

<b>Matter of Velez v Donelli</b>
2007 NY Slip Op 33789(U)
October 16, 2007
Supreme Court, Franklin County
Docket Number: 0000722/2007
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  
**EDGAR A. VELEZ, #97-A-7254,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #16-1-2007-0298.071  
INDEX #2007-0722  
ORI #NY016015J**

-against-

**JOHN J. DONELLI**, Superintendent,  
Bare Hill Correctional Facility, and  
**LT. PEPIN**, Bare Hill Correctional Facility,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR originated by the petition (denominated "AFFIDAVIT IN SUPPORT OF PETITION") of Edgar A. Velez, verified on May 21, 2007, and stamped as filed in the Franklin County Clerk's office on May 30, 2007. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Bare Hill Correctional Facility on April 23, 2007. The Court issued an Order to Show Cause on June 11, 2007, and has received and reviewed respondents' Answer and Return, verified on July 27, 2007, as well as respondents' Letter Memorandum of July 27, 2007. The Court has also received and reviewed petitioner's Reply thereto, stamped as filed in the Franklin County Clerk's office on August 16, 2007.

As a result of an incident that occurred at the Bare Hill Correctional Facility on April 17, 2007, the petitioner was issued an Inmate Misbehavior Report charging him with violations of inmate rules 109.10 (out of place), 109.12 (movement violation) and 107.20

(false statements). The Inmate Misbehavior Report, which was authored by C.O. Jeror and endorsed by C.O. Shatraw and Sgt. White, reads, in relevant part, as follows:

“ . . . Inmate Velez . . . signed out of Housing Unit E-2 and left for ART class in the Transitional Services Building. Earlier this very morning inmate Velez had attended the Facility sickcall and returned from the Infirmary with a medical slip signed by Registered Nurse M. Ojida, prohibiting him from attending programs, school, recreation, or doing any physical labor. Essentially this inmate can only attend meals or walk to the Infirmary for medical reasons . . . I called the Transitional Services Building and spoke with Officer K. Shatraw. He confirmed that inmate Velez was present in the ART class. I notified Sergeant McCabe of the situation and he ordered that inmate Velez be escorted back to the Housing Unit and placed on cube confined feed-in status...Upon his return to the Housing Unit, inmate Velez approached me and stated that he had special authorization from Deputy Superintendent Stearns to attend ART class. He stated that he had made Nurse Ojida aware of this fact and she had no problem with him attending this specific program. I called the Infirmary and spoke with Sergeant T. White. He addressed the issue with Nurse Ojida and she denied hearing about any special authorization from Dep Stearns and stated that this inmate was not to attend any type of class or program but could only attend chow or go to the Infirmary as needed. Sergeant White then advised me that he spoke with Dep. Stearns and was advised that the medical restriction issue with inmate Velez has been on going and this inmate knows full well that he can not attend ART class while he is on this type of medical restriction.”

A Tier II Disciplinary Hearing was held at the Bare Hill Correctional Facility on April 23, 2007. At the conclusion of the hearing the petitioner was found guilty of all three charges and a disposition was imposed restricting the petitioner to his dorm for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing were affirmed. This proceeding ensued.

7 NYCRR §251-3.1 (b) provides as follows: “The misbehavior report shall be made by the employee who has observed the incident or who has ascertained the facts of the incident. Where more than one employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees.”

The petitioner initially argues, in effect, that the hearing testimony of Nurse Ojida was improperly received inasmuch as she failed to endorse the Inmate Misbehavior Report despite having “full knowledge” of the facts underlying the report. The respondent takes issue with the petitioner on this point, asserting that Nurse Ojida did not have personal knowledge of the facts underlying the three violations charged in the Inmate Misbehavior Report. Inasmuch as Nurse Ojida could only have been aware of the limitations placed on petitioner’s medical slip, rather than the facts and circumstances surrounding petitioner’s alleged violations of those limitations, the Court agrees with the respondents that it was not necessary for her to endorse the Inmate Misbehavior Report. In any event, even if DOCS regulations required Nurse Ojida to endorse the report, her failure to do so would not necessitate that the results and disposition of the Tier II Disciplinary Hearing be vacated in the absence of demonstrable prejudice to the petitioner. *See Winbush v. Goord*, 6 AD3d 821, *Crawford v. Girdich*, 301 AD2d 921 and *Adams v. Stinson*, 267 AD2d 537, *lv den* 94 NY2d 761. There is no allegation in the case at bar that Nurse Ojida’s failure to endorse the Inmate Misbehavior Report resulted in any prejudice to the petitioner. Nurse Ojida’s name appeared in the report and she testified at the Tier II Disciplinary Hearing subject to the petitioner’s cross-examination.

The petitioner also maintains that his Tier II Disciplinary Hearing was conducted in an untimely manner “. . . 2 hours and 43 minutes past the 7 day period to commence said hearing . . .” 7 NYCRR §251-5.1(a) provides, in relevant part, that “[w]here an inmate is confined pending a disciplinary hearing . . . the hearing must be commenced as soon as is reasonably practicable following the inmate’s initial confinement . . . but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee.” In calculating the seven day period, however, the day the Inmate Misbehavior Report was written is excluded. *See General Construction Law* §20, *Agosto v. Selsky*, 39 AD3d 1106 and *Carrelero v. Goord*, 284 AD2d 679. Accordingly, the Court finds that the Tier II Disciplinary Hearing was conducted in a timely fashion.

Finally, the petitioner asserts that the Transitional Services Building, where the A.R.T. program was held, is not an academic area and, therefore, that his attendance at the A.R.T. program did not violate his medical restrictions. This argument, however, was not advanced on administrative appeal and, therefore, judicial review is not available. *See Scott v. Goord*, 272 AD2d 704 and *Malik v. Coughlin*, 133 Misc 2d 245.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

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

**DATED:** October 16, 2007 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice