

<b>Matter of Sweet v Poole</b>
2007 NY Slip Op 32013(U)
June 27, 2007
Supreme Court, Franklin County
Docket Number: 0000004/2007
Judge: S. Peter Feldstein
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**

**X**

In the Matter of the Application of  
**JACK SWEET, #04-B-0277,**

Petitioner,

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

-against-

**DECISION AND JUDGMENT  
RJI #16-1-2007-0002.01  
INDEX #2007-0004  
ORI #NY016015J**

**THOMAS POOLE**, Superintendent,  
Five Points Correctional Facility,  
**ROBERT K. WOODS**, Superintendent,  
Upstate Correctional Facility, and  
**DONALD SELSKY**, Director of Special  
Housing, NYS Department of Correctional  
Services,

Respondents.

**X**

This proceeding pursuant to Article 78 of the CPLR that was originated by the petition of Jack Sweet, verified on December 22, 2006, and stamped as filed in the Franklin County Clerk's Office on January 3, 2007. The petitioner, who is currently an inmate at the Upstate Correctional Facility, but was an inmate at the Five Points Correctional Facility at the time of the incident, is challenging the results of a Tier III Superintendent's Hearing which concluded at the Upstate Correctional Facility on November 20, 2006. The Court issued an Order to Show Cause on January 17, 2007, and has received and reviewed respondent's Answer, verified on March 9, 2007. Petitioner filed a Reply verified on March 22, 2007.

As a result of an incident dated November 1, 2006, at the Five Points Correctional Facility, petitioner was issued a misbehavior report on November 1, 2006 charging him with violation of inmate rules 106.10 (refusing a direct order), 104.11 (violent conduct), 107.10 (obstructing or interfering with an employee) and 109.12 (movement). The author

of the misbehavior report alleged that upon return to his cell following another hearing, petitioner stepped into his cell, pulled on his retention strap thereby causing the author to be pulled into the cell. The author stated that the petitioner refused direct orders to let go of the strap. The author and another correction officer were able to remove the handcuffs after a short struggle with petitioner. A Tier III Superintendent's Hearing was commenced with respect to these charges at the Upstate Correctional Facility on November 15, 2006. At the conclusion of the Tier III hearing on November 20, 2006, petitioner was found guilty of all four charges. A disposition was imposed of six months of special housing unit status, loss of good time, loss of packages, commissary and phone privileges. Petitioner filed an appeal and the Superintendent's Hearing was affirmed on January 5, 2007.

Petitioner asserts that he was improperly denied the videotape dated October 27, 2006, which would have corroborated his defense of retaliation by the author of the misbehavior report. Petitioner argues that the hearing was untimely and that the extension request was also untimely. Petitioner further asserts that he was improperly denied the testimony of Inmate Torres (who, he asserts, would have corroborated his retaliation defense), and that his inmate assistant failed to interview Inmate Torres. In addition, petitioner alleges that the videotape of the incident on November 1, 2006, was altered to eliminate the audio portion which would further corroborate petitioner's version of the events. Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record.

Respondent asserts that the hearing officer allowed petitioner to present evidence of a past grievance filed by petitioner against Corrections Officer Ayers, author of the instant misbehavior report, and called C.O. Ayers to testify. Respondent asserts that even

though petitioner claims that the incident was in retaliation to a prior grievance, the hearing officer properly did not allow that collateral issue to be a hearing within a hearing, and instead focused on the alleged incident. Respondent further asserts that the hearing officer properly requested an extension of time when it became apparent that C.O. Ayers was not available to testify until a later date, and the hearing resumed within a timely manner. While the petitioner's employee assistant did not have an opportunity to interview Inmate Torres due to the lack of identification number, Inmate Torres refused to participate in the hearing and refused to sign the refusal form. Instead, respondent argues that the hearing officer did hear testimony from the officer who spoke to Inmate Torres about testifying, which was sufficient. Furthermore, respondent argues that petitioner's claims that the videotape was altered are wholly unsupported and without merit. Respondent moves for dismissal of the petition.

The Court has reviewed the videotape of November 1, 2006, which captured the incident and was reviewed during the Superintendent's Hearing. While the scope of the videotape is limited to the view from outside the cell, in that there are two angles in the split screen (of four views), the videotape clearly shows that there was a scuffle with three to four correction officers involved in removing handcuffs or restraints from an inmate the Court presumes to be the petitioner. While there is no accompanying audio of the event, there is audio which appears to be related to a different view on the split screen. Despite petitioner's assertions that the audio would support his defense, the Court defers to the credibility determination made by the hearing officer who took testimony from the author of the misbehavior report.

While petitioner raises many issues related to his theory of retaliation for a grievance filed against C.O. Ayers (e.g., that threats were made by C.O. Ayers against

petitioner, that Inmate Torres overheard such threats, etc.), none of these tangential issues would exonerate petitioner with respect to his obvious physical struggle with the officers upon return to his cell. “Inmates are not free to choose which orders they will obey or to dictate the terms thereof (internal citations omitted).” *Matter of Tafari v. McGinnis*, 307 A.D.2d 502, 503 (3d Dept. 2003); *see also, Matter of Valentine v. Goord*, 21 A.D.3d 1195 (3d Dept. 2005). As to the issue of whether or not petitioner failed to follow a direct order, the Court notes that the hearing officer reviewed the videotape, and heard testimony from the author of the misbehavior report; the hearing officer’s determination in this respect was clearly permissible. Denial of such other matters as the hearing officer determined to be irrelevant was not arbitrary or capricious; accordingly, petitioner’s motion is without merit.

In this instance, the Hearing Officer clearly afforded the petitioner many opportunities to present his defense. Petitioner failed to refute the events as described by the misbehavior report author, C.O. Ramsdell, and instead petitioner argued that there were mitigating circumstances. A review of the transcript clearly indicates that the petitioner raised the issue of harassment at the hearing; however, the hearing officer did not find that harassment or retaliation occurred. Any issue of retaliation would be one of credibility for the hearing officer to determine. *See, Matter of Rizzuto v. Goord*, 35 A.D.3d 1075 (3d Dept. 2006); *Matter of Antonucci v. David*, 306 A.D.2d 654 (3d Dept 2003); *Matter of Govan v. Bennett*, 305 A.D.843 (3d Dept. 2003).

Petitioner argues that the commencement of the hearing, and moreover, the completion thereof, were untimely pursuant to 7NYCRR §251-5.1. However, as petitioner was housed in SHU for other reasons at the time of the incident, and upon discovery that the hearing would not be completed within the mandatory 14 days due to the necessary

testimony of C.O. Ayers who was not available, the hearing officer properly requested an extension pursuant to 7 NYCRR §251-5.1(b) with requisite reasons being described in the request and with notification to petitioner. *See, Farrell v. Selsky*, 32 A.D.3d 1103, 1104 (3d Dept. 2006).

The hearing officer did not err in not personally obtaining reasons for Inmate Torres's refusal to testify. Because Torres did not sign the refusal form, the hearing officer properly heard testimony of the officer (C.O. M. Cleveland) who contacted Inmate Torres. *See, Hill v. Selsky*, 19 A.D.3d 64, 66 (3d Dept. 2005).

Petitioner has failed to substantiate any claim of bias as against the Hearing Officer. "(T)he record does not establish that the Hearing Officer was biased or had predetermined petitioner's guilt, or that the determination flowed from such alleged bias (internal citations omitted)." *Matter of Moss v. Goord*, 36 A.D.3d 977 (3d Dept. 2007); *see also, Matter of Abdullah v. Goord*, 36 A.D.3d 978 (3d Dept. 2007). Contrary to the claims of petitioner, the Court finds that the Hearing Officer in this matter was extremely patient and allowed petitioner every opportunity to speak freely, question witnesses and present his arguments. Petitioner's claim of bias is without merit and is dismissed.

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

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

**DATED:** June 27, 2007 at  
Indian Lake, New York.

---

S. Peter Feldstein  
Acting Supreme Court Justice