

H'Shaka v Fischer

2011 NY Slip Op 33219(U)

November 9, 2011

Supreme Court, Franklin County

Docket Number: 2011-242

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
IMHOTEP H'SHAKA, #91-A-6065,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0110.23
INDEX # 2011-242
ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner,
New York State 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 Imhotep H'Shaka, verified on March 8, 2011 and filed in the Franklin County Clerk's office on March 10, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging his placement/continuation in a Special Housing Unit [SHU] upon a determination, following a hearing conducted pursuant to 7 NYCRR Part 254, that administrative segregation (7 NYCRR § 301.4) was warranted. The Court issued an Order to Show Cause on March 15, 2011 and has received and reviewed respondent's Answer, verified on May 6, 2011, as well as petitioner's Reply thereto, filed in the Franklin County Clerk's office on May 16, 2011. By Decision and Order dated May 20, 2011 the respondent was directed to serve supplemental answering papers. In response thereto, the Court has received and reviewed the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated July 15, 2011. The Court has received no Reply thereto from petitioner.

An administrative segregation recommendation (7 NYCRR §301.4(a) authored by Senior Investigator Duncan was issued on November 3, 2010. The recommendation reads as follows:

“Inmate Imhotep Hshaka 91A6065 was received by the New York State Department of Correctional Services on August 5, 1991. He is serving a 37 year to life sentence for the crimes of Murder 2nd, Criminal Possession of a Weapon 2nd and Assault 1st.

On April 16, 1989 at the Division For Youth Harlem Valley Secure Facility inmate Hshaka known at the time as Corey Heath assaulted a staff member by kicking and punching him. The injuries to this staff member included a separated shoulder, contusions to the left eye and strained lower back.

On January 14, 1996, at Coxsackie Correctional Facility inmate (Heath) Hshaka while being escorted back to his cell attacked a Correction Officer with a razor blade he received from another inmate. He slashed the officer in the face several times and then attacked two other officers with the razor blade as they responded to the incident. For this incident he was convicted of Assault 1st receiving a sentence of 0-15 years.

On April 12, 1999 while appearing in court a judge ordered his mechanical restraints removed. When the restraints were removed he pushed a lawyer out of the way and attacked his co-defendant punching him in the head several times, he then attempted to run from the court room. A razor blade was also recovered from the floor where the attack took place.

On November 7, 2005 while housed in the Special Housing Unit at Attica Correctional Facility during a cell search one U.S. currency 20 dollar bill was recovered from a law book under the inmate's bed.

Inmate Hshaka has also been identified in the past as a member of an unauthorized organization and continues to be recognized as a major influence in this type of activity.

Since receiving inmate Hshaka in 1991 he has incurred a total of 32 Misbehavior Reports and 17 Unusual Incident Reports. Since the January 1996 staff assault he has received a total 15 tier III Misbehavior Reports, including staff assault, escape attempt, gang activity and drug use.

Inmate Hshaka's past propensity for extreme violence towards staff in a correctional setting has shown that his presence in general confinement of any correctional facility poses an extreme threat and risk to staff and

inmates as well as the safety, security and good order of the facility. As such I recommend placement into Administrative Segregation.”

An administrative segregation hearing (7 NYCRR §301.4(a)) was commenced at the Upstate Correctional Facility commencing on November 10, 2010. At the conclusion of the hearing, on November 30, 2010, a determination was made affirming the administrative segregation recommendation. Upon administrative appeal the administrative segregation determination was affirmed. This proceeding ensued.

“Administrative segregation admission [to an SHU] results from a determination by the facility that the inmates’ presence in general population would poses a threat to the safety and security of the facility.” 7 NYCRR §301.4(b). See *Sutton v. Selsky*, 52 AD3d 1135 and *Dumpson v. Fischer*, 51 AD3d 1161. Petitioner asserts, however, that there is no relevant “general population” of inmates at the Upstate Correctional Facility and that his disciplinary-related SHU confinement at Upstate was scheduled to be completed on November 1, 2010. According to petitioner, a request was submitted in October of 2010 for his transfer into general population at another DOCCS facility. He goes on to assert, by definition in effect, that he could not have posed a threat in “general population” at the Upstate Correctional Facility since he would never have been placed in “general population” at Upstate. Citing *Wright v. Commissioner of Correctional Services*, 63 AD3d 1471 and *Blake v. Selsky*, 10 AD3d 774, petitioner concludes that he should not have been placed in administrative segregation through (SHU) admissions procedures (7 NYCRR §301.4) conducted at the Upstate Correctional Facility.

In *Blake* the Appellate Division, Third Department, citing 7 NYCRR §301.4(b) but utilizing language slightly different from that set forth in the regulation, stated that “[t]he placement of an inmate in a administrative segregation is justified when it is determined that the inmate’s presence in the general population would threaten the safety and

security of the facility where he or she is incarcerated.” 10 AD3d 774 at 775 (emphasis added) (other citation omitted). This quote from *Blake* was repeated by the Third Department in *Wright*. Seizing upon the emphasized language in the above quote, petitioner argues that only the DOCCS facility where safety and security might be threatened by an inmate’s presence in general population is empowered under 7 NYCRR §301.4(b) to initiate and conduct an administrative segregation hearing. Thus, during the course of the administrative segregation hearing, petitioner argued that “[t]he proper remedy for DOC[C]S was to place me on a transfer and allow the facility that I arrived [sic] to either deem me a threat to their facility or not. But you can’t tell me in the facility here that I’m a threat to the general population . . .”

This Court first notes that nothing in *Wright* or *Blake* suggests that the specific issue of whether or not an SHU facility (like Upstate) is empowered by regulation (7 NYCRR §301.4(b)) to initiate/conduct administrative segregation proceedings was before the Appellate Division, Third Department, for consideration. Accordingly, the reference to the “safety and security of the facility where he or she [the inmate] is incarcerated,” enunciated in *Blake* and repeated in *Wright*, does not necessarily warrant the outcome urged by petitioner. For what it is worth, this Court notes that after *Blake* was decided, but before *Wright*, the Third Department declined to disturb the results of administrative segregation proceedings commenced against an inmate while confined in special housing at Upstate. *See Dumpson v. Fischer*, 51 AD3d 1161.¹ As was the case in *Wright* and *Blake*, however, the specific issue of whether or not the administrative segregation proceedings

¹ Although the decision of the Appellate Division, Third Department, in *Dumpson* does not mention the Upstate Correctional Facility, that case was transferred to the Third Department by Order of Transfer of this Court dated July 25, 2007. The Order of Transfer stated, in relevant part, that the petitioner in *Dumpson* was an inmate at the Upstate Correctional Facility who “. . . is challenging the results of an administrative segregation hearing held at the Upstate Correctional Facility. . .” (Franklin County Index No. 2007-0609).

in *Dumpson* were properly initiated/conducted at Upstate does not appear to have been addressed.

Writing, therefore, on a clean slate, this Court rejects the overly-narrow interpretation of the language of 7 NYCRR §301.4(b) urged by petitioner in this proceeding. Deferring to prison authorities, as courts appropriately do on matters of internal security (*see Blake v. Selsky*, 10 AD3d 774), this Court finds that it would border on the absurd to require an SHU facility, such as Upstate, to release into general population at another DOCCS facility an inmate who had been confined in the SHU facility for a period of time and who was perceived by DOCCS officials as posing a threat to the safety and security of the facility to which such inmate would otherwise be transferred.

Petitioner next asserts that the hearing officer presiding at the administrative segregation hearing unlawfully denied his request that testimony be taken from Inmate Tafari. Petitioner had requested the testimony of Inmate Tafari through his inmate assistant (*see* 7 NYCRR §254.5(c)(1)) and the assistant reported back that Inmate Tafari had agreed to testify. When questioned by the hearing officer as to the nature of the evidence petitioner purposed to present through Inmate Tafari, the petitioner responded “[t]hat the Senior Investigator, author of report [administrative segregation recommendation] . . . told inmate Tafari that this recommendation . . . was about retaliation . . . That Senior Investigator . . . told him [Tafari] in a conversation that they had that this recommendation had nothing to do with any threat to security. That it was being done simply to retaliate against me and that [if ?] Tafari keep writing grievances, the same thing would happen to him.” The hearing officer then stated that he would allow Inmate Tafari to testify. Later, however, when Correction Officer Bateman was sent to escort Inmate Tafari to the hearing, the inmate apparently advised C. O. Bateman that he

did not want to testify. The hearing officer stated for the record that he “. . . advised officer Bateman that he [Bateman] needs to go back to the cell to advise Mr. Tafari that he had already [agreed ?] to testify and asked the officer to order Mr. Tafari to come to the hearing so he could be personally interviewed by me on the record as to why he changed his mind and is now refusing to testify.” At that point the following colloquy occurred between the hearing officer (Bullis) and C. O. Bateman:

- Bullis: What specifically did, uh, Mr. Tafari tell you?
- Bateman: Well I told him that he would be written up for disobeying a direct order, that I'd given him a direct order to come out and testify. He said I don't wanna be involved and that he's not coming out.
- Bullis: Other than saying he did not want to be involved, did he give you any other reason why he was changing his mind?
- Bateman: No sir.
- Bullis: Did he appear to you to be under any obvious mental or physical disabilities which would have interfered with him coming to the hearing to testify?
- Bateman: No sir.
- Bullis: Did he indicate to you that he was being influenced by anybody in any way not to come to the hearing to testify?
- Bateman: No sir.”

There was no further mention of the requested testimony of Inmate Tafari until petitioner stated, prior to the close of the administrative segregation hearing, that he “. . . would like to object to my witness refusal, of, of Tafari.” In a written statement issued at the time of disposition, the hearing officer explained the failure to call Inmate Tafari as a witness as follows: “Inmate Tafari refused to testify and refused to be

interviewed personally by this CHO [presumably, Commissioner's Hearing Officer] Bullis so that he could be questioned as to why he changed his mind to not testify, as evidence by the testimony of CO Bateman.”

Citing *Hill v. Selsky*, 19 AD3d 64, petitioner asserts that “[i]nstead of conducting a personal interview of Tafari about his refusal the hearing officer relied solely on the testimony of the correction officer sent to escort him to the hearing.” “When an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate’s unwillingness to testify . . . A witness’s statement that he ‘[did] not want to be involved’ is not a sufficient reason to excuse a personal interview by the hearing officer . . .” *Hill v. Selsky*, 19 AD3d 64, 67 (citations omitted). Therefore, the hearing officer’s personal inquiry as to the reason underlying Inmate Tafari’s refusal was clearly required. It does not appear, moreover, that the hearing officer’s obligation to personally ascertain the reason underlying Inmate Tafari’s refusal to testify was satisfied since Inmate Tafari’s purported unwillingness to discuss the issue with the hearing officer was documented solely through the testimony of C. O. Bateman. Notwithstanding the foregoing, where a petitioner fails to interpose a clear objection to the hearing officer’s failure to conduct a personal inquiry as to the reason underlying a requested inmate witness’s refusal to testify, the issue is not preserved for judicial review. See *Fontaine v. Superintendent of Southport Correctional Facility*, 35 AD3d 1113, *app dis* 8 NY3d 943, *Ryan v. Goord*, 12 AD3d 799 and *Perez v. Goord*, 300 AD2d 956. In this regard the Court finds petitioner’s general objection “to my witness refusal, of, of Tafari” insufficient to constitute a clear objection to the hearing officer’s failure to personally interview Tafari.

Finally, citing *Diaz v. Fischer*, 70 AD3d 1082, petitioner asserts that the hearing officer erred in denying his requests that the DOCCS Commissioner, the Superintendent

of the Upstate Correctional Facility and the DOCCS Inspector General be called to testify in support of his “retaliation defense.”² It is alleged in paragraph 17 of the Petition that “[a]ll three of these requested witnesses had conducted investigations into Petitioner’s claim of retaliation. Furthermore one of said witnesses had interviewed inmate Tafari who had allegedly refused to testify at my hearing . . . They all had access to documents denied to Petitioner during (& prior to) the hearing.”

The case before it is distinguishable from *Diaz v. Fischer*, 70 AD3d 1082, which, as noted above, is relied upon by petitioner. Inmate Diaz was originally found guilty following a Tier III Superintendent’s Hearing of assaulting DOCCS staff. That determination, however, was reversed on administrative appeal and a new hearing ordered. At the new hearing, as well as the original hearing, Diaz asserted that he was actually attacked by DOCCS staff in retaliation for his work with the facility grievance office. At the re-hearing he requested, but was denied, the testimony of an investigator from the DOCCS Inspector General’s office. In finding a deprivation of inmate Diaz’s constitutional right to call witnesses, the Appellate Division, Third Department, made the following findings:

“Petitioner [Diaz] explained to the to the Hearing Officer that the investigator commenced an investigation of the incident shortly after its occurrence and, in addition to questioning those witnesses who testified at the first hearing, was planning to interview inmate witnesses who had refused to testify due to fear of retaliation. However, the Hearing Officer denied the investigator as a witness on the ground that he was ‘not in the

² The Court notes that the term “retaliation defense” is something of a misnomer. The motivation of the author of an administrative segregation recommendation (or inmate misbehavior report) is not directly relevant to the issue of whether or not sufficient evidence has been adduced at a hearing to sustain the administrative segregation recommendation (or the allegation that an inmate rule has been violated). Where, however, specific allegations set forth in an administrative segregation recommendation (or an inmate misbehavior report) are disputed by an inmate through his/her own testimony or the testimony of his/her witness(es), the alleged retaliatory motivation of the author of the recommendation (report) may be relevant as part of a collateral challenge to his/her credibility.

area of the alleged incident'. . . . Inasmuch as [this] witnesses may have provided testimony that was material, [his] absence substantially prejudiced petitioner's ability to present his defense and the Hearing Officer denied [his] testimony for reasons other than institutional safety, we find such denial to be error." *Id* at 1082-1083 (footnote and citations omitted).

Thus, in *Diaz*, there was an on-the-record representation/suggestion that the representative of the Inspector General's office, who was clearly not present at the time of the underlying incident, gained or may have gained through the investigative process information directly relevant to the issue of what transpired at the time inmate Diaz either assaulted, or was assaulted by, DOCS staff.

In the case at bar there is no on-the-record representation or suggestion that the Commissioner, Superintendent or Inspector General had interviewed, or planned to interview, any witness to any of the incidents referenced in the administrative segregation recommendation. The petitioner, moreover, does not allege otherwise. Rather, it is his position that the three requested witnesses were called to testify in support of the "retaliation defense." Petitioner's statements at the hearing with respect to the potential relevancy of the testimony of the three proposed witnesses, however, were, at best, vague/conclusory. According to petitioner's hearing testimony, after receiving the administrative segregation recommendation "... I wrote to the Commissioner and I CC'd a copy of, um, while not CC I sent almost a, a verbatim letter to the Superintendent, I requested that they both investigate the matter of me being placed in Administrative Segregation because I felt that said recommendation was retaliatory. I asked them to investigate it and I provided a list of witnesses that I specifically wanted them to investigate. So I would like to call the Commissioner and the Superintendent to testify as to the results of their investigations." Petitioner also stated to the hearing officer that he wrote the "same letter" to the DOCCS Inspector General. Contrary to the previously-

quoted allegations set forth in paragraph 17 of the petition, there was no testimony at the administrative segregation hearing that any of petitioner's proposed witnesses had actually undertaken an investigation, much less that any particular individual had been interviewed as part of such investigation.

The fact that none of petitioner's proposed witnesses was present at the time and place of any of the incidents referenced in the administrative segregation recommendation even coupled with petitioner's failure to demonstrate that any of such proposed witnesses had gained, or may have gained, information with respect to these incidents through the investigative process, is not necessarily fatal to petitioner's claim of a violation of his limited constitutional due process and regulatory rights to call witnesses on his behalf. Even a potential witness with no knowledge of the incidents referenced in an administrative segregation recommendation may be properly called to provide testimony relevant to an inmate's retaliation claim. *See Adams v. Coughlin*, 202 AD2d 1055, and *Wilson v. Coughlin*, 186 AD2d 1090. Although it is clear that petitioner sought the testimonies of the Commissioner, Superintendent and Inspector General in support of his retaliation claim, petitioner never specified for the record the alleged basis of such claim³ and thus never developed any link between the retaliation claim and the author of the administrative segregation recommendation. *See Dawes v. Selsky*, 251 AD2d 912. In this regard the Court notes that the administrative segregation recommendation includes specific allegations of assaultive behavior dating back to 1989 at a Division for Youth Facility, as well as general allegations of unauthorized organizational activity and inmate

³ The only potential retaliatory motivation referenced by petitioner during the course of the administrative segregation hearing came during his cross examination of the author of the Administrative Segregation Recommendation. At that time the petitioner, in bizarre fashion, requested that the hearing officer ask the author of the recommendation “. . . did he ever tell an inmate that he was gonna administratively segregate me in retaliation for the, uh, assaults on guards. Not, not any thing to do with the safety of the facility.” Petitioner did not explain how assaults on guards are not related to facility safety.

misbehavior reports. There is nothing in the record to connect the author of the administrative segregation recommendation with any of the incidents referenced in the recommendation.

In any event, this Court finds that a hearing officer presiding at an administrative segregation hearing may, in the exercise of his or her discretion, limit the magnitude of evidence submitted in connection with a retaliation claim in order to avoid an extended collateral hearing within the hearing being conducted. In the case at bar the hearing officer afforded petitioner an opportunity to develop a retaliation claim by permitting him to cross-examine the author of the administrative segregation recommendation with respect to his alleged retaliatory motivation. *See Shapard v. Coombe*, 234 AD2d 744. In view of the foregoing, this Court finds that the hearing officer did not err in denying petitioner's request to call the Commissioner, Superintendent and Inspector General to provide unspecified testimony with respect to petitioner's retaliation claim at the administrative segregation hearing.

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

ADJUDGED, that the petition is dismissed.

Dated: November 9, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice