

Russell v Selsky

2007 NY Slip Op 33099(U)

August 8, 2007

Supreme Court, Seneca County

Docket Number: 0039187/2007

Judge: Dennis F. Bender

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STATE OF NEW YORK
SUPREME COURT COUNTY OF SENECA

MARK RUSSELL
DIN #: 02-A-5076,

Petitioner

DECISION AND ORDER

-against-

Index No. 39187

DONALD SELSKY, DIRECTOR OF SPECIAL
HOUSING, FIVE POINTS CORRECTIONAL
FACILITY,

Respondent

The Petitioner herein filed this Article 78 proceeding, finding him guilty of violating Rule 113.25 (drug possession) and Rule 105.12 (unauthorized organizational activities). A disposition was imposed of 14 days pre-hearing keep-lock, 12 months SHU to begin November 24, 2006 and 12 months loss of packages, phone, commissary, recreation, special events, inmate-to-inmate correspondence privileges and loss of personal clothing, property and permits, etc., in addition to a recommended 12 months loss of good time and 15 days keep-lock. (Transcript, pp. 15-16, Ex. F) The hearing officer specifically noted information found through mail watches and kites as part of his finding that the Confidential Informant’s indication the Petitioner was engaged in gang activity was confirmed. (Ex. F, p. 15)

The Petitioner alleged as part of his complaints of the underlying hearing that he was denied effective assistance to prepare for the hearing. In Exhibit E of the Return, it is noted that the Petitioner asked for any “...factual information, if available, before the hearing”. The assistant responded “I explained that all details of the investigation would be brought up at the

hearing.” At the hearing, the Petitioner was informed that a mail watch had been placed on his correspondence from the prison facility. The Petitioner did not understand what information was being relied upon by the officer in bringing the charges against him asking “They caught me with drugs or something?”. (Transcript, p. 3, Ex. F) The steward at the hearing stated “No, they are not saying they caught you with drugs, they are saying that they got paperwork that you’re the one that - - um - - making the arrangements to have drugs brought into the facility. And the money being sent to the person that’s d the drugs. But I’m going have Lt. Querns come in.” (Transcript, p. 3, Ex. F) The Petitioner then went on to ask “Yes, um, how did him come up with it?” and the steward responded “I told them that you had some letters come that were - - um - - intercepted.” Lt. Querns then asked “Alright, did you show him the uhh” and the steward responded “I didn’t show him any of the letters”. (Transcript, pp. 4-5, Ex. F) The hearing then consisted in large part of information being read by Lt. Querns of the contents of some of the Petitioner’s mail he sent as well as mail he received. (Ex. F) Lt. Querns indicated that references to the books and the correspondence was referring to books as drugs and money, that that’s how the Petitioner talked about it in the mail. The inmate responded “You can check even when I go on visits, I send books out. Check that book.” (Transcript, p. 6, Ex. F) Later on in the hearing, the Petitioner stated “...Like I said, none of that stuff came from me, so 3 letters that he intercepted from me that I mailed out (unintelligible), I hoping I could get my assistance if I could, I couldn’t get (unintel) and (unintel) visiting, my visitin’ records or sompin’ so cuz’ they made me sign a sheet, (unintel) everything else he had is just like stuff I don’t know where he got that from, caught other people with that stuff...”. (Transcript, p. 12, Ex. F) Towards the end of the hearing, the Petitioner states “...I was jacked because I didn’t have not time to build up, I

didn't have no time to research or my assistant didn't help me. I didn't know what was going on."

The charge against the Petitioner was general in nature and did not specify what information was being relied upon by the Respondent in presenting the case against the Petitioner. Although the Petitioner's request for additional information was vague, the inmate assistant could have clarified what he meant by his request for "any factual information if available before the hearing". The Petitioner would be hard pressed to understand what information was being relied upon by the Respondent from just a review of the Respondent's misbehavior report. In order to succeed on a claim of denial of meaningful employee assistance, the Petitioner has to establish prejudice resulted from any failure of the assistant to comply with his duties. Here, the Petitioner indicated that he had a history of sending books out (Transcript, p. 6, Ex. F); that he would have requested his visiting records (Transcript, p. 12, Ex. F) and that he felt he didn't have time to prepare a defense (Transcript, p. 14, Ex. F).

In some cases, the failure of a petitioner's assistant to provide the petitioner with certain requested documentation can be remedied by production at the hearing. Here, however, the letters were an integral part of corrections officer's decision to bring the charges of gang involvement and bringing drugs into the facility and were a critical part of the proof brought against the Petitioner. Although the Petitioner would not be entitled to the Confidential Informant's information, as noted by the Petitioner in his present application, there has been no showing why he wasn't provided copies of his own correspondence sent to others and copies of

the letters he apparently received from others to him. This Court cannot conclude the failure to provide the information to the Petitioner, was harmless error. At a minimum, as indicated, the employee assistant should have made further inquiry as to the specifics of the charge against the Petitioner so that the Petitioner could have articulated a more pointed request for documents and/or information of the charges against him. There has been no showing by the Respondents herein that the letters the Petitioner himself wrote or that he received from others, which were being relied upon in large part by the corrections officer bringing the charges, were unavailable or confidential. Roman v. Goord, 272 AD 2d 695 (4th Dept., 2000).

The determination made by the hearing officer is vacated. The Petitioner is to be afforded a new hearing and be provided copies of his own letters and the letters he received from others that were relied upon by the corrections officer at the hearing at least two days prior to commencement of the new hearing.

THIS CONSTITUTES THE DECISION AND JUDGMENT OF THE COURT.

DATED: August 8, 2007



HON. DENNIS F. BENDER
Acting J.S.C.