

Matter of Allah v LeClaire

2007 NY Slip Op 32021(U)

June 19, 2007

Supreme Court, Franklin County

Docket Number: 0000179/2007

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 #16-1-2007-0068.024
INDEX #2007-0179
ORI #NY016015J

-against-

LUCIEN J. LeCLAIRE, JR., Acting
Commissioner, NYS Department of
Correctional Services,

Respondent.

X

This proceeding pursuant to Article 78 of the CPLR that was originated by the petition of Kha-Sun Creator Allah, formerly known as Khaliq Clark, verified on January 2, 2007, and stamped as filed in the Franklin County Clerk's Office on January 30, 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 hearing, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility on August 21, 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. Petitioner filed an unverified letter reply dated April 12, 2007.

As a result of an incident that occurred at the Downstate Correctional Facility on July 21, 2006, the petitioner was issued a misbehavior report on July 21, 2006, charging him with violation of inmate rules 102.10 (threats) 106.10 (refusing a direct order), 116.10 (property damage) and 112.22 (visibility obstruction). The author of the misbehavior

report alleged that petitioner threatened to commit suicide and requested a visit with the psychiatric unit, then covered his cell door window with a towel, obstructing the officers view into the cell. Petitioner ignored the author's direction to remove the towel necessitating entrance into the cell wherein petitioner was found destroying a state-issued t-shirt in an attempt to fashion a noose for his suicide attempt. A Tier III Superintendent's Hearing was commenced with respect to these charges at the Upstate Correctional Facility on August 14, 2006. At the conclusion of the Tier III hearing on August 21, 2006, petitioner was found guilty of all four charges. A disposition was imposed of confinement in the special housing unit for a period of three months, loss of packages, commissary and phone privileges for three months, recommended loss of three months of good time and restitution ordered for destruction of the t-shirt in the amount of \$2.83. Petitioner filed an appeal which was ultimately affirmed on November 28, 2006.

Petitioner asserts that he was denied the right to call witnesses, specifically Ms. Smith from OMH at Downstate C.F., that the hearing officer received testimony from mental health officials confidentially and outside the presence of the petitioner, and that the hearing officer violated 7 N.Y.C.R.R. 254.6(b), (c), and (c)(2). Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record.

Respondent asserts that as the petitioner's mental health state may have been put into issue, respondent conducted a confidential interview with an OMH clinician outside the presence of the petitioner pursuant to 7 N.Y.C.R.R. 254.6(c)(3) to clarify whether the petitioner's mental health state should be considered. Respondent also asserts that petitioner did not otherwise meet the criteria for 7 N.Y.C.R.R. 254.6(b) and denies

petitioner's claim. Respondent moves for dismissal of the petition.

As relates to petitioner's objection that the hearing officer received testimony of the mental health professional outside the petitioner's presence, such argument is without merit. 7 N.Y.C.R.R. 254.6(c)(3) states: "(the hearing officer shall) where an inmate's mental state is at issue, out of the presence of the inmate and on a confidential tape, interview an OMH clinician as may be available concerning the inmate's mental condition at the time of the incident and the time of the hearing." Prior to such examination, the hearing officer clearly communicated to petitioner his intention to conduct the confidential interview with OMH, without objection by the petitioner, and as such, the hearing officer acted within the scope of the statute. *See*, Respondent's Exhibit D, p. 6; *Matter of Farrell v. Selsky*, 32 A.D.3d 1103, 1104 (3d Dept. 2006).

As relates to petitioner's claim that he was denied the right to call a witness, specifically Ms. Smith, the OMH employee he consulted with immediately following the incident at Downstate C.F., such claim is without merit. In this instance, the hearing officer correctly complied with 7 N.Y.C.R.R. 254.6(c)(3) and while petitioner requested that the hearing officer hear testimony from Ms. Smith, the petitioner failed to assert how Ms. Smith's testimony would be different from that of the OMH clinician from whom the hearing officer received confidential testimony. The testimony of the OMH clinician referred to notes in petitioner's mental health file, presumably from the date of entry into the DOCS system, including a notes dated July 12, 2006, and August 15, 2006. *See*, Respondent's Confidential Exhibit, pp. 2-3. The hearing officer has the discretion to deny a witness whose testimony would be redundant and the hearing officer indicated this reason in writing. *See*, 7 N.Y.C.R.R. 254.5(1); Respondent's Exhibit E.

While petitioner asserts that the incident report arose from his attempt at suicide and concomitantly he should be afforded special protection pursuant to 7 N.Y.C.R.R. 254.6, such argument is unpersuasive. The testimony elicited at the hearing indicated that the incident began when petitioner became upset because he was not being transferred that day when he thought he should have been. *See*, Respondent's Exhibit D, p. 8. In retaliation, petitioner obscured the cell door window and began destroying his t-shirt in an alleged effort to fashion a noose. It does not appear from the testimony nor from the charges asserted that petitioner actually made any overt attempt to commit suicide and, as such, his mental health was not automatically at issue pursuant to 7 N.Y.C.R.R. 254.6(b)(1)(ii). As petitioner's circumstances did not otherwise conform to the delineated categories of 7 N.Y.C.R.R. 254.6(b), and having received testimony from an OMH clinician as described above, petitioner's claim for special consideration is denied.

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 19 , 2007 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice