

**Matter of Plummer v Brown**

2007 NY Slip Op 33020(U)

September 24, 2007

Supreme Court, Clinton County

Docket Number:

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  
**CLINTON PLUMMER, #04-A-2840,**

Petitioner,

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

**DECISION AND JUDGMENT**

**RJI #09-1-2007-0246.025**

**INDEX #07-0521**

**ORI #NY009013J**

-against-

**WILLIAM D. BROWN**, Superintendent,  
Eastern Correctional Facility,

Respondent.

**X**

This proceeding pursuant to Article 78 of the CPLR was originated by the petition of Clinton Plummer, verified on April 10, 2007, and stamped as filed in the Clinton County Clerk's Office on April 17, 2007. The petitioner, who is now an inmate at the Clinton Correctional Facility, but was an inmate at the Eastern Correctional Facility at the time of the incident, is challenging the results of a Tier III Superintendent's Hearing concluded on October 16, 2006. The Court issued an Order to Show Cause on May 7, 2007, and has received and reviewed respondent's Answer, verified on June 15, 2007, together with his Letter Memorandum of that date. Petitioner filed a Reply sworn to July 2, 2007, which was stamped as filed in the Clinton County Clerk's Office on July 10, 2007.

While at the Eastern Correctional Facility, petitioner was issued two inmate misbehavior reports as a result of incidents occurring on September 27, 2006. The inmate misbehavior report by Sgt. Parry charged petitioner with violation of inmate rules 100.13

(fighting), 107.20 (false statements or info), and 118.23 (unreported illness). The second inmate misbehavior report by Correction Officer Godfrey charged petitioner with violation of inmate rules 113.14 (unauthorized medication), 113.16 (money/unauthorized property), 113.23 (contraband), 116.11 (tampering with property), and 120.20 (gambling).

Sgt. Parry alleged that a fight was reported, that upon checking inmates he found that petitioner had an abrasion to a knuckle on his hand, and that a confidential informant had reported that facial cuts upon another inmate had been inflicted by petitioner. Correction Officer Godfrey alleged that upon packing up petitioner's belongings to take to SHU various items of contraband were found. The misbehavior reports were reviewed by Lt. Hauck on September 28, 2006, which resulted in a Tier III Superintendent's Hearing being commenced at the Eastern Correctional Facility with respect to all of these charges on October 3, 2006. Petitioner pled guilty to rule violations 113.14 (unauthorized medication), 113.16 (money/unauthorized property), 113.23 (contraband), 116.11 (tampering with property), and 118.23 (unreported illness). Petitioner pled not guilty to rule violation 120.20 (gambling), 100.13 (fighting) and 107.20 (false statements or info). At the conclusion of the hearing on October 16, 2006, the petitioner was found guilty of all charges except 100.13 (fighting). A disposition of 90 days confinement in the special housing unit, loss of packages, loss of commissary, loss of phone privileges and a recommended loss of good time of three (3) months was imposed. Upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing concluded on October 16, 2006, were modified on December 20, 2006, by dismissing rule violation 120.20 (gambling) and directing no loss of good time. This proceeding ensued.

With respect to the Tier III Superintendent's Hearing concluded on October 16, 2006, the petitioner asserts several objections: that the charges were improperly considered as Tier III violations; that the Hearing Officer used evidence of a fight which petitioner was found not guilty to enhance the penalty imposed; and that none of the charges petitioner was found guilty of warranted 90 days of confinement to SHU. Petitioner contends that because of this determination he lost other privileges and benefits that would not have been lost had the charges not been raised to Tier III status. Petitioner seeks a judgment vacating and setting aside respondent's determination of assigning petitioner to 90 days confinement in SHU on the basis that the underlying Superintendent's Hearing is null and void, and further directing "Respondent to expunge all entries of said Superintendent's hearing and the resulting dispositions thereof from all of petitioner's records and restore petitioner's merit-time eligibility, transfer petitioner back to Eastern Correctional Facility or a downstate facility" so petitioner can participate in the Family Reunion Program.

Respondent asserts that the review officer acted properly when he determined that both misbehavior reports would be considered in a Tier III proceeding, that petitioner was advised that the proceeding was a Tier III proceeding and was given the Tier III procedures. As to the alleged excessiveness of the penalty, respondent asserts that petitioner failed to preserve the issue by failing to raise it on administrative appeal; that the issue is moot; that the penalty was not so shocking as to be offensive to the Court's sense of fairness; and that the Commissioner of Correctional Services has broad discretion in the formulation of policies with respect to security and the disciplining of inmates.

Petitioner in his reply asserts that the charges would not have been considered Tier III violations if there were no charge for fighting; that the penalty imposed resulted both in the petitioner being rendered ineligible for the merit time board, which would have made petitioner eligible for early release in 2009 rather than 2013, and also in his loss of time in a drug program which petitioner must complete to be considered for early release; and that the Hearing Officer improperly used inmate Pelt's injury although petitioner was not found guilty of fighting.

Petitioner's argument that the charges in the misbehavior reports should have been considered as Tier II violations as a result of his having been found not guilty of fighting is without merit. It is the function of the review officer, based upon the seriousness of the charges and the appropriate corresponding penalty in the event the charges are substantiated, to determine the tier classification (*see*, 7 NYCRR 251-2.2(b)). *See, Pettus v. Selsky*, 28 AD3d 1043 (2006). All charges except violation of rule 118.23 (unreported illness) may be considered as Tier III violations (7 NYCRR 270.2(B)(1)(I), (8)(iii), (14)(iv), (14)(vi), (14)(xiii), (17)(ii), (19)(v), and (21)(I)). Thus, the review officer acted within his authority in directing that these misbehavior reports be considered in a Tier III proceeding. The Hearing Officer's statements that the charges may have been considered in a Tier II proceeding absent the fighting charge are gratuitous statements that have no effect on the review officer's determination. The record establishes that petitioner had in his possession several items of contraband which may be considered in a Tier III proceeding.

With the reversal of the loss of good time and the fact that petitioner has already served the penalty imposed, any challenge to the severity of the penalty is moot. *See, Matter of Martinez v. Goord*, 28 AD3d 839, *appeal dismissed* 7 NY3d 898 (2006).

The discipline imposed was within the guidelines for the rule violations petitioner was found to have committed, and thus any claims based on his not having been found guilty of fighting are without merit. Although petitioner may - as a consequence of the upholding after review of the finding of guilt as to the six charges - have lost certain anticipated benefits, this Court cannot substitute its judgment for that of the Commissioner, in the absence of a clear abuse of the Commissioner's "broad discretion in the formulation and interpretation of policies relating to security and to the disciplining of inmates." *Artega v. State*, 72 NY2d 212, 217 (1988).

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:** September 24, 2007 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice