

Matter of Griffin v Yelich
2010 NY Slip Op 30637(U)
March 19, 2010
Supreme Court, Franklin County
Docket Number: 2009-1443
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
DONALD GRIFFIN, #87-A-0320,
Petitioner,

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

-against-

BRUCE S. YELICH, Superintendent,
Bare Hill Correctional Facility,
Respondent.

DECISION AND JUDGMENT
RJI #16-1-2009-0553.114
INDEX # 2009-1443
ORI #NY016015J

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Donald Griffin, verified on October 19, 2009, and filed in the Franklin County Clerk's office on October 27, 2009. 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 October 6, 2009. The Court issued an Order to Show Cause on November 5, 2009, and received and reviewed respondent's Answer, verified on December 21, 2009.

In his Answer respondent took the position that the petition raised the "substantial evidence" question, as specified in CPLR §7803(4). Accordingly, respondent requested that this proceeding be transferred to the Appellate Division, Third Department, for disposition. Nevertheless, in paragraph 16 of the Answer the following was asserted: "In the interests of judicial economy, the respondent has not submitted a detailed analysis of the merits of this proceeding. However, if the Court does not deem it appropriate to transfer this proceeding to the Appellate Division, the respondent respectfully requests that they be given a reasonable period of time to submit a further written response on the merits."

On January 25, 2010, petitioner's Opposition to Respondent's Answer to Article 78 Petition was filed in the Franklin County Clerk's office. In that document petitioner, without conceding that the "substantial evidence" question had been raised in his petition, withdrew "... the claim in his petition which is asserted by respondent to raise a question of substantial evidence." According to petitioner, this Court should only address the due process claim set forth in paragraph 15 of the petition. By Decision and Order dated February 1, 2010, the Court found no basis to transfer this proceeding to the Appellate Division, Third Department, and directed respondent to submit supplemental answering papers on the merits. The Court has since received and reviewed the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated February 19, 2010, submitted on behalf of the respondent. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on March 4, 2010.

As a result of an incident that occurred at the Bare Hill Correctional Facility on September 30, 2009 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 114.10 (smuggling), 116.10 (stealing) and 107.20 (lying). The inmate misbehavior report, authored by Food Service Administrator Trombley and endorsed by C.O. Hellijas and C.O. Herbert, alleged that a variety of food items were found secreted in petitioner's sweatshirt hanging on a rack in the facility dish room. According to the inmate misbehavior report, the petitioner told Food Service Administrator Trombley and C.O. Hellijas that C.O. Herbert had given him permission to remove the food items from the mess hall. The inmate misbehavior report went on to allege that "C.O. . . .Herbert stated that he did not give Griffin permission to take the above items out."

A Tier II Disciplinary Hearing was held at the Bare Hill Correctional Facility on October 6, 2009. At the conclusion of the hearing petitioner was found guilty of all three

charges and a disposition was imposed confining him to his cube during non-program hours for 21 days, directing the loss of various privileges for a like period of time, referring petitioner to the facility Program Committee for possible suspension from his job in the mess hall and directing restitution. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing were affirmed. This proceeding ensued.

During the course of the hearing, after testimony had been received from C.O. Hellijas but before testimony was received from the author of the inmate misbehavior report, C.O. Herbert testified that he did not give petitioner permission to take the food items in question from the mess hall nor did he regularly give inmates permission to take food items from the mess hall. The hearing officer next invited petitioner to ask questions of C.O. Herbert and the following colloquy occurred:

“IM [Inmate]: Um do you plan to testify truthfully at this hearing?

HO [Hearing Officer]: I’m not going into that question. He is ob, he is obligated to testify truthfully at this hearing. He is obligated to.

IM: So, you’re , you are saying he must tell the truth.

HO: Absolutely.

IM: And everything in that report is the truth.

HO: He didn’t write the report. He co-signed the report for a portion of it. He’s witnessing that the portion that he’s mentioned is accurate. So what questions do have [sic] for him?

IM: Okay, ah, if one of your fellow employees was lying would co-sign [sic] the ticket?

HO: Do not answer that question. That has nothing to do with this. You’ve asking [sic] questions specifically related to the misbehavior report and the (inaudible). I’ve already soak [sic], spoken to you

that the officer is obligated to tell the truth. When I call him to testify, he's obligated to tell the truth, so do you have a specific question? He has testified. The written report from Mr. Trombley states very clearly that Officer Herbert was asked. You stated Officer Herbert gave you permission. Officer Herbert denied giving you permission. He has verbalized that. I asked him that question; did he give you permission? He said, no he did not. So, are the questions related to that that you need answered?"

The petitioner then went on to ask other questions of C.O. Herbert but later interposed an objection to the above-described limitations placed upon his questioning of C.O. Herbert by the Hearing Officer. In response to petitioner's objection the following colloquy occurred:

“HO: You do not have the right to question the officer's integrity by asking him that question. His signature on the report is a legal document. The document is legal. What I am, what my goal is in questioning him and allowing you to question him is to validate that there was nothing gray in here, in terms of what he allowed you to take out of the Mess Hall. To question him on his integrity is not appropriate.

IM: What about his credibility?

HO: His credibility? Your testimony should either establish or deny his credibility. You are not going to take a witness and ask that witness directly about his credibility.”

The hearing officer also affirmatively stated that he had not prejudged petitioner's case.

In paragraph 15 of his petition the petitioner asserts that his due process right to an impartial fact finder was denied. He further asserts as follows:

“It is well settled in law in this circuit that prisoners may challenge or question the credibility of correction officers that testify at tier hearings . . . Additionally, petitioner believes that the hearing officers statement that I don't have the right to question the officers credibility was without

doubt, tantamount to telling me no defense I could present at the hearing could be successful against the charges. Since any defense asserted by me would in effect be an attempt on my part to question or challenge the integrity or credibility of the officers. Which according to the hearing officers own words I have no right to do. Thus making the tier hearing a mere formality to finding me guilty. Rather than the adversarial fact-finding-process the constitution mandates . . .” (Citations omitted).

The Court first observes that inmates have no fundamental due process right to confront/cross-examine adverse witnesses at prison disciplinary proceedings. *See Wolff v. McDonnell*, 418 U.S. 539 at 567-568, *Abdur-Raheem v. Mann*, 85 NY2d 113 at 119 and *Hayes v. Goord*, 284 AD2d 813. In any event, since the charges against the petitioner were heard at the Tier II level he was not subject to any potential loss of good time but, rather, merely to confinement of limited duration and/or loss of privileges. *See* 7 NYCRR §253.7(a)(1). The Court therefore finds that petitioner’s due process rights could not have been implicated by the curtailment of his cross-examination of C.O. Herbert. *See Sandin v. Connor*, 515 US 472 and *Cliff v. DeCelle*, 260 AD2d 812, *lv den* 93 NY2d 814. In addition, even though the hearing officer in the case at bar afforded petitioner the opportunity to pose questions, through him, to C.O. Herbert, 7 NYCRR Part 253 does not include any provision permitting an inmate at a Tier II Disciplinary Hearing to confront/cross-examine adverse witnesses.

Notwithstanding the foregoing, the Court does find that petitioner was entitled by regulation to have his Tier II Disciplinary Hearing presided over by an impartial hearing officer. *See* 7 NYCRR §253.1(b). The Court, however, finds no basis in the record to conclude that the hearing officer was biased against petitioner or that the determination of guilt flowed from any alleged bias. *See Gimenez v. Artus*, 63 AD3d 1461, *Arnold v. Fischer*, 60 AD3d 1177 and *Arrington v. Burge*, 57 AD3d 1032. The

hearing officer never suggested that the credibility of C.O. Herbert's testimony could not be called into question, indirectly, through the testimony of other witnesses or the introduction of documentary evidence at odds with the officer's testimony. In this regard the Court notes that petitioner's own testimony included no specific details as to when, where and under what circumstances C.O. Herbert allegedly gave him permission to remove food items from the mess hall. As far as the limitations placed by the hearing officer on petitioner's questioning of C.O. Herbert are concerned, the Court finds no evidence of bias in the determination to prevent petitioner's direct and heavy-handed (indeed, bordering on argumentative) inquiries with respect to C.O. Herbert's integrity.

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: March 19, 2010, at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice