

Matter of Raqiyb v Fischer

2011 NY Slip Op 31110(U)

April 13, 2011

Supreme Court, Albany County

Docket Number: 5619-10

Judge: Jr., George B. Ceresia

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STATE OF NEW YORK
 SUPREME COURT COUNTY OF ALBANY

In The Matter of HASAN RAQIYB,
Petitioner,
-against-

BRIAN FISCHER, COMMISSIONER,
 DEPARTMENT OF CORRECTIONAL
 SERVICES,
Respondent,

For A Judgment Pursuant to Article 78
 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
 Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
 RJ1 # 01-10-ST1885 Index No. 5619-10

Appearances: Hasan Raqiyb
 Inmate No. 71-C-0140
 Petitioner, Pro Se
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Wende Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review three separate disciplinary determinations.

Because it does not appear that the petitioner raised an issue of whether or not the determination was supported by substantial evidence (see CPLR 7803 [4]), the Court finds that it should retain the proceeding for disposition, rather than transferring it to the Appellate Division pursuant to CPLR 7804 (g) (see Matter of Taylor v Fischer, 80 AD3d 1037, 1037 [3d Dept., 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3). Each of the disciplinary determinations will be discussed in turn.

Misbehavior Report Dated April 3, 2010

The petitioner was charged with a violation of Rule 106. 10, refusing a direct order, and Rule 109.12, which, as relevant here, requires an inmate to follow all regulations and staff directions with regard to movement within the facility. The misbehavior report indicates that on April 3, 2010 the petitioner was ordered to attend a medical call-out. It further indicates that he informed the officer that he would not go, and that he then locked back in his cell. The petitioner alleges, inter alia, that he was denied his right to call witnesses during the disciplinary hearing; that the Hearing Officer turned off the tape recorder during the hearing; that he never received published rules concerning the mandatory nature of medical call-outs; that the Hearing Officer improperly reviewed and considered his disciplinary record; and that the Hearing Officer was biased against him, and that the outcome of the hearing was predetermined.

It is well settled that a hearing officer may properly deny witnesses who would provide testimony which is merely cumulative and redundant to that given by prior witnesses

(see Matter of Gomez v Fischer, 74 AD3d 1399, 1400 [3d Dept., 2010]; Matter of McLean v Fischer, 63 AD3d 1468, 1469 [3d Dept., 2009]; Matter of Igartua v Selsky, 41 AD3d 717 [3d Dept., 2007]); or those who have no direct knowledge of the subject incident (see Matter of Davis v State of New York, 75 AD2d 1022, 1023 [3d Dept., 2010]; Matter of Hernandez v Bezio, 73 AD3d 1406, 1407 [3d Dept., 2010]; Matter of Spencer v Goord, 38 AD3d 1028 [3d Dept., 2007]; Matter of Knight v Bezio, ___ AD3d ___ [3d Dept., March 10, 2011]). In this instance, the petitioner refused to disclose to the Hearing Officer the questions he desired to ask Officer Rodriguez, the author of the misbehavior report. In this respect he prevented the Hearing Officer from making any kind of assessment with regard to the relevancy and appropriateness of such the testimony. This is of particular significance here, since the petitioner openly acknowledged his refusal to participate in the medical call-out, a salient fact in the proceeding. The Hearing Officer also properly denied the testimony of Dr. Levitt, inasmuch as his testimony concerning the reason for the medical call-out would not be relevant.

From a review of the hearing transcript, it appears that the petitioner never voiced an objection during the hearing with respect to his claim that the Hearing Officer improperly turned the tape recorder off. By reason of this fact, the Court finds that the petitioner failed to preserve this issue for review, and it was therefore waived (Matter of Tafari v Selsky, 41 AD3d 1117 [3rd Dept., 2007] mot for lv to app denied 9 NY3d 809; Matter of Gray v Selsky, 37 AD3d 890 [3rd Dept., 2007]; Matter of Kross v Goord, 278 AD2d 637 [3d Dept., 2000]; Matter of Faison v Senkowski, 255 AD2d 625, 625-626 [3d Dept., 1998]; Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]).

As noted, petitioner attempts to justify his actions by arguing that he never received a copy of facility regulations, particularly as they relate to the mandatory nature of medical call-outs. The respondent however, has submitted evidence that the petitioner signed for a DOCS rule book on January 30, 2006¹, and had recently participated in Health Services Orientation at Auburn Correctional Facility (receiving a form which indicated that medication call-outs were mandatory). This, in the Court's view, was sufficient to establish that he was on notice that medical call-outs were mandatory, that he should follow all orders (Rule 106.10), and follow directions with regard to movement, including with respect to medical call-outs (Rule 109.12).

Turning to petitioner's claim that he was improperly removed from the hearing, from a review of the record, it appears that the petitioner was warned on several occasions concerning his conduct in interrupting and/or talking over the Hearing Officer while the latter was speaking, and was warned that a further interruption would result in his removal from the hearing. For this reason, the Court finds that the claim has no merit (see Matter of Acevedo v Goord, 32 AD3d 1143 [3rd Dept., 2006]; Matter of Marie v Goord, 34 AD3d 1019 [3rd Dept., 2006]; Matter of Applewhite v Goord, 49 AD3d 1046 [3rd Dept., 2008]; Matter of Odom v Fischer, 65 AD3d 1425, 1426 [3rd Dept., 2009]; Matter of McDaniels v Bezio, 76 AD3d 1129, 1129[3rd Dept., 2010]).

With regard to petitioner's claim of hearing officer bias, the Court has reviewed the hearing transcript with care. There is nothing in the record to support petitioner's contention

¹Notably, there is no requirement that an inmate sign for a Rule Book (see Matter of Tumminia v Goord, 294 AD2d 727, 727 [3d Dept., 2002]).

that the Hearing Officer was biased, or that the determination of guilt flowed from any alleged bias (see Matter of Lamage v Bezio, 74 AD3d 1676 [3rd Dept., 2010]; Matter of Cruz v Bezio, 79AD3d 1509, 1510 [3rd Dept., 2010]). The mere fact that credibility determinations or other rulings were resolved adversely to petitioner does not establish bias on the part of the hearing officer and/or that the outcome of the hearing flowed from alleged bias (see Matter of Nieves v Goord, 39 AD3d 1104, 1105 [3rd Dept., 2007]; Matter of Yancey v Conway, 46 AD3d 1042, [3rd Dept., 2007]; Matter of Morgan v Goord, 10 AD3d 792, 793 [3d Dept., 2004]; Matter of Sweet v Woods, 60 AD3d 1183, 1183 [3rd Dept., 2009]; Matter of Lopez v Fischer, 60 AD3d 1180, 1180 [3rd Dept., 2009]; Matter of Raqiyb v Goord, 246 AD2d 719 [3d Dept., 1998]). From a review of the entire record, it appears that the determination of guilt flowed from the evidence presented and not from any alleged bias on the part of the Hearing Officer (see Matter of Cruz v Bezio, *supra*; Matter of Hamilton v Bezio, 76 AD3d 1125, 1126 [2010]). Nor is there evidence in the record that the Hearing Officer reviewed petitioner's disciplinary record or that it was a factor in his determination.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. The Court concludes that the petition must be dismissed with respect to the disciplinary determination dated April 6, 2010.

Misbehavior Report Dated April 15, 2010

The petitioner was charged with violation of the following rules: Rule 104.13, disturbing the order of the facility; Rule 106.10, refusing to obey a direct order; Rule 107.10, obstructing or interfering with an employee; Rule 107.11, harassment of an employee; and

Rule 109.12, failure to follow facility regulations and staff directions with regard to movement within the facility. According to the misbehavior report, the petitioner became loud and combative in the keeplock waiting room of the facility medical unit as C.O. Blakely attempted to secure other inmates. As a part of the foregoing it is alleged that the petitioner refused several orders to go to a separate room and to quiet down. He was informed that because he was on a medical tuberculosis hold that he had to be secluded from other inmates per medical policy. The petitioner alleges that he was denied his right to call witnesses; that the Hearing Officer made off-the-record comments; that the petitioner never received a DOCS Rule Book; that the Hearing Officer was biased against the petitioner; and that the Hearing Officer inaccurately computed the length of time of the keeplock imposed as a penalty.

With respect to the issue concerning alleged denial of witnesses, the Hearing Officer properly denied Deputy Post as she was not present in the medical unit when the incident occurred, and therefore had no direct knowledge thereof. The Court finds that the Hearing Officer properly denied the testimony of C.O. Blakely as being redundant. Moreover, while the petitioner voiced a number of procedural objections at the end of the hearing, no mention was made of C. O. Blakely. In this respect the Court finds that the request to obtain the testimony of C.O. Blakely had been abandoned (see Matter of Cornwall v Fischer, 74 AD3d 1507, 1509 [3rd Dept., 2010]). Although late in the hearing the petitioner made a request to call certain inmate witnesses who were present in the medical unit waiting room at the time of the subject incident, he was unable to identify them so that they could be contacted.

