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| <b>Matter of Perez v Artus</b>   |
| 2007 NY Slip Op 32007(U)   |
| June 21, 2007  |
| Supreme Court, Clinton County  |
| Docket Number: 00-0132/2007  |
| Judge: S. Peter Feldstein  |
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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF CLINTON**

**X**

In the Matter of the Application of  
**JAIME PEREZ, #01-A-3397,**

Petitioner,

For a Judgment Pursuant to Article 78  
Of the Civil Practice Laws and Rules

-against-

**DECISION AND JUDGMENT  
RJI #09-1-2007-0057.04  
INDEX #2007-0132  
ORI #NY009013J**

**DALE ARTUS,** Superintendent,  
Clinton Correctional Facility,

Respondent.

**X**

This proceeding pursuant to Article 78 of the CPLR was originated by the petition of Jaime Perez, verified on January 23, 2007, and stamped as filed in the Clinton County Clerk's Office on January 31, 2007. The petitioner, who is now an inmate at the Upstate Correctional Facility, but was an inmate at the Clinton Correctional Facility at the time of the incident, is challenging the results of a Tier III Superintendent's Hearing conducted on August 16, 2006. The Court issued an Order to Show Cause on February 2, 2007, and has received and reviewed respondent's Answer, verified on March 16, 2007, together with his Letter Memorandum of that date. Petitioner did not file a Reply.

As the result of an investigation conducted at the Clinton Correctional Facility, petitioner was issued an inmate misbehavior report on August 10, 2006, charging him with violation of inmate rules 100.10 (assault on another inmate) and 102.10 (threats). The author of the inmate misbehavior report alleged that the petitioner, together with inmates Ramos and Hernandez, threatened inmate Ruiz if he did not stab another inmate (Pimental) during the evening recreation on August 10, 2006. A Tier III

Superintendent's Hearing was commenced at the Clinton Correctional Facility with respect to these charges on August 15, 2006. At the conclusion of the hearing on August 16, 2006, the petitioner was found guilty of both charges. A disposition of 10 months confinement in the special housing unit, loss of packages, loss of commissary and loss of phone privileges was imposed. Upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing concluded on August 16, 2006, were affirmed on October 26, 2006. This proceeding ensued.

With respect to the Tier III Superintendent's Hearing concluded on August 16, 2006, the petitioner asserts several objections: that the hearing was commenced less than 24 hours after he met with his employee assistant in violation of 7 NYCRR §254.6(a)(1); that the misbehavior report incorrectly states the date, time and place of the incident in violation of 7 NYCRR §251-3.1(c)(3); that the misbehavior report fails to specify what alleged role petitioner had in relation to the charges; that the confidential informant did not identify him as having committed any violation, and moreover, there was not investigation to verify the confidential informant's information; and finally that the misbehavior report lacked "substantial evidence." Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record.

Respondent asserts that the petitioner waived any objections to the commencement of the hearing prior to the lapse of 24 hours after the employee assistant met with him. Respondent asserts that the confidential informant did identify the petitioner and inasmuch as the informant appeared in an open hearing with petitioner present, the Hearing Officer was not required to make any additional finding of reliability. Respondent further asserts that the misbehavior report did indeed contain the requisite

information to provide the petitioner with sufficient information to prepare for the hearing. Respondent moves for dismissal of the petition.

A review of the August 15, 2007, transcript clearly indicates that the Hearing Officer acknowledged that the hearing was being commenced prior to the expiration of 24 hours since the petitioner met with his employee assistant and that petitioner agreed to waive the time frames. *See*, Respondent's Exhibit D, Transcript, p. 2. As the petitioner waived the objection, he cannot raise it on appeal.

It is noted that the petitioner raises the argument that the misbehavior report lacks "substantial evidence." Based upon the arguments advanced in conjunction with this phrase in the pleadings, the Court finds that the petitioner is not arguing that the hearing lacked substantial evidence, only that the misbehavior report was insufficient on its face. As such, the Court will not transfer this matter to the Appellate Division, Third Department pursuant to CPLR 7804(g).

The petitioner was charged by misbehavior report with violation of rule 100.10 (an inmate shall not assault or attempt to inflict bodily harm upon any other inmate) and violation of rule 102.10 (an inmate shall not, under any circumstances, make threats). The description of the incident reads as follows:

"Due to information obtained from a reliable, confidential informant, it was found, that you, inmate Perez (01A3397) conspired to have inmate Pimental (95A5488) stabbed during the evening recreation period in the north yard on 8-10-06. You, along with inmates Ramos (97A3564) and Hernandez (01A2935) threatened a fourth inmate (at this facility) with being stabbed if he did not follow the instructions to stab inmate Pimental on 8-10-06. This plan was set in motion, at the meeting on 8-6-06 - Court 123, during the evening recreation in the north yard."

Petitioner's complaints regarding the misbehavior report are vague and conclusory. "A misbehavior report is sufficient if it contains the date, time and place of the offense, identifies the disciplinary rule alleged to have been violated and specifies the factual basis for the charge with enough particularity to enable the inmate to prepare a defense." *Matter of Torres v. Goord*, 261 A.D.2d 759, 759 (3d Dept 1999). The misbehavior report clearly sets forth what the plan was, who the co-conspirators were, and when the plan was developed. While petitioner argues that the misbehavior report failed to specify what his exact role was while acting in concert with the other co-conspirators, the misbehavior report sufficiently identifies the underlying act, to wit: to threaten inmate Ruiz with physical injury if he did not stab inmate Pimental. *Matter of Rivera v. Miller*, 273 A.D.2d 599, 599 (3d Dept. 2000).

At the hearing, petitioner was present for the testimony of, and had opportunity to ask questions of the author of the misbehavior report, Sgt. Bisso; the (initially) confidential informant, inmate Ruiz; alleged co-conspirator, inmate Ramos; and the alleged victim, inmate Pimental. The testimony elicited confirmed what the misbehavior report indicated: that inmate Ruiz was threatened with physical harm if he did not stab inmate Pimental (who was apparently unaware of the events [Transcript, p. 9-10]). Contrary to petitioner's assertions, inmate Ruiz clearly identified petitioner as the person who told him that Pimental was to be stabbed (Transcript, p. 17). Moreover, since inmate Ruiz willingly testified in an open session of the hearing, rather than maintain his confidential status, and petitioner was present during the testimony, the Hearing Officer was not required to make any special determination as to the informant's reliability. Instead, the Hearing Officer was able to determine credibility just as with any other

witness and petitioner was fully privy to the testimony. *See, Matter of Abdur-Raheem v. Mann*, 85 N.Y.2d 113 (1995).

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

**ORDERED**, that respondent's motion is granted; and it is further

**ADJUDGED**, that the petition herein is dismissed.

**DATED:** June 21, 2007 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice