

**Tafari v Rock**

2010 NY Slip Op 32363(U)

August 20, 2010

Supreme Court, Franklin County

Docket Number: 2010-0138

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  
**INJAH TAFARI, #89-A-4807,**  
Petitioner,

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

-against-

**DECISION AND JUDGMENT**  
**RJI #16-1-2010-0047.06**  
**INDEX # 2010-0138**  
**ORI #NY016015J**

**DAVID A. ROCK,** Superintendent,  
Upstate Correctional Facility,

Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the petition of Injah Tafari, verified on January 28, 2010, and filed in the Franklin County Clerk's office on February 2, 2010. Petitioner's Memorandum of Law, dated January 28, 2010 and also filed in the Franklin County Clerk's office on February 2, 2010, is considered by the Court to be part of the petition. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Upstate Correctional Facility and concluded on January 12, 2010.

The Court issued an Order to Show Cause on February 11, 2010, and received and reviewed respondent's Answer, verified on April 9, 2010, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on April 22, 2010. By Decision and Order dated April 30, 2010 the Court found no basis for the transfer of this proceeding to the Appellate Division, Third Department and directed respondent to serve supplemental answering papers on the merits. The Court has since received and

reviewed the Affirmation of Kelly L. Munkwitz, Esq., Assistant Attorney General, dated June 23, 2010, functioning as respondent's supplemental answering papers on the merits. The Court has also received and reviewed petitioner's Reply Memorandum of Law, filed in the Franklin County Clerk's office on July 15, 2010.

As the result of an incident that occurred at the Upstate Correctional Facility on December 29, 2009 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (failure to obey a direct order), 107.10 (interference with employee) and 107.11 (harassment of employee). The inmate misbehavior report, authored by C.O. Streeter and endorsed by C.O. Bilow, alleged, in relevant part, as follows:

“ . . . I C.O. A. Streeter and Officer Bilow went to inmate Tafari's . . . cell. I informed him to get dressed for a trip. He asked where he was going and I informed him that it was against security protocol to let him know where the trip was enroute to. He then asked if he was leaving the facility, and I did tell him that he was leaving the facility, but I didn't tell him where he was going to. I then told him to get dressed and ready to go again. This whole time the inmate was standing at his cell door and at his sink washing clothes. I then gave him another direct order to get dressed and ready for his trip, this time he told me to 'get the fuck away from his cell.' So I asked him if he was refusing to go and he stated to me again, 'just get the fuck away from my cell.' I told the console officer that he was refusing to get ready and I also informed medical of his refusal.”

A Tier II Disciplinary Hearing was commenced on January 7, 2010. At the conclusion of the hearing, on January 12, 2010, petitioner was found not guilty of violating inmate rules 107.10 and 107.11 but guilty of the remaining direct order charge. A disposition was imposed confining petitioner to keeplock status for 20 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.

From the outset of the hearing petitioner took the position that the incident of December 29, 2009 did not occur as described in the inmate misbehavior report. In this regard, petitioner testified as follows:

“They [C.O. Streeter and C.O. Bilow] walked up to my door, I was taking a bath (inaudible). And the guard [said ?] to me ‘get dressed,’ and I looked at him and I thought you know, who you talking to like that? And he said again ‘get dressed’, and I said for what? ‘[Y]ou’re going on a trip’, I said where. He said ‘a medical trip’ and I said inside or outside? He said ‘outside’, I said for who? ‘Don’t worry about it, you’ll find out when you get there’. I said for who, I have a number of different ah, specialists I have to see. I’ve got papers that I need to show the doctor, who am I going to see? He says um, ‘get dressed’, I said alright, I’ll get dressed and go on out the door, I want to [go to?] the sink to grab my wrapper so I can take the soap from underneath my arm, he says that’s a refusal, [?] to walk away from the door.”

After the security videotape of the underlying incident was viewed the following colloquy occurred:

“Ranieri [Hearing Officer]:	Do you have any other testimony?
Tafari:	No sir.
Ranieri:	Do you have any witnesses?
Tafari:	The video tape.
Ranieri:	We’ve already seen it. Do you have any other witnesses?
Tafari:	Um . . . yeah I need a document also. I need um, I’d like to have the medical refusal form . . . I need Sgt. Lambard and I need the form.”

When the hearing officer asked why Sgt. Lambard was needed as a witness, petitioner replied as follows: “Because if you refuse [a medical call out], he’s there to supervise it, he never came to my cell . . . when he [C.O. Streeter] said I’m taking that as a refusal, I said hey I didn’t refuse and he walked away. I’m waiting for the sergeant to come to

come up now and ask me did I refuse or come up with a refusal form cause it's a medical. (Inaudible) didn't offer an opportunity to sign a refusal form. Nothing was ever brought to me, I was waiting for the sergeant. I never refused my medical trip."

Following various adjournments, C.O. Bilow and C.O. Streeter were called as witnesses on behalf of the hearing officer. At the conclusion of their testimony the hearing officer asked petitioner if he had any other testimony and the petitioner replied "[n]o sir." The hearing officer then entered into the record a copy of DOCS Form #3195 (Refusal of Medical Examination and/or Treatment), dated December 29, 2009, which was identified as signed by C.O. Streeter and C.O. Bilow. Upon examination of that document petitioner sought to call Nurse Practitioner Smith as a witness stating that "... the nurse is the one supposed to come to your cell with that [the refusal form] ... I told she right there (inaudible)." At that point the following colloquy occurred:

"Ranieri:	She's denied. She wasn't part of the incident, nor is she in the ticket.
Tafari:	She's, you denied me Ms. Smith?
Ranieri:	Yes.
Tafari:	She was there.
Ranieri:	She was not there, I watched the video too.
Tafari:	Yea, soon as they walked away they walked out.
Ranieri:	She wasn't there."

Petitioner later objected to the refusal form, stating that medical personal, rather than just a correction officer, would have to consult with him with respect to the alleged refusal of a medical call out. According to petitioner, "[t]hat form is invalid, no nurse ever came to me and asked me was I refusing or was I not refusing. And I'm asking for the nurse that was working that day to come to this hearing, or I'm asking for the ticket

to be dismissed because that form is invalid.” Later, after apparently being informed that Nurse Chesbrough was on duty on the day of the incident, the hearing officer adjourned the hearing to obtain that nurse’s testimony. Nurse Chesbrough subsequently testified that he was present on the gallery at the time of the December 29, 2009 incident and heard the interaction between C.O. Streeter and petitioner. The nurse’s testimony on this point supported that of the corrections officers. Upon questioning by the petitioner, however, Nurse Chesbrough admitted that although he had signed the medical refusal form (the second signature on the form was apparently not that of C.O. Bilow), he never went to petitioner’s cell to discuss the purported refusal with petitioner. According to Nurse Chesbrough, “. . . I heard (inaudible) say get the fuck away from his door, so I assumed that meant he didn’t want to go.” The nurse conceded that he never heard petitioner specifically state that he was refusing to go to a medical call out.

After summing up his position petitioner was asked whether he had any other witnesses or testimony. He responded in the negative. When asked if he had any procedural objections, petitioner made no mention of Nurse Administrator Smith. The hearing was then closed for disposition. Just before the hearing officer read his determination into the record he read from Form 2176 (Witness Interview Notice) as follows: “Requested witness: Nurse Administrator Smith, permission to call the witness is denied, date 1-12-10. Nurse Administrator Smith was not part of this incident, so would not provide any relevancy to this hearing. Signed Lt. Ranieri .” At that point petitioner stated as follows: “I will object to that, uh, because um, she was involved whether she was involved with it, she was (inaudible), uh, and that nurse (inaudible) she was there to testify that I’m innocent of these charges.”

As limited by his Reply, the only claim advanced by petitioner in this proceeding is that the hearing officer unlawfully refused to call Nurse Administrator Smith as a

witness. The Court notes that an inmate at a Tier II Disciplinary Hearing is entitled by regulation to “. . . call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals.” 7 NYCRR §253.5(a) (emphasis added).

In the absence of any clear indication in the record that Nurse Administrator Smith was present at or near petitioner’s cell at the time C.O. Streeter directed petitioner to get dressed for the medical trip, the Court agrees that her potential testimony would not have been material. A different result might have been reached had petitioner’s questions/concerns with respect to the preparation of the inmate refusal form not been addressed through the testimony of Nurse Chesbrough. The Court notes that petitioner did not initially request Nurse Administrator Smith as a witness and twice during the course of the hearing he responded to the hearing officer’s inquiries with respect to additional witnesses without mentioning Nurse Administrator Smith. It was only after petitioner was provided with a copy of the inmate refusal form that he first requested the testimony of Nurse Administrator Smith, but that request was in the context of exploring the process underlying the preparation of the medical refusal form rather than as a witness to petitioner’s prior interaction with C.O. Streeter. Accordingly, the Court finds that the hearing officer properly denied petitioner’s request that Nurse Administrator Smith be called as a witness since she could not have provided relevant testimony with respect to the issue of whether or not petitioner promptly complied with C.O. Streeter’s order to get dressed in preparation for the medical trip. *See Thompson v. Votraw*, 65 AD3d 1403 and *Sutherland v. Selsky*, 61 AD3d 1188.

Although ultimately not relevant to the disposition of the sole issue in this proceeding - whether or not the hearing officer properly denied petitioner’s request that Nurse Administrator Smith be called as a witness - the Court would be remiss if it did not

express its serious concern regarding two aspects of the contents/execution of the medical refusal form. According to the hearing testimony of C.O. Streeter, the petitioner never expressly stated that he was refusing to go on the medical trip. Rather, C.O. Streeter interpreted petitioner's actions and demeanor as constituting such refusal. Nevertheless, in the medical refusal form signed by C.O. Streeter the petitioner is quoted, under the heading "[i]nmate statement or inmate reason for refusal" as follows: "I said I don't want to go." In addition, on the line on the medical refusal form marked "Signature of Patient," the word "Refused" has been written. The Court interprets this entry as constituting a representation that petitioner refused to sign the form. According to the hearing testimony of Nurse Chesbrough, however, it appears that the form was never presented to the petitioner for signature and the petitioner, therefore, could not have refused to sign it.

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:** August 20, 2010 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice