

**Matter of Hinton v Fischer**

2011 NY Slip Op 31402(U)

May 27, 2011

Sup Ct, Franklin County

Docket Number: 2010-1518

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  
**LEONARD HINTON, #96-A-0837,**  
Petitioner,

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

**DECISION AND JUDGMENT  
RJI #16-1-2010-0569.121  
INDEX # 2010-1518  
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 Leonard Hinton, verified on December 8, 2010 and filed in the Franklin County Clerk's office on December 14, 2010. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held, presumably at the Marcy Correctional Facility, and concluded on September 13, 2010. The Court issued an Order to Show Cause on December 17, 2010 and has received and reviewed respondent's Answer, including Confidential Exhibit C, verified on February 9, 2011 and supported by the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated February 9, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on February 24, 2011.

As the result of an incident that occurred at the Marcy Correctional Facility on August 11, 2010 petitioner was issued two inmate misbehavior reports. The first report, authored by C.O. Ruggiero, charged petitioner with violations of inmate rules 100.13

(fighting), 104.13 (creating a disturbance) and 104.11 (violent conduct). C.O. Ruggerio's report alleged, in relevant part, as follows:

“ . . . I heard crashing noise in the lg/day/rm near the kitchen (cooking) area. I then responded to said area and observed Inmate Hinton lying on his left side (prone) near his overturned wheelchair. I also observed Inmate Burton standing over Hinton with a clinched [sic] fist. There was also a medium size stainless steal frying pan lying near the lg wheel of Inmate Hinton's wheelchair . . . ”

The second inmate misbehavior report, authored by Correction Sergeant Betti, charged petitioner with violations of inmate rules 100.10 (assault on inmate), 100.13 (fighting) and 104.11 (violent conduct). Sgt. Betti's report alleged, in relevant part, that he “ . . . interviewed inmate Hinton . . . regarding a fight he had on the B-2 dorm with inmate Burton . . . on 8/11/10 . . . During the interview inmate Hinton admitted to me that he had a verbal argument with inmate Burton over some missing food items. He said the argument ended with him picking up a frying pan and hitting inmate Burton once over the head with it.”

A single Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on September 7, 2010 with respect to the charges set forth in both inmate misbehavior reports. At the conclusion of the hearing, on September 13, 2010, petitioner was found guilty of all charges and a disposition was imposed confining him to the special housing unit for six months, denying him various privileges for a like period of time and recommending the loss of three months good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on September 13, 2010 were affirmed. This proceeding ensued.

During the course of the Tier III Superintendent's Hearing petitioner denied striking Inmate Burton with a frying pan. According to petitioner's testimony, Burton struck him with a fist, knocking him out of his wheelchair to the floor. With the exception

of four potential inmate witnesses who apparently refused to testify, the only witness requested by petitioner prior to the hearing, through his employee assistant, was C.O. Ruggerio, the author of the first inmate misbehavior report. During the hearing, however, petitioner also requested testimony from Sergeant Betti, the author of the second inmate misbehavior report, as well as from Inmate Burton, Captain Scarafile and Deputy Superintendent Kinderman.<sup>1</sup>

While the relevance of the potential testimony of C.O. Ruggerio, Sergeant Betti and Inmate Burton are obvious, such is not the case with respect to the potential testimony of Captain Scarafile and Deputy Superintendent Kinderman. Petitioner informed the hearing officer that he sought the testimony of these two latter individuals “. . . because they had spoke to me not even (inaudible) not even twelve hours after that (inaudible) . . .” The hearing officer elicited no further clarification with respect to the materiality of the potential testimony of Captain Scarafile or Deputy Superintendent Kinderman and he made no specific ruling on the record with respect to petitioner’s requests for their testimony. Nor did he make any specific ruling on the record with respect to petitioner’s request for the testimony of Inmate Burton. Indeed, the hearing officer repeatedly expressed an attitude of impatience and dismissiveness with respect to petitioner’s request for witnesses and ultimately stated tersely that “[w]e’ll get Betti and Ruggerio to testify.” The hearing was then adjourned to obtain the testimony of these two individuals.

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<sup>1</sup> Although petitioner testified that he had requested the testimony of these additional potential witnesses through his employee assistant but had difficulty communicating with her, the point is ultimately irrelevant since an inmate at a Tier III Superintendent’s Hearing can request a witness either before the hearing by informing his assistant or during the hearing by informing the hearing officer. *See* 7 NYCRR §254.5(c).

When the hearing was reconvened on September 13, 2010 Sergeant Betti testified and the petitioner was permitted to pose questions. After the testimony of Sergeant Betti was concluded, the hearing officer asked petitioner if he had any thing else he wanted to add at that time. Petitioner then provided details of his version of the incident of August 11, 2010, stating, *inter alia*, “I’m medically confined to a wheelchair, I can’t walk and this guy [presumably, Inmate Burton] is tall and there’s no way I’m gonna hit this guy in his head with a frying pan, sitting in a wheelchair . . . He came and struck me, struck me out of the wheelchair. I’m on the floor (inaudible) Officer Ruggerio, when he responded to the noise, he responded to me being on the floor, (inaudible) on the floor.” After petitioner completed his statement the hearing officer asked “. . . do you have any thing else you want to add at this time?” Petitioner replied in the negative and the following colloquy occurred:

|                          |  |
|--------------------------|--|
| “Haug [Hearing Officer]: | No? Alright, so you’re all set? Okay, so you have no further procedural objections or testimony at this time, except the ones noted? |
| Hinton:                  | Yeah, I object to (inaudible).   |
| Haug:                    | Okay, alright, I’m now going to close the testimony at this time . . . [and] make a disposition . . .”                               |

C.O. Ruggerio never testified, nor did Inmate Burton, Captain Scarafilo or Deputy Superintendent Kinderman.

An inmate at a Tier III Superintendent’s Hearing has a limited constitutional and regulatory right to call witnesses on his/her behalf provided institutional safety and correctional goals are not jeopardized and the proposed testimony is material/relevant and not redundant. *See Wolff v. McDonnell*, 418 US 539 at 556 and 7 NYCRR §254.5(a). The burden is on prison officials to demonstrate a valid reason for precluding the

testimony of a witness requested by an inmate. *See Escoto v. Goord*, 9 AD3d 518. “A disciplinary determination cannot stand when a denial of the inmate’s request to call a witness . . . is wholly unexplained.” *Laureano v. Kuhlmann*, 75 NY2d 141, 147 (citation omitted). *See Johnson v. Combe*, 244 AD2d 664.

Petitioner’s request for the testimony of C.O. Ruggerio, Inmate Burton, Captain Scarafile and Deputy Superintendent Kinderman were effectively denied by the hearing officer without explanation and without legitimate reasons for such denials apparent in the record. The potential testimony of C.O. Ruggerio and Inmate Burton was clearly relevant and, respondent’s argument to the contrary notwithstanding, there is nothing in the record to suggest that the testimony of C.O. Ruggerio would have been redundant in view of the prior testimony of Sergeant Betti. Although the potential testimony of Captain Scarafile and/or Deputy Superintendent Kinderman may have been irrelevant, the hearing officer’s failure to address petitioner’s request for such testimony and/or elicit petitioner’s reason(s) for requesting such testimony, renders it impossible for this Court to rule on the relevancy of the proposed testimony of these potential witnesses. The Court, moreover, finds no basis to conclude that petitioner waived his right to call any witnesses simply by his failure to reiterate requests for testimony and/or interpose objections when the hearing officer announced his intention to close the hearing. *See Johnson v. Combe*, 244 AD2d 664.

Finally, the Court finds that hearing officers effective denial of petitioner’s request to call C.O. Ruggerio, Inmate Burton, Captain Scarafile and Deputy Superintendent Kinderman as witnesses, without a stated good faith reasons, constituted a clear constitutional violation for which expungement is the appropriate remedy. *See Alvarez v. Goord*, 30 AD3d 118.

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 September 13, 2010 are vacated; and it is further

**ADJUDGED**, that the respondent is directed to expunge all reference of such hearing, and the incident underlying same, from petitioner's institutional records; and it is further

**ADJUDGED**, that the respondent is directed to refund to petitioner's inmate account any mandatory surcharge imposed upon the disposition of such hearing.

**Dated:** May 27, 2011 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice