

Matter of Mitchell v Fischer

2008 NY Slip Op 30666(U)

March 11, 2008

Supreme Court, Franklin County

Docket Number: 0001268/2007

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
DONTIE S. MITCHELL, #98-A-0071,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2007-0465.101
INDEX # 2007-1268
ORI #NY016015J**

-against-

BRIAN FISCHER, Commissioner,
New York State Department of Correctional Services,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Dontie S. Mitchell, verified on August 24, 2007, and stamped as filed in the Franklin County Clerk's office on August 29, 2007. Petitioner, who is an inmate at the Great Meadow Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility on March 19, 2007. The Court issued an Order To Show Cause on September 21, 2007, and an Amended Order To Show Cause on October 23, 2007. The Court has since received and reviewed respondent's Answer and Return, verified on November 30, 2007, as well as respondent's Letter of Memorandum of November 30, 2007. The Court has received no Reply thereto from the petitioner.

As a result of an incident that occurred at the Clinton Correctional Facility on March 8, 2007, the petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 105.12 (unauthorized organizational activity) , 105.10 (inmates shall not form a group of inmates to join an assembly of inmates without authorization) and 180.11 (correspondence procedure violation). A Tier III

Superintendent's Hearing was held at the Upstate Correctional Facility on March 19, 2007, at the conclusion of which the petitioner was found not guilty of violating inmate rules 105.12 and 105.10 but guilty of the remaining charge. A disposition was imposed confining petitioner to the special housing unit for 3 months, directing the loss of various privileges for a like period of time and recommending the loss of 3 months good time. Upon administrative appeal the results and disposition of the Superintendent's Hearing were affirmed. This proceeding ensued.

The petitioner asserts two causes of action in support of his contention that the results and disposition of the Superintendent's Hearing of March 19, 2007, must be vacated. He first alleges that at the hearing he requested the testimony of the DOCS Deputy Commissioner of Program Services and the DOCS Director of the Crisis Intervention Unit. According to the petitioner, "[t]hese witnesses have testimony material to the question whether the organization being alleged to be unauthorized was actually unauthorized, and the question of what makes an organization unauthorized." The petitioner goes on to assert that the hearing officer's denial of the request for these witnesses constituted a violation of his regulatory and constitutional rights. The Court, however, agrees with the respondent that since the petitioner was found not guilty of violating inmate rules 105.12 and 105.10 he was not aggrieved by the determination denying these witnesses.

The petitioner also asserts that his regulatory and constitutional rights were violated when the Tier III Superintendent's Hearing was commenced in an untimely manner. 7 NYCRR §251-5.1(a) provides, in relevant part, that "[w]here an inmate is confined pending a . . . superintendent's hearing, the hearing must be commenced as soon as is reasonably practicable following the inmate's initial confinement pending said

. . . superintendent's hearing, but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee." In calculating that seven day period, however, the day the misbehavior report was written is not counted. *See* General Construction Law §20, *Barnes v. Goord*, 20 AD3d 615 and *Bossett v. Portuondo*, 3 AD3d 639. Since the inmate misbehavior report was written, and the petitioner confined, on March 8, 2007, and that day is excluded in the seven-day commencement deadline calculation, the Court finds that the Superintendent's Hearing could have been commenced as late as March 15, 2007, without an extension.

The record before the Court indicates that on March 14, 2007, officials at the Upstate Correctional Facility, asserting, "ASSISTANCE NOT COMPLETED, HEARING OFFICER UNAVAILABLE. WILL RETURN 3/19," sought an extension of time to commence the Superintendent's Hearing to March 19, 2007. The initial response from the DOCS central office was as follows: " REASSIGNE [SIC] HEARING AND COMMENCE BY 3/16/07." Upstate responded, still on March 14, 2007, " FACILITY REQUESTING CHO [Commissioner's Hearing Officer] TO DO THIS HEARING, REQUEST EXT FOR 3/19/07 CHO OUT OF FACILITY UNTIL THAT DATE." Later in the day on March 14, 2007, permission was granted by the DOCS central office to commence the petitioner's hearing by March 19, 2007.

Although, petitioner argues that other DOCS employees were available to commence the hearing and that he never requested assistance, the fact remains that the extension was, in fact granted. The Court also notes that the petitioner apparently did meet with an assistant on March 14, 2007 at 7:40 AM and was provided with certain materials at that time. In any event, the Court notes that the time limits set forth in 7 NYCRR §251-1 are directory, rather than mandatory, and therefore even if there was a

violation of these limits the annulment of the results and disposition of the Tier III Superintendent's Hearing would not be warranted in the absence of substantial prejudice to the petitioner. *See Bilbrew v. Goord*, 33 AD3d 1107. No such prejudice has been alleged in this case.

Based upon all of the above, it is, therefore, the decision of the court and is hereby **ADJUDGED**, that the petition is dismissed.

Dated: March 11, 2008, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice