

Matter of Bolanos v Fischer

2011 NY Slip Op 32406(U)

September 8, 2011

Supreme Court, Albany County

Docket Number: 5614-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of the Application of
EDGARDO BOLANOS, 87-A-7271

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER,
NEW YORK STATE DEPARTMENT OF
CORR. 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
RJI # 01-10-ST1957 Index No.5614-10

Appearances: Edgardo Bolanos
 Department Identification No. 87-A-7271
 Petitioner, Pro Se
 Attica Correctional Facility
 P.O. Box 149
 Attica, NY 14011-0149

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Adam W. Silverman,
Assistant Attorney General
Of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate currently at Attica Correctional Facility, commenced the

instant CPLR Article 78 proceeding to review a Tier III disciplinary determination in which he was found guilty of violating Rule 113.16, possession of money/unauthorized property, and Rule 113.23, possession of contraband (see 7 NYCRR 270.2). The charges arose out of a search of his cell. The petition alleges various procedural violations including that the hearing officer was disqualified from conducting the hearing, hearing officer bias, that the penalty imposed was overly severe, and that he was denied an opportunity to prepare his defense.

Turning to a threshold issue, upon initial review of the papers submitted in this matter the Court discerned significant deficiencies in the hearing transcript which had been submitted by the respondent as part of the record. In an interim decision-order dated May 19, 2011 the Court pointed these matters out, and directed the respondent to serve and file a complete transcript of the hearing. The respondent has done so, however the petitioner maintains that the transcript is still incomplete. Upon review, the Court finds that the inaudible portions of the transcript are not so significant as to preclude meaningful review (see Matter of Cowart v Bezio, 67 AD3d 1152, 1152 [3rd Dept., 2009]; Matter of McFadden v Venettozzi, 65 AD3d 1401, 1402 [3rd Dept., 2009]; Matter of Hodge v Selsky, 53 AD3d 953, 954 [3rd Dept., 2008]; Matter of Johnson v Rock, 64 AD3d 1096, [3rd Dept., 2009]). The Court accordingly finds that the determination is now ready for review.

Because it does not appear that the petitioner raised an issue with regard to whether 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 procedural issues raised by the petitioner under the provisions of CPLR 7803 (3).

The primary argument advanced by the petitioner in this proceeding is that the Hearing Officer was disqualified from presiding over the disciplinary hearing by reason that he participated in the investigation of the underlying incident. In support of his argument the petitioner cites Rule 254.1 of the Rules of the Department of Correctional Services. Said section recites:

“The person appointed to conduct the superintendent's hearing shall be either the superintendent, a deputy superintendent, captain or commissioner's hearing officer employed by the department's central office, but the superintendent may, in his or her discretion, designate some other employee to conduct the proceeding. The following persons shall not be appointed to conduct the proceeding: a person who actually witnessed the incident; a person who was directly involved in the incident; the review officer who reviewed the misbehavior report, or a person who has investigated the incident.” (see 7 NYCRR 254.1).

The record reveals that Hearing Officer Adler was present at the facility Synagogue while a search was conducted there for contraband related to the subject incident (specifically involving search for a cell phone). There is no evidence however, that Officer Adler actively participated in the investigation at the Synagogue. Moreover, no contraband was found on petitioner's person at that time.¹ Subsequent to the search at the Synagogue, a search was conducted (as relevant here) of petitioner's cell. Officer Adler did not conduct the search, and was not present. As a result of the cell search, a Samsung cell phone charger and Samsung instructional manual (both compatible with the confiscated cell phone), and a five

¹A Samsung cell phone was found in the possession of a fellow inmate.

foot long cable, were recovered. In the Court's view, the only incident which is directly relevant to the instant disciplinary determination is the search of petitioner's cell (which resulted in the discovery of contraband). Thus, because the record reflects that Hearing Officer Adler's connection to the initial investigation (at the Synagogue) was indirect and tangential, there was nothing to prohibit him from presiding over petitioner's disciplinary hearing (see Reynolds v Selsky, 270 AD2d 743 [3rd Dept., 2000]; Dubois v Bezio, 7 AD3d 1111 [3rd Dept., 2009]; Cruz v Bezio, 79 AD3d 1509 [3rd Dept., 2010]).

With regard to petitioner's claim of hearing officer bias separate and apart from the foregoing, the Court has reviewed the hearing transcript with care. There is nothing in the record to support petitioner's contention 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 [3rd 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]). Of great significance here, during the hearing the petitioner changed his plea to the relevant charges from not guilty to guilty. The hearing officer made no determinations adverse to the petitioner, finding him guilty only of the charges to which petitioner entered a guilty plea. The Court finds that the petitioner failed to demonstrate that Hearing Officer

Adler did not conduct the hearing in a fair and impartial manner.

The petitioner also complains that the Hearing Officer improperly conducted his own investigation when he performed an internet search to determine whether the cell phone charger and adapter cable might actually have been for petitioner's tape player (as the petitioner maintained). Although the hearing transcript reveals that the Hearing Officer did indeed perform an internet search with regard to the cell phone charger and adapter cable, the Court observes that the petitioner never raised any objection to this during the hearing. As such, the Court finds the objection un-preserved for review (see Matter of Riggsbee v Fischer, 65 AD3d 729 [3d Dept., 2009]; Matter of Tafari v Selsky, 41 AD3d 1117, 1117 [3rd Dept., 2007]).

With regard to petitioner's request for certain documents, a review of the record reveals that petitioner changed his plea from not guilty to all charges to a plea of guilty to two of the charges before the Hearing Officer issued a ruling with respect to documents known to exist. Thereafter, the petitioner expressly stated that he no longer required any further documentary evidence. The Court finds that any objection with regard to production of documents was waived (see Matter of Gray v Selsky, 37 AD3d 890 [3d Dept., 2007]).

Petitioner, in his reply, complains that certain documents in Exhibit C of respondent's answer were not furnished to him prior to the hearing. These documents include a contraband receipt, the chain of possession of evidence form, and a memorandum from Captain B. Keith to DSS W. Caldwell which notes three contraband items recovered. Notably, it does appear that Officer Adler relied upon the exhibits in his disposition. Nor does petitioner demonstrate how or in what manner the failure to produce these documents

impeded his defense. Thus, even if such documents were properly demanded, the Court finds that such error was harmless.

The petitioner also contends that the penalties imposed (18 months in special housing, 18 months loss of recreation, packages, commissary, and phones, and 12 months loss of good time) are excessive. “Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law” (Matter of Kelly v Safir, 96 NY2d 32, 38 [2001], mot for reargument denied 96 NY2d 854, citing Matter of Featherstone v Franco, 95 NY2d 550, 554, and CPLR 7803 [3]). The penalty imposed by an administrative agency must be upheld unless it is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness” (Matter of Pell v Board of Educ., 34 NY2d 222, 233 [1974], citations omitted; Matter of Featherstone v Franco, *supra*; Matter of Torrance v Stout, 9 NY3d 1022, 1023 [2008]; Matter of Bottari v Saratoga Springs City School District, 3 AD3d 832, 833 [3d Dept., 2004]; Matter of Martindale v Novello, 13 AD3d 761, 763-764 [3d Dept., 2004]; Matter of Waldren v Town of Islip, 6 NY3d 735, 736-737 [2005]; Matter of JMH, Inc. v New York State Liquor Authority, 61 AD3d 1260 [3rd Dept., 2009]; Matter of Liguori v Beloten, 76 AD3d 1156 [3rd Dept., 2010]). The Court finds that the loss of privileges stated above is not an abuse of discretion. Nor was petitioner entitled to more lenient penalties by reason of his subsequent entry of a plea of guilty to two of the charges.

In view of all of the foregoing, the Court concludes that the petition must be dismissed.

Lastly, the Court observes that by letter dated July 16, 2011 the petitioner submitted

a Freedom of Information Law (“FOIL”) request under Public Officers Law Article 6 seeking production of respondent’s Exhibit I, which was submitted to the Court for *in camera* review. The request must be denied for two reasons. First, it is well settled that the judiciary is expressly excluded from agency status under FOIL (see Public Officers Law § 86 [3]; Matter of Newsday, Inc. v Empire State Development Corporation, 98 NY2d 359, 362-363 [2002]). Second, within the context of a pending special proceeding, disclosure is governed by CPLR 408, which requires leave of court before any such disclosure could be granted. In this instance, the petitioner did not make an appropriate motion, on notice to the respondent, for such relief. Apart from the foregoing, the Court observes that it has not reviewed or considered Exhibit I. The Court, by separate order, will direct that Exhibit I be sealed.

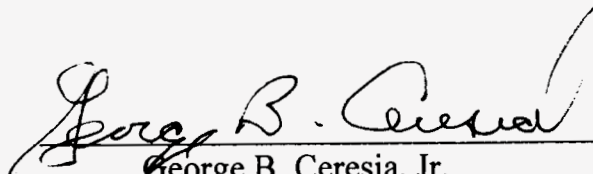
Accordingly, it is

ORDERED, 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 and delivery 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: September 8, 2011
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order to Show Cause dated September 28, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated January 14, 2011, Supporting Papers and Exhibits.
3. Petitioner's Reply dated February 11, 2011
4. Letter of Adam W. Silverman, Assistant Attorney General, dated June 29, 2011, enclosing a copy of the Hearing Transcript
5. Petitioner's Letter dated July 5, 2011
6. Petitioner's Letter dated July 16, 2011

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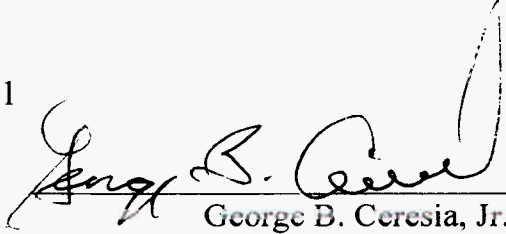
SEALING ORDER

The following document having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit I, Unusual Incident Report. For good cause shown, it is hereby

ORDERED, that the foregoing designated document, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: September 8 , 2011
 Troy, New York



George B. Ceresia, Jr.
Supreme Court Justice