

Matter of Tafari v Fischer

2010 NY Slip Op 32746(U)

September 14, 2010

Sup Ct, Franklin County

Docket Number: 2010-620

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

**DECISION AND JUDGMENT
RJI #16-1-2010-0254.50
INDEX # 2010-620
ORI #NY016015J**

-against-

BRIAN S. FISCHER, Commissioner,
NYS 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 Injah Tafari, verified on May 7, 2010 and filed in the Franklin County Clerk's office on May 10, 2010. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent Hearing held at the Upstate Correctional Facility and concluded on March 30, 2010. The Court issued an Order to Show Cause on May 14, 2010 and has received and reviewed respondent's Answer, verified on July 22, 2010 and supported by the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated July 22, 2010 (the Dague Affirmation). The Court has also received and reviewed petitioner's Reply Memorandum of Law, filed in the Franklin County Clerk's office on August 2, 2010.

As the result of an incident that allegedly occurred in an inmate transport van, off facility grounds, petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (failure to obey a direct order), 104.11 (violent conduct), 100.11 (assault on staff), 107.11 (harassment of employee) and 118.22 (unhygienic act). A Tier III Superintendent's Hearing was held at the Upstate Correctional Facility

commencing on March 15, 2010. At the conclusion of the hearing, on March 30, 2010, the petitioner was found guilty of all five charges and a disposition was imposed confining him to the special housing unit for 36 months, directing the loss of various privileges for a like period of time and recommending the loss of 36 months of good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing were affirmed. This proceeding ensued.

Although the specific details of the incident underlying the issuance of the inmate misbehavior report are not relevant to the disposition of this proceeding, the Court notes that petitioner was accused of assaulting DOCS staff, and spitting at one correction officer, while in the van being transported to a court appearance. Petitioner, for his part, denied such allegations and asserted that DOCS staff assaulted him inside the transport van, allegedly in retaliation for past difficulties.

A review of the employee "ASSISTANT FORM" prepared prior to the commencement of the Superintendent's Hearing (Exhibit E, annexed to respondent's Answer) reveals that petitioner meet with his assistant on February 22, 2010 and requested that Inmate Jones and Inmate Hofelich be interviewed as potential witnesses. It was noted on the assistant form that both potential inmate witnesses agreed to testify on behalf of the petitioner. Soon after the Superintendent's Hearing was commenced on March 15, 2010 the petitioner requested that Inmate Jones and Inmate Hofelich be called as witnesses. According to petitioner, the two potential inmate witnesses observed DOCS staff beating him in the transport van through their housing unit windows. Although the hearing officer expressed some incredulity with respect to the potential witnesses' distance from the van, he quickly moved on to discussions of other potential witnesses. Later during the course of the Superintendent's Hearing, but still on March 15, 2010, the hearing officer directed that the two potential inmate witnesses be escorted to the hearing

room. After an adjournment to locate these inmates the hearing officer advised petitioner that “. . . the two witnesses you called for inmate Jones . . . and inmate Hofelich . . . both refused to testify. Here’s form 2176 [REQUESTED INMATE WITNESS REFUSAL TO TESTIFY IN TIER II/TIER III DISCIPLINARY HEARING] will you please bring that over so he [presumably, the petitioner] can read it please.” The two refusal forms, annexed to respondent’s Answer as part of Exhibit F, were signed on March 15, 2010 by inmates Jones and Hofelich, respectively, and each form indicated that the requested witness did not want or wish to be involved.

Later during the course of the Superintendent’s Hearing, on March 30, 2010, the escort officer who had been previously directed to bring the two potential inmate witnesses to the hearing room testified as to the circumstances surrounding the refusals to testify. According to the escort officer, the two potential witnesses “. . . didn’t want to uh they didn’t want to be involved so we had to so we brought forms down for them to sign off on so they signed stating I don’t want to be involved.” The escort officer further testified that he observed each of the potential inmate witnesses sign a refusal form and that both appeared to be of sound mind and to understand the implications of the form.

Following the testimony of the escort officer, petitioner requested that the hearing officer find out why the potential witnesses did not want to be involved in the Superintendent’s Hearing. The hearing officer responded as follows: “Well Mr. Hofelich is no longer here. I believe he was released from prison, completely. And they said they do not wish to be involved. That was there [sic] reason. We have a signed statement from them.” Before the close of the hearing petitioner objected “. . . to my two witnesses that didn’t want to be involved . . .”

Citing *Hill v. Selsky*, 19 AD3d 64, petitioner asserts that the “. . . hearing officer’s failure, to make a personal interview with the two inmates who originally agreed to testify,

but later said they did not want to be involved, requires reversal and annulment on the matter of law [sic].” The Court agrees. “When an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate’s unwillingness to testify . . . A witness’s statement is that he ‘[did] not want to be involved’ is not a sufficient reason to excuse a personal interview by the hearing officer . . .” *Id* at 67 (citations omitted).

In paragraph 57 of the Dague Affirmation it is asserted that “[t]he witness refusal forms adequately set forth the reasons the inmates [Jones and Hofelich] refused to testify, and provide sufficient basis upon which the hearing officer could conclude that the witnesses would not testify.” The cases cited by respondent in support of this position, however, are unpersuasive in light of the clear holding of the Appellate Division, Third Department, in *Hill*. In the unreported March 19, 2007 decision of the Supreme Court, Albany County, in *Ferrer v. Goord*, Index #6291-06, (respondent’s Exhibit O), for example, the refusing inmate witness’s prior willingness to testify was demonstrated only by petitioner’s unsupported allegations. In the case at bar, as in *Hill*, the prior willingness of inmates Jones and Hofelich to testify was documented by petitioner’s employee assistant, who presumably spoke to the potential witnesses. Nothing in the three other cases cited by respondent suggests that the refusing inmate witnesses had previously agreed to testify.

Although, as noted in paragraph 21 of the Dague Affirmation, denials of requested inmate witnesses based upon considerations of relevancy have been judicially upheld, the hearing officer in the case at bar did not deny petitioner’s request for the testimony of inmates Jones and Hofelich based upon such considerations. The hearing officer did issue a written statement (part of respondent’s Exhibit F) denying petitioner’s request that

unnamed inmates at the Upstate Correctional Facility Infirmary be called as witnesses on the grounds that such potential witnesses “. . . were not present during this incident and could provide no relevant testimony to the validity of the incident in question . . .” The hearing officer, however, made no such finding with respect to inmates Jones and Hofelich but, rather, directed an escort officer to bring these two inmates to the hearing room to testify. Since petitioner’s request that inmates Jones and Hofelich be called to testify was, in effect, initially granted by the hearing officer, petitioner was under no obligation to demonstrate how their testimony would be relevant.

Finally, the Court rejects respondent’s request that the hearing officer’s failure to personally interview inmates Jones and Hofelich with respect to their refusals to testify be deemed “harmless error” since such inmates had no relevant testimony to offer. While the Court acknowledges that the relevancy of the potential testimony of inmates Jones and Hofelich with respect to the incident described in the inmate misbehavior report is certainly subject to serious doubt, the relevancy issue was never developed during the course of the Superintendent’s Hearing and thus petitioner was never afforded an opportunity to make his case, so to speak, with respect to such issue, either at the hearing itself or on administrative appeal. Under such circumstances the Court declines to apply a “harmless error” analysis.

The Court finds that the hearing officer’s failure to personally interview inmates Jones and Hofelich with respect to their refusals to testify on March 15, 2010, after both witnesses had indicated to petitioner’s employee assistant that they were willing to testify, constitutes a violation of petitioner’s fundamental due process rights for which expungement is the proper remedy. *See Alverz v. Goord*, 30 AD3d 118 and *Hill v. Selsky*, 19 AD3d 64.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Hearing concluded on March 30, 2010 are vacated, the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records and the respondent is further directed to reimburse petitioner's inmate account for any mandatory surcharge imposed at the conclusion of such hearing.

Dated: September 14, 2010 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice