 NYCRR § 270.2[1]). The disciplinary charges arose out of an incident in which the petitioner's cousin, one Donna Vivinetti, was intercepted on July 8, 2006 as she attempted to visit the petitioner, and was discovered to be in possession of a quantity of tan power which tested positive for heroin. Ms. Vivinetti, upon being apprehended, gave a verbal and written statement in which she implicated the petitioner in the incident, indicating that he solicited and conspired with her to smuggle the drugs into Fishkill Correctional Facility, and that this was the third time she had done this. The misbehavior report recites as follows:

> "Inmate Gonzalez, Vincent 94A0165 violated the above rules in that he repeatedly solicited from the conspired with his cousin, Donna Vivinetti, to smuggle drugs into Fishkill Correctional Facility. On the above date and approximate time, as Donna Vivinetti attempted to visit inmate Gonzalez 94A0165, she voluntarily surrendered a quantity of tan powder, which tested positive for heroin. She also gave a verbal and written statement to the fact that inmate Gonzalez 94A0165 did solicit from her and conspired with her to smuggle drugs into Fishkill Correctional Facility and that this is at least the third time she

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[1]Rule 113.25: "An inmate shall not make, possess, sell or exchange any narcotic, narcotic paraphernalia, controlled substance or marijuana. An inmate shall not conspire with any person to introduce such items into the facility."

Rule 114.10 "An inmate shall not smuggle or attempt to smuggle solicit others to smuggle any item in or out of the facility or from one area to another." (see 7 NYCRR § 270.2)

smuggled drugs to him at Fishkill CF. End of Report."

The petitioner argues that the respondent denied petitioner his due process and regulatory right to adequate notice of the charges against him. He points out that the misbehavior report is required to set forth the date, time and place of the incident (see 7 NYCRR § 251-3.1 [c] [3]). In his view, he had no notice of the particulars of the alleged misbehavior, in particular, the date and time when, or the place where his alleged misconduct occurred. The petitioner alleges that the respondent violated the petitioner's regulatory right to respond to the evidence by failing to provide the petitioner with Ms. Vivinetti's written statement, in violation of 7 NYCRR § 254.6 (a) (3). He points out that the statement was part of the evidence considered by the hearing officer in reaching his determination. It is argued that if the petitioner had been provided a copy of Ms. Vivinetti's written statement he would have learned of the specific details regarding his alleged involvement in Ms. Vivinetti's drug smuggling operation. This, he maintains, would have enabled him to question Ms. Vivinetti about her written statement and otherwise prepare a defense, including attacking her credibility[2]. The petitioner asserts that the withholding of Ms. Vivinetti's written statement greatly prejudiced the petitioner in his ability to prepare a defense.

As a part of the foregoing argument, the petitioner maintains that the hearing officer improperly found Ms. Vivinetti's written statement to be confidential and therefore not

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[2]Significantly, Ms. Vivinetti testified on the petitioner's behalf at the hearing. Her testimony, for the most part, contradicted the verbal and written statements she had given when she was apprehended on July 8, 2006 at Fiskill Correctional Facility. She denied that she had been smuggling drugs into Fishkill Correctional Facility at the petitioner's request.

subject to disclosure. He asserts that the hearing officer failed to make appropriate findings that the disclosure would be harmful to institutional safety or correctional goals or implicate inmate privacy concerns. He also asserts that the reason given by the hearing officer for non-disclosure, that there was an ongoing criminal investigation, and the written statement constituted evidence in a criminal prosecution, was unsupported and conclusory.

The Court is mindful that, in general, it is required that the misbehavior report indicate that date, time and place of the incident (see 7 NYCRR 251-3.1 [c]). As stated in Abdur-Raheem v Mann (85 NY2d 113 [1995]), however, "[i]n the context of prison disciplinary proceedings, the notice requirement is satisfied when the inmate is given enough particulars to make an effective response" (id., at p. 123). In Abdur-Raheem v Mann, the Court of Appeals found the misbehavior report was sufficient to charge the petitioner with conspiring to commit murder when it indicated that the murder occurred on the morning of May 4, 1992 in the facility gymnasium. No specifics were provided with regard to petitioner's alleged participation. The Court held "there was no need to notify him of the specific role he was alleged to have played, since the act of conspiring to commit a deadly assault was itself sufficient to constitute a violation of the prison rules" (id.). Similarly, in Matter of Borcsok v Selsky (296 AD2d 678, 679 [3rd Dept., 2002]) it was held that the omission of dates and times in the misbehavior report was not fatal since the misconduct took place over several months and was the subject of a lengthy investigation. Also, in Matter of Shannon v Goord, 282 AD2d 909, 910 [3rd Dept., 2001] the Court held " considering the ongoing investigation

and nature of the misconduct, it was sufficient that the misbehavior report set forth the date and time of the cell search rather than specify the dates, times and places of petitioner's involvement in the prohibited conduct" (id., at 848). In a case having strong similarities to the case at bar, the petitioner was accused of participating in a scheme to purchase heroin and have it smuggled into the jail (see Matter of McGoey v Selsky 260 AD2d 814 [3rd Dept.,1999]). The Court found that although the misbehavior report did not identify the date of the telephone call that provided the basis for the charges, the report was sufficiently specific to enable petitioner to prepare a defense (see id., at p. 816).

In view of the foregoing, the Court finds that the misbehavior report was sufficient to enable the petitioner to prepare a defense to the charges.

Turning to the petitioner's due process argument, "[t]he due process protections afforded a prison inmate do not equate to 'the full panoply of rights due to a defendant in a criminal prosecution'" (Sira v Morton, 380 F3d 57, 69 [2nd Cir., 2004] quoting Wolff v. McDonnell, 418 US 539, at 556). The inmate does not have a right to counsel or a right to confrontation of witnesses (id., citing Wolff v McDonnell, supra, at 563-567). "Nevertheless, an inmate is entitled to advance written notice of the charges against him; a hearing affording him a reasonable opportunity to call witnesses and present documentary evidence; a fair and impartial hearing officer; and a written statement of the disposition, including the evidence relied upon and the reasons for the disciplinary actions taken" (id.). Notice of the charges must be sufficiently specific to "to inform the inmate of what he is

accused of doing so that he can prepare a defense" (id., at 70).

The Court, however, discerns no meaningful distinction between the constitutional notice prescribed under the Due Process Clause, and the regulatory notice required under the rules of the Department of Correctional Services (see 7 NYCRR 251-3.1), as applied and interpreted by New York courts. In fact, as noted, it appears that in at least two instances, involving fact patterns similar to the one at bar (where the date of the underlying misconduct was not specified in the misbehavior report) Courts have held that there was sufficient information to enable the inmate to prepare a defense (see Abdur-Raheem v Mann, supra, at p.123, where the Court of Appeals stated that the "petitioner was given all the information necessary to the preparation of a defense" ; Matter of McGoey v Selsky, supra, at p. 816, where the misbehavior report "was sufficiently specific to enable petitioner to prepare a defense"). In this instance, the misbehavior report advises the petitioner with regard to the general nature of the misconduct, the person with whom the petitioner conspired, and the date when the scheme to deliver drugs to him was carried out.

The Court finds that the misbehavior report was sufficient to enable the petitioner to prepare a defense, and therefore satisfied the regulatory requirements of rules of the Department of Correctional Services, and the requirements of constitutional due process.

The Court now turns to the hearing officer's denial of the petitioner's request to review the written statement of Ms. Vivinetti. As stated in Hillard v Coughlin (187 AD2d 136 [3rd Dept., 2003]) "[s]ome evidence relied upon by a hearing officer may remain

confidential, provided the confidential documents are 'submitted to the reviewing court for in camera inspection [and] ... the hearing officer must, at the time of the hearing, inform the inmate that he will consider certain information which will remain confidential and articulate some reason for keeping the information confidential'" (Hillard v Coughlin, supra, at 139, quoting Matter of Boyd v Coughlin, 105 AD2d 532, 533 and citing Matter of Freeman v Coughlin, 138 AD2d 824). The hearing officer here indicated that the petitioner would not be permitted to review the written statement by reason that it involved a criminal prosecution and criminal investigation. Upon *in camera* review of the written statement, and review of the testimony of Corrections Officer Feliciano (both his confidential testimony and his non-confidential testimony), the Court finds support for the hearing officer's finding in the record, since it implicated legitimate institutional correctional goals (compare Hillard v Coughlin, supra, and Matter of Cahill v Goord, 36 AD3d 997 [3rd Dept., 2007], where the respective hearing officers in each case failed to articulate or substantiate institutional safety or correctional goals in denying access to documents). In this instance, the conduct of an investigation into a drug smuggling incident would fall within the broad parameters of legitimate correctional goals, specifically, to prevent the entry of drugs into a prison facility. While the petitioner asserts that the reason for non-disclosure of Ms. Vivinetti's written statement (a criminal prosecution and criminal investigation) is conclusory, the Court is of the view that to elaborate further would risk disclosing information which could compromise the ongoing investigation. The Court finds that the hearing officer properly found the written

statement of Donna Vivinetti to be confidential.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is 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. Notice of Petition dated February 7, 2007, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 30, 2007
3. Reply Affirmation of Dianna Goodwin, Esq., dated April 9, 2007