

Matter of Finkelstein v Horn

2008 NY Slip Op 32474(U)

September 9, 2008

Supreme Court, New York County

Docket Number: 0402609/2007

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

Steven Finkelstein

Plaintiff,

- v -

Melvin Horw

Defendant.

INDEX NO.: 402609/07

MOTION DATE: [Signature]

MOTION SEQ. NO.: 001

MOTION CAL. NO.:

The following papers, numbered 1 to _____ were read on this ^{petition} motion to/for Article 78 relief.

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: [] Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition} is decided in accordance with the answered memoranda, Decree, Order + Judgment.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: Sept. 9, 2008

[Signature]

J.S.C.

Check one: FINAL DISPOSITION [] NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

-----X
In the Matter of the Application of
STEVEN FINKELSTEIN,

Index No. 402609/07

Petitioner,
-against-

MARTIN HORN, Commissioner, New York City
Department of Corrections, et al,

Respondents.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served on any person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

-----X
Joan A. Madden, J.:

In this Article 78 proceeding, petitioner Steven Finkelstein, a pro se inmate at the Manhattan Detention Complex, seeks a judgment setting aside the March 12, 2007 determination of respondents Martin Horn, Commissioner of the New York City Department of Corrections, and George Okada, Warden of the Manhattan Detention Complex, finding petitioner guilty of certain disciplinary infractions and expunging all references to said disciplinary infractions from his record. Respondents oppose the petition, which is granted to the extent set forth below.

Background

On March 6, 2007, Corrections Officer Swetokos ("Swetokos") of the Manhattan Detention Complex ("the Complex") searched petitioner's cell located in Area 9 North of the Complex. Swetokos discovered a test tube used for blood collection with an attached butterfly needle taped under the sink. On March 7, 2007, petitioner was served with a Report and Notice of Infraction charging him with violating Rule 123.11, Smuggling of Other Contraband, in connection with the discovered needle.

On March 12, 2007, a hearing was held before Adjudication Captain Jenkins ("Captain

Jenkins”) during which petitioner challenged the veracity of the report and denied knowledge of how the needle came to be in his cell. Petitioner maintains that while the investigation report states that he was assigned to his cell on December 1, 2006, this is inaccurate and that petitioner was not afforded the opportunity to challenge any other inaccuracies in the report. Captain Jenkins summarized petitioner’s testimony on the Hearing Report and Notice of Disciplinary Disposition as: “I didn’t get there until December 4th. I wasn’t arrested until after. I have no knowledge of the item. I’m told it’s used for tattooing. There have been other inmates entering my cell” (Exhibit C of the Petition).

At the hearing, petitioner requested a hearing facilitator to assist him with his defense and to help him locate certain security tapes of the area around his cell. Petitioner also sought to inspect the Investigation Captain’s report, and petitioner also requested that Deputy Warden of Security Ronald Jorgenson be permitted to testify to explain the procedures for entering and leaving the Area 9 North and whether security tapes from that area are maintained. In addition, petitioner requested that Dr. Michael Weiner, the site medical director, testify as to the procedures for reporting any lost needles from the medical center’s inventory. Petitioner’s requests for these witnesses’ testimony were denied on the grounds that these witnesses were not present at the time the needle was found in petitioner’s cell.

At the conclusion of the hearing, petitioner was found guilty “based on Swetokos’ written account and due to graphic evidence. And of the fact that you were present when the contraband was found [sic].” (Exhibit C to the petition). Petitioner was sentenced to 10 days of punitive segregation, the maximum penalty for infraction 123.11, Smuggling Other Contraband. Petitioner appealed the hearing determination by a letter to Warden Okada dated March 14, 2007.

He stated as grounds for his appeal: (1) the fact that his requested witnesses were not permitted to testify, (2) that the Notice of Disposition erroneously states a hearing facilitator was not requested and thus one was not provided, (3) that the Investigation Captain's report was not shown to petitioner so he did not have a chance to review it during or before the hearing, (4) that petitioner was not permitted to enter evidence including security tapes that other inmates would enter his cell, and (5) that the disposition was not supported by substantial evidence. (Exhibit B to Petition). The record contains no response to petitioner's appeal.

On March 27, 2007, petitioner commenced this Article 78 proceeding seeking to set aside respondents' determination and to expunge all references to the infraction from his record. Petitioner argues that respondents' March 7, 2007 determination was arbitrary, capricious, and an abuse of discretion, contrary to the weight of the evidence adduced at the disciplinary hearing, and a violation of petitioner's due process rights.

Respondents filed a verified answer and certified transcript of the hearing. Respondents assert that petitioner's due process rights were not violated and that the determination that petitioner was guilty of smuggling contraband is supported by substantial evidence. Respondents argue that petitioner had ample time to inspect the Report and Notice of Infraction and prepare a defense prior to his disciplinary hearing. Respondents also assert that they attempted to locate the security tapes that would show who exited and entered petitioner's cell but determined they did not exist, and that under these circumstances, petitioner's rights were not violated based on Captain Jenkins' decision that a facilitator was not necessary to locate and produce the tapes. Respondents also contend that petitioner was read all reports and the contents of documents at the hearing, and petitioner never asked to physically inspect the documents.

With respect to petitioner's request to have two staff witnesses testify, respondents assert that such testimony was not relevant since neither witness was present during the search. Respondents also rely on Captain Jenkins's statement during the hearing that she is familiar with the search and contraband procedures that Captain Jorgenson would testify to, and that there is no need for the testimony of the site medical director since there is no evidence the needle came from the medical facility. Therefore, respondents argue, the testimony of these witnesses would have been "irrelevant, immaterial, cumulative and unnecessary" and it was within the proper discretion of Captain Jenkins to deny petitioner's request.

In support of their position, respondents submit the Report and Notice of Infraction written by Officer Swetokos, the Investigation Report written by a Captain Wray, the Hearing Report and Notice of Disciplinary Disposition by Captain Jenkins with an attached photo of the contraband found, and the Inmate Disciplinary Due Process Procedures ("Directive 6500R-B") from the City of New York Department of Corrections (Exhibits A, B and C of the Verified Answer).

In reply, petitioner asserts that while the respondents' answer states that petitioner was found guilty of smuggling contraband, he was never alerted, either through the Report and Notice of Infraction or at the hearing, that he was being charged of smuggling since the reports state the infraction number, but no document contains the word "Smuggling." According to petitioner, he thought he had been charged with possession of contraband, not smuggling contraband, and that the hearing did not clarify the charges against him. Petitioner argues that respondents' failure to notify him of the charges against him violated Directive 6500R-B, which states that the Adjudication Captain must read the charges to the inmate at the hearing and ask whether he/she

has understands them. Petitioner further argues that even if the court finds that Directive 6500R-B was not violated, the respondents' determination was not supported with substantial evidence since possession of contraband does not constitute sufficient evidence that petitioner smuggled the contraband into the facility.

Discussion

"Inmates at disciplinary proceedings are not entitled to the full panoply of rights due a criminal defendant or administrative law rules designed for free citizens...However, an inmate 'should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.'" Hillard v. Coughlin, 187 A.D.2d 136, 139 (3d Dep't 1993), lv denied, 82 NY2d 651 (1993), quoting Wolff v. McDonnell, 418 U.S. 539 (1974)(citations omitted).

Directive 6500R-B(III)(C) establishes the Infraction Hearing Procedures for Inmates facing disciplinary proceedings. Subsection (10) of this directive states that the "Adjudication Captain will read the charges to the inmate and ask whether he/she understands them." Subsection (14) makes clear that the inmate must be apprised of the charges he is facing before the Adjudication Captain interviews him. This subsection provides that "once apprised of the charges against him/her and advised of his/her rights and the possible penalties if found guilty, the infraction inmate shall be interviewed by the Adjudication Captain outside of the presence of any and all witnesses, including those the inmate wishes to call on his/her own behalf." The transcript of the March 12, 2007 hearing indicates that the hearing officer read the charges and evidence noted on the Report and Notice of Infraction and the Investigation Report. Specifically, the hearing officer, in this case Captain Jenkins, stated that "therefore you are

hereby charged with 123.11, which is other contraband, I believe that is a grade 3 offense, if found guilty maximum penalty is ten days of punitive segregation.” However, Captain Jenkins failed to tell petitioner he was charged with smuggling or to assure that petitioner understood the charges pending against him. As this is a violation of petitioner’s regulatory rights, the determination of Captain Jenkins is vacated and this case is remitted back to the City of New York Correction Department for a new hearing that provides petitioner ample opportunity to understand the charge of Smuggling Other Contraband and to prepare a defense against such charge.

Upon remittal for petitioner to respond to the Smuggling charge against him, the Adjudication Captain shall also permit Officer Jorgenson to testify as to the procedures for entering the area where petitioner was housed and who has access to his cell. Contrary to Captain Jenkins’s conclusion, it would appear from the record before the court that this testimony is potentially relevant even though Officer Jorgenson was not present at the time petitioner’s cell was searched. Furthermore, while Captain Jenkins denied this witness by stating that she was aware of the “search and contraband procedures,” such awareness does not provide a basis for denying petitioner his right to call a relevant witness.

Inmates have the right to call witnesses on their behalf “provided that so doing does not jeopardize institutional safety or correctional goals.” 7 NYCRR 253.4 [b][1]; See DeMauro v. LeFevre, 91 A.D.2d 1156, 1157 (3d Dep’t 1983). While the Adjudication Captain may deny witnesses that would be immaterial or redundant (Direction 6500R-B (24); Odom v. Goord, 246 A.D.2d 941 (3d Dep’t 1998)), where no other testimony has been admitted to a prisoner’s

defense, even background information can be material evidence.¹ See DeMauro, 91 A.D.2d at 1157 (holding that a corrections facility should have allowed inmates accused of infractions to introduce the testimony of a corrections officer who did not witness the incident in question, but who witnessed the events leading up to the incident). As to the relevancy of the medical director's testimony, as petitioner is charged with smuggling, which implies bringing contraband into the facility, it appears that evidence that butterfly needles and test tubes of the type found in petitioner's cell were missing from the medical center prior their discovery in petitioner's cell would be relevant. Accordingly, petitioner should have access to evidence, including reports and the medical personnel's testimony, if necessary, to ascertain whether any butterfly needles and test tubes of the type in issue, were missing from the medical dispensary during the three month period prior to their discovery in petitioner's cell.

With respect to petitioner's request for expungement, the court notes that "[e]xpungement is required only when (1) the challenged disciplinary determination is not supported by substantial evidence...; (2) there has been a violation of one of the inmate's fundamental due process rights...; or (3) other equitable considerations dictate expungement of the record rather than remittal for a new hearing..." Hillard v. Coughlin, 187 A.D.2d at 140 (citations omitted). Here, as the circumstances here warrant remittal for a new hearing, expungement is not an appropriate remedy at this juncture.

¹Respondents cite Coleman v. Coombe, 108 A.D.2d 1018 (3d Dep't 1985) in support of their contention that petitioner's lack of knowledge regarding how the needle got into his cell makes testimony regarding who had access to his cell irrelevant. However, the Third Department decision in Coleman was reversed by the Court of Appeals, 65 N.Y.2d 777 (1985), which held that testimony offered in mitigation of a penalty or that raises a possible justification to the charged violation is relevant and material evidence.

Petitioner's other procedural objections are without merit. Petitioner argues that he was improperly denied a hearing facilitator. Directive 6500R-B (III)(9)(c)(i) states that an inmate must be afforded a hearing facilitator when he is illiterate, if the case is complicated, or if there is some other reason preventing the inmate from obtaining witnesses or material evidence. Petitioner requested a hearing facilitator in order to obtain security tapes of who has recently entered his housing area. However, from the hearing transcript it is apparent that Captain Jenkins offered to facilitate obtaining this evidence herself, if such evidence existed, and petitioner agreed to this arrangement. (Hearing Transcript p. 5). Respondents assert that Captain Jenkins attempted to obtain the requested tapes but confirmed that the requested information could not be obtained because such areas are viewable by officers in the control room, but are not videotaped (Answer at ¶ 19). Since petitioner requested a hearing facilitator for evidence that does not exist, and since he agreed to Captain Jenkins acting as a facilitator, his due process rights were not denied by not being provided a facilitator.

Petitioner also argues that his rights were violated because he was not shown a copy of the Investigation Captain's report. Petitioner signed a copy of the Report and Notice of Infraction outlining the evidence against him the day after the needle was found in his cell as per Directive 6500R-B(III)(a)(6). Directive 6500R-B(III)(a)(3) dictates that a supervisor shall document their official report on an Investigation Report and that notice of any resulting infraction shall be served upon the inmate as soon as practicable. The regulations do not state, however, that the inmate must receive a copy of the Investigation Report, and the record indicates that petitioner received the Report and Notice of Infraction. In any event, as the Investigation Report is attached to the Verified Answer served upon petitioner in connection with this

proceeding and this court has directed a new hearing, this objection is moot.

Petitioner's assertion that he was not permitted to testify that other inmates entered his cell when petitioner was not present is also unavailing, as the hearing transcript contains testimony from petitioner that other inmates entered his cell and indicates that Captain Jenkins asked petitioner to state specific times other people entered his cell, and later in the hearing she clarified with petitioner under what circumstances people occasionally entered his cell. Further, in the Hearing Report and Notice of Disciplinary Disposition authored by Captain Jenkins, she marks a summary of his testimony, in part, as "[t]here have been other inmates entering my cell." (Exhibit C to the Verified Answer).

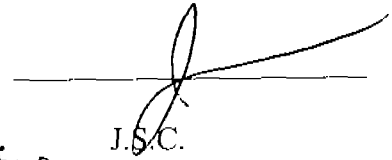
Finally, in view of this court's determination remitting this matter for a new hearing, the court does not reach whether respondent's determination was supported by substantial evidence.²

In view of the above, it is

ORDERED and ADJUDGED that the petition is granted only to the extent that this matter is remitted to the Department of Corrections for a new hearing consistent with this decision, order and judgment on the charge of 123.11, Smuggling of Other Contraband, and it is further

ORDERED that the motion expunge petitioner's record is denied.

DATED: September 9, 2008



J.S.C.

~~THIS JUDGMENT HAS NOT BEEN ENTERED BY THE COUNTY CLERK~~
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²The issue of whether respondent's determination is supported by substantial evidence is an issue for the Appellate Division, First Department.