

**Barnes v Rock**

2011 NY Slip Op 33218(U)

October 19, 2011

Supreme Court, Franklin County

Docket Number: 2011-198

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  
**JESSIE J. BARNES, #09-B-2707,**  
Petitioner,

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

**DECISION, ORDER AND  
JUDGMENT**

**RJI #16-1-2011-0087.19**

**INDEX # 2011-198**

**ORI #NY016015J**

-against-

**DAVID A. ROCK**, Superintendent,  
Upstate Correctional Facility,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jessie J. Barnes, verified on February 15, 2011 and filed in the Franklin County Clerk's office on February 24, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of two, separate Tier II Disciplinary Hearings held at the Upstate Correctional Facility and concluded on December 26, 2010 and February 2, 2011, respectively.

An Order to Show Cause was issued on February 28, 2011. The Court next received the respondent's Answer, verified on April 29, 2011. In his Answer the respondent asserted that petitioner had raised the "substantial evidence" question (CPLR §7803(4)) in connection with the disciplinary hearing concluded on February 2, 2011. Accordingly, it was argued that the entire proceeding, involving judicial review of the results of both disciplinary hearings, must be transferred to the Appellate Division, Third Department. The respondent concluded his Answer by stating as follows: "In the interests of judicial economy, the respondent has not submitted a detailed analysis of the merits of this

proceeding. However, if the Court does not deem it appropriate to transfer this proceeding to the Appellate Division, the respondent respectfully requests that he be given 30 days to submit a further written response on the merits.”

By letter dated May 4, 2011, filed in the Franklin County Clerk’s office on May 9, 2011, petitioner objected to the respondent’s failure to file with his Answer copies of the transcripts of the two disciplinary hearings. By Letter Order dated May 11, 2011 respondent was directed to immediately file certified copies of the missing transcripts. In response thereto, a copy of the transcript of the Tier II Disciplinary Hearing concluded on December 26, 2010 was filed in the Franklin County Clerk’s office on May 18, 2011. By Letter Order dated May 19, 2011 respondent was re-directed to immediately file a certified copy of the still-missing transcript of the Tier II Disciplinary Hearing concluded on February 2, 2011.

By letter dated May 24, 2011 counsel for the respondent advised the Court that due to the limited audibility of the hearing tape respondent was unable to provide a transcript of the disciplinary hearing concluded on February 2, 2011. In his letter counsel further advised the Court that as a result thereof the results and disposition of the disciplinary hearing concluded on February 2, 2011 had been administratively reversed and reference to the hearing expunged from petitioner’s institutional record. Counsel noted that the penalties imposed following the disciplinary hearing concluded on February 2, 2011 were not scheduled to commence until 2019. Accordingly, it was asserted that petitioner had received all of the relief to which he was entitled and that petitioner’s challenge to the results and disposition of the Tier II Disciplinary Hearing concluded on February 2, 2011 had been rendered moot. Counsel concluded his May 24, 2011 letter as follows: “In that the basis for respondent’s request for transfer to the Appellate Division is now a nullity, counsel respectfully requests an opportunity to put a complete answer before this Court,

as to the hearing of December 26, 2011. By Letter Order dated May 25, 2011 the respondent was directed to file an Amended Answer. In response thereto the Court has received and reviewed the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated August 5, 2011. The Court has received no Reply thereto from petitioner.

Provided that any mandatory surcharge imposed upon disposition of the Tier II Disciplinary Hearing concluded on February 2, 2011 is reimbursed to petitioner's inmate account, the Court agrees that the administrative reversal of the results and disposition of such hearing, coupled with the expungement of all reference to same from petitioner's institutional record, has effectively rendered petitioner's challenge to the results and disposition of the disciplinary hearing concluded on February 2, 2011 moot. *See Kairis v. Fischer*, 86 AD3d 868 and *Mastropietro v. Fischer*, 81 AD3d 1022.

As a result of an incident that occurred at the Upstate Correctional facility on December 8, 2010 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (failure to obey a direct order), 107.10 (interference with employee), 107.11 (harassment), 102.10 (threats) and 104.13 (creating a disturbance). The inmate misbehavior report, authored by R.N. Holmes, alleges, in relevant part, as follows:

“ . . . I stopped at 10 C8 B to give his meds to Barnes . . . Cell dark, Inmate was asked if he's refusing meds. Inmate was then directed to light cell and meds were given. Inmate had to be directed to show mouth after swallowing. This is persistent behavior of interference, has to be directed through administration of meds every day. Inmate responds 'You fuck with me, you'll get what you deserve. You racist ass bitch. You cracker white bitch, such my dick, you stinky white cunt.' Obscenities continued. Inmate was directed to stop harassment and to stop hollering so sick call could be heard. Attempting to do sick call at C 11, unable to hear Inmate due to Barnes hollering.”

A Tier II Disciplinary Hearing was commenced at the Upstate Correctional Facility on December 21, 2010. At the conclusion of the hearing, on December 26, 2010, petitioner was found guilty as charged and a disposition was imposed confining him to

keeplock status for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results of the disciplinary hearing concluded on December 26, 2010 were affirmed. This proceeding ensued.

Petitioner advances only one cause of action. According to petitioner, he was denied his right to call as witness the inmate that was housed in cell C-1-7 on December 8, 2010, the date of the incident underlying the issuance of the misbehavior report. A view of the transcript reveals that the hearing was adjourned after petitioner requested the testimony of the unidentified inmate housed in the C-7 cell. When the hearing was reconvened the hearing officer stated as follows: “. . . inmate Barnes had request to have inmate from 10 C 7, H. Cruz, . . . testify on his behalf and the inmate refused.” Petitioner interposed no objection and there was no further discussion of the requested witness (inmate C-7 cell or inmate Cruz). Before concluding the hearing petitioner was asked whether he wanted any further witnesses. He replied “Nah, I wanna go back to my cell.” The hearing record includes an inmate witness refusal to testify form apparently signed by a correction officer, reporting that when the testimony of inmate Cruz was requested the inmate stated “I not coming out for that crap.”

In paragraph nine of the Petition it is alleged that “[t]he person called Herman Cruz was not the person housed in C-1-7 on December 8, 2010.” The Court finds, however, that petitioner’s failure to interpose any objection during the course of the hearing, when corrective action could have been taken, precludes judicial review in this proceeding.

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

**ORDERED**, that any mandatory surcharge imposed upon disposition of the Tier II Disciplinary Hearing concluded on February 2, 2011 be refunded to petitioner's inmate account, if not already done; and it is further

**ADJUDGED**, that the petition is dismissed.

**Dated:** October 19, 2011 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice