

Matter of Strauss v Bellnier

2010 NY Slip Op 33537(U)

October 25, 2010

Sup Ct, Franklin County

Docket Number: 2009-1280

Judge: S. Peter Feldstein

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

-----X

In the Matter of the Application of
CHARLES STRAUSS, #94-B-2765,
Petitioner,

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

**DECISION AND JUDGMENT
RJI #16-1-2009-0491.103
INDEX #2009-1280
ORI# NY**

- against -

JOSEPH F. BELLNIER, Superintendent,
Upstate Correctional Facility,
Respondent.

-----X

This proceeding was originated by the Petition for Writ of Habeas Corpus of Charles Strauss, verified on September 8, 2009 and filed in the Franklin County Clerk’s office on September 22, 2009. Petitioner, who is currently confined in DOCS custody at the Attica Correctional Facility, challenged his incarceration in the custody of the Department of Correctional Services on the grounds that his “parole release date of June 2, 2009, was impermissibly cancelled due to a fundamentally unfair disciplinary hearing violating petitioners [sic] right to due process and providing no parole rescission hearing.”

The Court issued an Order to Show Cause on October 7, 2009 and as a part thereof this proceeding was converted into a proceeding for judgment pursuant to Article 78 of the CPLR. An Amended Order to Show Cause was issued on March 22, 2010. The Court next received and reviewed respondent’s Answer, including confidential Exhibit C, verified on May 17, 2010, as well as petitioner’s Reply thereto, filed in the Franklin County Clerk’s office on June 10, 2010. Respondent asserted that petitioner raised the

“substantial evidence” question (CPLR §7803(4)) as part of his challenge to the results of a Tier III Superintendent’s Hearing held at the Bare Hill Correctional Facility on May 8, 2009. Without addressing the merits, or lack thereof, of petitioner’s challenge, the respondent sought an order transferring this proceeding to the Appellate Division, Third Department pursuant to CPLR §7804(g). By Decision and Order dated July 12, 2010 the Court found no basis to conclude that the “substantial evidence” question had been raised, either directly or indirectly. Accordingly, the respondent was directed to serve answering papers. A subsequent motion for leave to reargue with respect to the Court’s Decision and Order of July 12, 2010 was denied by Decision and Order dated August 10, 2010. The Court has since received and reviewed the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated September 13, 2010 and 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 October 6, 2010.

As the result of incidents that occurred at the Bare Hill Correctional Facility on May 4, 2009 petitioner was issued two inmate misbehavior reports charging him with violations of inmate rule 113.23 (contraband), 118.20 (tattoo paraphernalia), 118.31 (altered electrical devise) and 113.25 (drugs). The incidents in question apparently occurred soon after some or all of petitioner’s good time that had been recommended lost upon the disposition(s) of prior Tier III Superintendent’s Hearings was restored to him and a conditional release date of June 2, 2009 was established.

A Tier III Superintendent’s Hearing with respect to the pending charges was held at the Bare Hill Correctional Facility on May 8, 2009. At that time petitioner pled guilty to all four charges but the presiding hearing officer nevertheless dismissed the charge that

petitioner violated inmate rule 118.31 (altered electrical devise). Based upon his pleas petitioner was found guilty with respect to the three remaining charges and a disposition was imposed confining him to the special housing unit for 24 months, directing the loss of various privileges for a like period of time and recommending the loss of 24 months of good time. Since the May 8, 2009 disposition involved the recommended loss of additional good time, such disposition was subject to automatic review by the commissioner, or his designee, pursuant to 7 NYCRR §263.2(a)(3). Upon such review, prior to the submission of any administrative appeal by petitioner, the recommended loss of good time upon disposition of the Tier III Superintendent's Hearing of May 8, 2009 was affirmed on May 21, 2009.

Petitioner's May 21, 2009 administrative appeal from the results and disposition of the Tier III Superintendent's Hearing of May 8, 2009 was received by the DOCS director of Special Housing/Inmate Disciplinary Programs on May 27, 2009. In his administrative appeal the petitioner did not allege any procedural flaws at the underlying hearing nor did he challenge the various findings of guilt. Rather, he described alleged mitigating circumstances surrounding his possession of the cell phone and based upon such circumstances sought modification of the disposition imposed following the superintendent's hearing and a "... return to general population as swiftly as possible in hopes of achieving the necessary milestones to once again earn my soonest release date." By letter dated June 25, 2009, however, the commissioner's designee responded as follows:

"This is in response to your letter requesting reconsideration of your appeal regarding the Superintendent's Hearing of May 8, 2009.

I do not believe that there are sufficient grounds to reconsider the previous decision on that hearing. No further administrative action will be taken.

I encourage you to exhibit a positive record to expedite your release from confinement.”

This proceeding ensued.

The Court initially finds that petitioner was not entitled to a parole recision hearing (9 NYCRR §8002.5) following the May 8, 2009 Tier III Superintendent’s Hearing. A recision hearing before a Board of Parole is only required where parole authorities seek to re-consider a prior Board decision granting discretionary parole release. In the case at bar, however, there is nothing in the record to suggest that petitioner ever received a discretionary parole release date pursuant to 9 NYCRR Part 8002. Rather, the June 2, 2009 release date reference by petitioner constituted a conditional release date (Penal Law §70.40(1)(b)) established following the grant of a good behavior time allowance pursuant to 7 NYCRR Parts 261 and 262. Where, as here, an inmate who has been granted a good behavior time allowance is subsequently found guilty of violating a standard of inmate behavior following a Tier III Superintendent’s Hearing and a disposition includes a recommended loss of good time, such recommendation is merely subject to review by the DOCS Commissioner, or designee, with no requirement and any additional hearing be conducted. *See* 7 NYCRR §263.2(a)(3). In addition, where, as here, the disposition of the Tier III Superintendent’s Hearing is affirmed, the recommended loss of good time “. . . shall be applied to the inmate’s conditional release date.” 7 NYCRR §263.2(a)(4).

As far as petitioner’s purported challenge to the results and disposition of the May 8, 2009 Tier III Superintendent’s Hearing is concerned, the Court finds that his

failure to raise any of the issues sought to be raised in this proceeding on administrative appeal, coupled with his guilty plea at the underlying hearing, preclude judicial review at this juncture. *See* CPLR §7801(1).

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: October 25, 2010 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Justice