

<b>Matter of Excell v Woods</b>
2007 NY Slip Op 32015(U)
June 19, 2007
Supreme Court, Franklin County
Docket Number: 0000066/2007
Judge: S. Peter Feldstein
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**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**

**X**

In the Matter of the Application of  
**MORTIMER EXCELL, #96-R-8355,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #16-1-2007-0026.010  
INDEX #2007-066  
ORI #NY016015J**

-against-

**ROBERT K. WOODS**, Superintendent,  
Upstate Correctional Facility, and  
**GLENN S. GOORD**, Commissioner,  
NYS Department of Correctional Services,  
Respondents.

**X**

This proceeding pursuant to Article 78 of the CPLR that was originated by the petition of Mortimer Excell, verified on January 2, 2007, and stamped as filed in the Franklin County Clerk's Office on January 12, 2007. The petitioner, who is an inmate at the Upstate Correctional Facility at the time of the incident, is challenging the results of a Tier III Superintendent's Hearing which concluded on July 27, 2006. The Court issued an Order to Show Cause on January 23, 2007, and has received and reviewed respondent's Answer, verified on March 14, 2007. Petitioner did not file a Reply.

As the result of an incident dated July 10, 2006, at the Upstate Correctional Facility, petitioner was issued an inmate misbehavior report on July 11, 2006, charging him with violation of inmate rules 104.11 (violent conduct), 106.10 (refusing direct order), 107.10 (interference with employee), 109.12 (movement regulation violation) and 107.11 (harassment). The author of the inmate misbehavior report alleged that after escorting the petitioner back to his cell, petitioner brought his handcuffed hands from his back to his front, refused to comply with a direct order to be released from the handcuffs and was otherwise belligerent. A Tier III Superintendent's Hearing was commenced at the

Upstate Correctional Facility with respect to these charges on July 21, 2007. At the conclusion of the hearing on July 27, 2007, the petitioner was found guilty of charges 104.11 (violent conduct), 107.10 (interference with employee), 106.10 (refusing direct order) and 109.12 (movement regulation violation). A disposition of six (6) months special housing unit, loss of recreation, loss of packages, loss of commissary and loss of phone privileges, as well as, three (3) months loss of good time was imposed. Upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing concluded on July 27, 2006, were affirmed on September 12, 2006. This proceeding ensued.

With respect to the Tier III Superintendent's Hearing concluded on July 27, 2006, the petitioner asserts several objections. First of all, petitioner asserts that the misbehavior report was issued as harassment or retaliation in response to numerous grievances filed by petitioner as against various personnel. Secondly, petitioner asserts that Correction Officer T. Ramsdell, who authored the misbehavior report on July 11, 2006, did so outside the scope of his responsibility, in that C.O. Ramsdell was to have escorted petitioner back to his cell and instead, conducted an unauthorized cell search in which various items were confiscated and petitioner's "religious packages" were mistreated. Third, petitioner asserts that he was "provoked" into these acts by conduct at another disciplinary hearing held on July 10, 2006, and the Hearing Officer at the subsequent Tier III hearing refused to hear mitigating evidence which supported such claimed defense. Fourth, the petitioner was denied the opportunity to call a witnesses. Lastly, the petitioner asserts that the hearing officer was biased. Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record.

Respondent asserts that the petitioner failed to show any retaliation on behalf of the author and it was a credibility determination for the hearing officer to make.

Respondent also asserts that the petitioner was not present during a portion of his hearing due to his behavior as he was escorted to the hearing and therefore, petitioner has failed to preserve these issues for judicial review. Furthermore, respondent asserts that petitioner has failed to substantiate any of the allegations of bias by the hearing officer. Respondent moves for dismissal of the petition.

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 a credibility issue for the hearing officer. *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's former cell mate, Inmate Brown, was called and testified in petitioner's presence. *See*, Respondents' Exhibit D, pp. 48 - 55. Inmate Brown clearly refuted petitioner's claims of wrongdoing by the author of the misbehavior report and further corroborated the testimony of C.O. Ramsdell.

Petitioner's actions outside the presence of the Hearing Officer as he was being escorted to the continuation of his Superintendent's Hearing, caused petitioner to be denied attendance at that hearing. "Inasmuch as petitioner forfeited his right to attend the remainder of the hearing, the Hearing Officer properly continued it in his absence. By his conduct, petitioner waived his right to raise his procedural claim that he was denied witnesses (internal citations omitted)." *Matter of Tafari v. Selsky*, 31 A.D.3d 1087, 1088

(3d Dept. 2006). In any event, the testimony elicited by the Hearing Officer substantiated the misbehavior report and supported the determination.

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 at the July 2, 2006, portion of the hearing 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

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

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

**DATED:** June 19, 2007 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice