

Matter of Warren v Fischer

2008 NY Slip Op 30612(U)

March 3, 2008

Supreme Court, Albany County

Docket Number: 0093162/0071

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
JAMES WARREN, #03-A-1476

Petitioner,

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

-against-

DECISION and ORDER
INDEX NO. 9316-07
RJI NO. 01-08-ST8410

BRIAN FISCHER, COMMISSIONER, DOCS,

Respondent.

Supreme Court Albany County All Purposes Term, February 1, 2008

APPEARANCES:

James Warren, #03-A-1476
Pro Se Petitioner
Elmira Correctional Facility
P.O. Box 500
Elmira, New York 14902

Andrew M. Cuomo, Esq.
Attorney General of the State of New York
Attorney for the Respondents
(Dean Higgins, Esq. AAG)
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Albany, New York 12224

TERESI, J.:

Petitioner commenced the instant CPLR Article 78 proceeding challenging a determination of a Tier III disciplinary hearing where he was found guilty of possessing a

weapon. Respondent seeks the dismissal of the petition alleging the petitioner failed to state a cause of action pursuant to CPLR 3211(a)(7).

The petitioner was charged with possession of a weapon in a misbehavior report dated August 24, 2007. The hearing was commenced on August 27, 2007 and completed on September 7, 2007. The petitioner was found guilty of the charge. Petitioner's appeal was denied on November 14, 2007.

The respondent commenced this Article 78 proceeding and alleges 1) the hearing officer's actions were arbitrary and capricious and an abuse of discretion; 2) the hearing officer did not receive a proper extension for the hearing; 3) the hearing officer's decision was pre-determined; 4) the petitioner was denied a witness at the hearing and 5) the petitioner did not receive an answer to his appeal within 60 days.

The respondent maintains the petitioner now raises issues that were not addressed at the hearing. The hearing officer informed the petitioner that if he had any procedural objections that he should raise them at the hearing. The record reveals the petitioner answered in the affirmative when the hearing officer asked if he understood his rights and obligations. If a petitioner fails to timely raise objections at the hearing, he has waived his right to challenge them throughout the administrative process. (Matter of Hubert v. Coombe, 233 AD 2d 644 (3rd Dept. 1996); Watergate II Apartments v. Buffalo Sewer Auth., 46 NY 2d 52 (1978)).

Petitioner alleges he was denied the right to call a witness. An inmate has a conditional right to call witnesses in a proceeding unless the hearing officer finds that to do so would jeopardize institutional safety or correctional goals or that such proffered testimony was irrelevant or redundant to an issue in dispute. (Matter of Laureano v. Kuhlmann, 75 NY 2d 141 (1990)). The

record reveals the testimony of the witnesses requested by the petitioner was provided.

Petitioner alleges the hearing officer was biased and the outcome was predetermined.

Petitioner's claim that the hearing officer was biased is without substance as there is no proof that the outcome of the hearing flowed from any alleged bias. (Matter of Washington v. Goord, 245 AD 2d 914 (3rd Dept. 1997); Matter of Rosa v. Coombe, 238 AD 2d 814 (3rd Dept. 1997)).

Moreover, the petitioner had failed to establish that the outcome of the hearing flowed from the alleged bias. (Matter of Almonte v. Goord, 261 AD 2d 684 (3rd Dept. 1999), lv denied, 93 NY 2d 818 (1999)). The petitioner has failed to establish actual bias or substantial prejudice on the part of the hearing examiner. (Matter of Cornwall v. Goord, 289 AD 2d 619 (3rd Dept. 2001)).

The petitioner alleges the hearing was not conducted in a timely fashion, the hearing was extended without a proper reason and the respondent failed to determine his appeal within 60 days. 7NYCRR § 251.1(a) of the Rules of the Department of Correctional Services is directory not mandatory. (Matter of Proctor v. Coombe, 234 AD 2d 749 (3rd Dept. 1998)). Hearings will not be deemed untimely where they are completed pursuant to valid extensions. (Matter of Stokes v. Goord, 254 AD 2d 558 (3rd Dept. 1998), lv denied 92 NY 2d 819 (1999)). 7 NYCRR § 251.5.1(b) requires a disciplinary hearing to be completed within 14 days following the initiation of the misbehavior report. The record reveals the hearing was completed within the prescribed 14 day period. In addition, the hearing officer granted an extension in order to have witnesses available on the adjourned date. Petitioner has failed to demonstrate how or in what manner he has suffered specific and substantial harm by reason of the extension when the hearing was completed within 14 days. Petitioner alleges his appeal denial was received several days past the 60 day requirement. A review of Directive 4932 § 254.8 requires that the Commissioner "shall" issue an

appeal decision within 60 days of the receipt of the appeal. The Directives of the respondent are directory and not mandatory and petitioner has failed to demonstrate any ascertainable harm or prejudice. (Gaberdhan v. Goord, 7 AD 3d 897 (3rd Dept. 2004)).

Finally, the resolution of credibility questions is the province of the hearing officer, and “the courts may not weigh the evidence or reject the choice made by the hearing officer where the evidence is conflicting and room for choice exists.” (Matter of Collins v. Codd, 38 NY 2d 269 (1976); Johnson v. Selsky, 45 AD 3d 714 (2nd Dept. 2007)).

All papers, including this Decision and Order are being returned to the attorneys for the respondent. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provision of that section respecting to filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
March 3, 2008


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated December 7, 2007;
2. Verified Petition dated November 14, 2007 with attached exhibits;
3. Verified Answer dated January 15, 2008;
4. Affirmation of Dean Higgins, Esq. dated January 15, 2008 with attached exhibits A-M;
5. Affidavit of James Warren dated February 5, 2008.