The petitioner failed to exhaust his administrative remedies with regard to his

complaint that keeplock was incorrectly calculated, as he did not mention this issue in his administrative appeal (see Matter of Vasquez v Coombe, 225 AD2d 925, [3d Dept., 1996]; see Matter of Cruz v Travis, 273 AD2d 648 [3rd Dept., 2000]; see also Matter of Moore v New York State Board of Parole, 233 AD2d 653 [3rd Dept., 1996]).

There is no evidence in the record to establish that the Hearing Officer was biased or that the determination flowed from such bias. In addition, with respect to petitioner's complaint that the Hearing Officer made an off-the-record comment concerning his tuberculous hold, petitioner failed to raise a timely objection during the hearing.

For the reasons set forth above, the Court finds petitioner's arguments concerning non-receipt of the DOCS Rule Book have no merit. The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. The Court concludes that the petition must be dismissed with respect to the disciplinary determination dated April 21, 2010.

Misbehavior Report Dated June 28, 2010

The petitioner was charged with a violation of Rule 106.10, failure to obey a direct order, and Rule 109.12 which, as noted, requires an inmate to follow all regulations and staff directions with regard to movement within the facility. It is alleged that the petitioner refused to report to the facility nurse for a medical call-out, despite several direct orders to do so. The petitioner alleges that he was denied the right to call witnesses; that the Hearing Officer conducted an off-the-record investigation; that the Hearing Officer did not record the entire hearing; that the petitioner never received the inmate orientation manual and/or rule

book with regard to medical call-outs. The petitioner also alleges that the Hearing Officer was biased; and that he did not hear the order he is accused of disobeying.

With respect to the Hearing Officer's off-the-record investigation, the petitioner had argued during the hearing that the medical call-out was not mandatory, and he was not required to report to the medical unit. The Hearing Officer announced that she intended to adjourn the hearing to call the medical unit to ascertain the underlying reason for the medical call-out. After her telephone call to the medical unit, she resumed the hearing and disclosed on the record what had transpired. Specifically, she indicated that she was informed that the petitioner was required to report to the medical unit every Monday for a finger stick (apparently to check for blood sugar with respect to a possible diabetic condition). Notably, the petitioner never objected to the foregoing on the record, before or after the Hearing Officer's telephone call to the medical unit. The Court finds that the petitioner waived any such objection by not promptly raising an objection at a time when the matter could have been addressed by the Hearing Officer.

The Hearing Officer properly denied petitioner's request to call the nurse he was supposed to see that day, inasmuch as she would possess no personal knowledge of the incident in question. For the reasons set forth above, the Court also finds that petitioner's argument concerning non-receipt of the DOCS Rule Book has no merit. Moreover, and apart from the foregoing, the Court observes that the petitioner was on notice with regard to the mandatory nature of a medical call-out, if for no other reason than by virtue of the disciplinary determination dated April 6, 2010.

With regard to petitioner's claim that he never heard the direct order, it appears that

the petitioner neglected to preserve the issue through its inclusion in his administrative appeal. As such, he failed to exhaust his administrative remedies (see Matter of Vasquez v Coombe, supra; see Matter of Cruz v Travis, supra; see also Matter of Moore v New York State Board of Parole, supra).

The Court finds that there is no evidence in the record that the Hearing Officer was biased or that the determination flowed from such bias.

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit. Court concludes that the petition must be dismissed with respect to the disciplinary determination dated July 1, 2010.

In summary, the Court finds that the determinations were not made in violation of lawful procedure, are not affected by an error of law, and are not irrational, arbitrary and capricious, or constitute an abuse of discretion. The Court concludes that the petition must be dismissed.

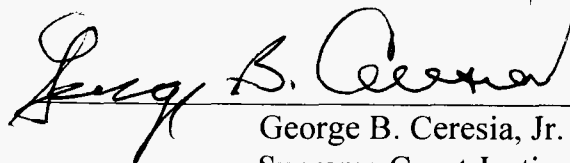
Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: April 13, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 3, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated January 5, 2011, Supporting Papers and Exhibits