

Matter of Adeline v LaClair

2011 NY Slip Op 31403(U)

May 25, 2011

Sup Ct, Franklin County

Docket Number: 2010-1536

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
SCOTT ADELINE, #85-B-0526,
Petitioner,

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

DECISION AND JUDGMENT

RJI #16-1-2010-0580.122

INDEX # 2010-1536

ORI #NY016015J

-against-

DARWIN LaCLAIR, Superintendent,
Franklin Correctional Facility,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Scott Adeline, verified on December 7, 2010 and filed in the Franklin County Clerk's office on December 20, 2010. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Franklin Correctional Facility on August 24, 2010. The Court issued an Order to Show Cause on December 27, 2010 and has received and reviewed respondent's Answer, verified on February 14, 2011 and supported by the Affirmation of Brian J. O'Donnell, Esq. Assistant Attorney General, dated February 14, 2011. The Court has also received and reviewed petitioner's Reply thereto (dominated Memorandum of Law and Response to Respondent's Opposition), filed in the Franklin County Clerk's Office on March 10, 2011.

As the result of an incident that occurred at the Franklin Correctional Facility on August 17, 2010 petitioner was issued an inmate misbehavior report charging him with

violations of inmate rules 116.10 (loss of state property) and 109.12 (“An inmate shall follow all facility regulations and staff directions relating to movement within the facility. This includes...call slip procedures...”). The inmate misbehavior report, authored by C.O. LaPointe, alleges, relevant part, as follows: “. . . I . . . sent inmate Adeline . . . to the infirmary . . . Per facility procedure I gave Adeline the yellow laminated medical pass labeled #1. Upon his return to B-1 inmate Adeline told me he didn’t know where the pass was. I called down to the medical area and was told by C.O. Cowen that the pass was not in his area. I asked Adeline to check and make sure he didn’t have it and he responded that ‘I must of lost it.’”

A Tier II Disciplinary Hearing was conducted at the Franklin Correctional Facility on August 24, 2010. At the conclusion of the hearing petitioner was found not guilty of violating inmate rule 116.10 but guilty of the remaining charge. A disposition was imposed directing the loss of various privileges for thirty days, with portions thereof suspended. Upon administrative appeal the results and disposition of Tier II Disciplinary Hearing were affirmed. This proceeding ensued.

There is no dispute that petitioner traveled from his housing unit to the infirmary with a pass authorizing such movement. Petitioner initially testified at the hearing that he gave the pass to the correction officer on duty at the infirmary but when he (petitioner) left the infirmary the officer stated that he did not take the pass and instructed petitioner to go back to his housing unit. Petitioner also testified that he advised the officer on duty that he (petitioner) would return to the infirmary to pick up the pass if it turned up there. Petitioner’s testimony notwithstanding, he acknowledged that the officer on duty may not have kept the pass and that he (petitioner) may have mislaid it in the infirmary area.

Petitioner also testified that the pass in question was eventually returned to his housing area without any action on his part.

C.O. Cowen, the officer on duty at the infirmary, testified that petitioner displayed the pass when he arrived at the infirmary but that “. . . I don’t take the passes cause there’s too many inmates, too many passes to collect . . . I just make sure they come on a pass.” The hearing officer then questioned C.O. Cowen as follows: “And then when they [inmates] leave [the infirmary], they tell you they’re done there. You check ‘em off when they leave?” C.O. Cowen responded “[c]orrect.” No testimony was elicited from C.O. Cowen as to whether he was aware that petitioner was not in possession of the pass when he left the infirmary and, if so, whether he instructed petitioner to nevertheless return to his housing unit.

The only argument advanced by petitioner in this proceeding is that the hearing officer failed to record the entire hearing.¹ In this regard petitioner, quoting from his administrative appeal in paragraph four of the petition, asserts as follows:

“Upon coming back to the dorm [after the Tier II Disciplinary Hearing] and talking to the B-1 dorm officer Beritak who was working on 8/24/10 it was discovered that LT Irwin [the hearing officer] called him and asked some facts about this incident about my pass. This conversation was not recorded it was not made part of the hearing record which is a violation of Title 7 chapter v.”

The Court notes that when the results and disposition of the Tier II Disciplinary Hearing of August 24, 2010 were affirmed on administrative appeal, it was acknowledged that the

¹ Petitioner also argued on administrative appeal that he did not commit a movement violation because, in effect, even if the pass had been misplaced prior to his return from the infirmary, he followed the alleged verbal instructions of C.O. Cowen to nevertheless return to his housing unit. It is clear, however, from the second paragraph seven of the petition, as well as the accompanying Memorandum of Law, that the only argument advanced in this proceeding relates to the hearing officer’s alleged failure to record the entire hearing.

hearing officer did, in fact, call C.O. Beritak and speak to him off the record. It was determined on administrative appeal, however, that the call was made “. . . to verify that the pass was returned to housing unit, not to receive testimony. Therefore there was no violation of Title 7 Chapter 5. You were found not guilty of the charge of 116.10 [loss of state property].”

7 NYCRR §253.6(b) provides that “[t]he entire [disciplinary] hearing must be electronically recorded.” This Court has little difficulty in concluding that the hearing officer’s acknowledged off-the-record conversation with C.O. Beritak constituted a functional part of the Tier II Disciplinary Hearing and, therefore, should have been recorded, and for that matter, should have taken place in the presence of petitioner. The only on-the-record evidence that the pass in question ultimately found its way back petitioner’s housing area came from petitioner’s testimony. The hearing officer apparently confirmed petitioner’s testimony by conversing with C.O. Beritak, off-the-record, during the 23 minutes that elapsed between the adjournment of the hearing following the close of testimony and the reconvening of the hearing for disposition.

While the Court understands respondent’s position that the off-the-record contact was merely utilized to confirm petitioner’s testimony and resulted in the finding of not guilty with respect to the charge petitioner violated inmate rule 116.10, the problem remains that there is no record of the conversation and, therefore, the Court is unable to determine exactly what was discussed during such conversation. If, for example, the circumstances surrounding the return of the pass to the petitioner’s housing area was discussed, the conversation might arguably have been relevant to the movement violation charge as well. For this reason the Court finds it appropriate to draw a bright line in determining that the off-the-record conversation constituted a regulatory violation requiring the reversal of the results and disposition of the entire Tier II Disciplinary

Hearing of August 24, 2010. Having so determined, the Court must next decide whether expungement or rehearing is the appropriate remedy.

“Expungement will be ordered only where there has been a showing that ‘(1) the challenged disciplinary determination is not supported by substantial evidence . . .; (2) there has been a violation of one of the inmate’s fundamental due process rights, as enunciated in *Wolff v. McDonnell* (418 U.S. 593 . . .); or (3) other equitable considerations dictate expungement of the record rather than remittal for a new hearing.” *Monko v. Selsky*, 246 AD2d 699 at 700, quoting *Hillard v. Coughlin*, 187 AD2d 136, 140, *lv den* 82 NY2d 651 (citations omitted). In the case at bar there has been no finding that the determination of guilt was not supported by substantial evidence nor has there been a finding that one of petitioner’s fundamental due process rights was violated. Accordingly, this Court’s determination with respect to expungement or rehearing must be based on equitable principals. Upon consideration of such principals the Court concludes that expungement is the appropriate remedy. In reaching this conclusion it is noted that the charges against the petitioner were not particularly serious, as evidenced by the fact that such charges were heard at the Tier II, rather than Tier III, level. It is also noted that the penalties imposed upon disposition have long since run their courses.

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

ORDERED AND ADJUDGED, that petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier II Disciplinary Hearing of August 24, 2010 are vacated and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner’s institutional records; and it is further

ORDERED AND ADJUDGED, that the respondent is directed to reimburse petitioner's inmate account for any surcharge imposed.

DATED: May 25, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice