

<b>Matter of Allah v Woods</b>
2007 NY Slip Op 32016(U)
June 19, 2007
Supreme Court, Franklin County
Docket Number: 0000087/2007
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  
**KHA-SUN CREATOR ALLAH,**  
**f/k/a KHALIQ CLARK, #99-A-2260,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #16-1-2007-0032.012**  
**INDEX #2007-0087**  
**ORI #NY016015J**

-against-

**ROBERT K. WOODS,** Superintendent,  
Upstate Correctional Facility,  
Respondent.

**X**

This is a proceeding pursuant to Article 78 of the CPLR that was originated by the petition of Kha-Sun Creator Allah, verified on January 2, 2007, and stamped as filed in the Franklin County Clerk's Office on January 17, 2007. The petitioner, who is currently an inmate at the Green Haven Correctional Facility, but was an inmate at the Upstate Correctional Facility at the time of the incident, is challenging the results of a Tier II Disciplinary Hearing held at the Upstate Correctional Facility on September 25, 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 a result of an incident dated September 11, 2006, at the Upstate Correctional Facility, petitioner was issued two misbehavior reports on September 11, 2006; one charging him with violation of inmate rule 106.10 (refusing a direct order), and the other charging him with violation of inmate rules 116.10 (destroying state property) and 116.11 (altered item). The author of the first misbehavior report alleged that prior to a cell frisk, as per procedure, petitioner was directed "to place his hands behind his back and out of

the cell hatch” to be handcuffed, petitioner repeatedly refused to comply. The author of the second misbehavior report alleged that during the cell frisk, the petitioner was found to be in possession of contraband items. A Tier II Disciplinary Hearing was commenced with respect to these charges at the Upstate Correctional Facility on September 25, 2006. At the conclusion of the Tier II hearing, petitioner was found guilty of all three charges. A disposition was imposed of keep lock status for 29 days, loss of packages, commissary and phone privileges for 30 days, and restitution ordered for a total of \$26.11. Petitioner filed an appeal, although said appeal was not located or otherwise determined, and the respondent acknowledges same.

Petitioner asserts that he was improperly excluded from his disciplinary hearing; that he was denied the right to call witnesses; that he was denied the right to present evidence, e.g., that the hearing officer failed to play the entire incident tape; and, that the hearing officer was biased. Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record.

Respondent asserts that the petitioner’s behavior at the hearing resulted in his removal and, as the record will reflect, that petitioner was properly excluded. Respondent also asserts: that the hearing officer did not act with bias; that said claim is otherwise not preserved as petitioner did not raise it at the hearing; that the hearing officer acted appropriately both in limiting the amount of the video tape shown to that of the incident alleged in the misbehavior report, and in denying the petitioner’s request to call Dr. Berrand for irrelevant testimony. Respondent moves for dismissal of the petition.

Petitioner asserts that his refusal to place his hands behind his back was because such an act caused him pain due to a hand fracture. Petitioner repeatedly requested the

testimony of Dr. Berrand, petitioner's treating orthopedist, to substantiate that the petitioner would be caused pain by having his hands handcuffed behind his back, rather than in front. The hearing officer acknowledged that the petitioner may have experienced pain (see, respondent's exhibit C, p.6); however, the misbehavior report charged petitioner with failing to follow a direct order - placing his hands behind his back - and mitigating circumstances are irrelevant. "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 related to whether the petitioner failed to follow a direct order, the hearing officer reviewed the pertinent portions of the videotape, which was within the hearing officer's discretion to determine, and heard testimony from the author of the misbehavior report. Denial of such other matters that the hearing officer determined to be irrelevant was not arbitrary or capricious and, as such, petitioner's claim is without merit.

A review of the hearing transcript indicates that petitioner was argumentative and despite a warning from the hearing officer - repeatedly failed to cooperate with the hearing officer, resulting in his removal from the hearing. See, Respondent's Exhibit C, p. 19. Under these circumstances, petitioner's removal from the hearing was reasonable and within the discretion of the hearing officer. See, 7 N.Y.C.R.R. 253.6[b]; *Matter of Green v. Goord*, 32 A.D.3d 1076 (3d Dept. 2006).

Moreover, in light of petitioner's failure to raise the issue of bias as against the hearing officer during the hearing, the claim is not preserved for review. See, *Matter of Striplin v. Selsky*, 28 A.D.3d 969 (3d Dept. 2006).

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