

**Matter of Cumba v Fischer**

2012 NY Slip Op 31859(U)

May 22, 2012

Sup Ct, Franklin County

Docket Number: 2011-1189

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  
**JULIO C. CUMBA, #03-B-2175,**  
Petitioner,

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

**DECISION AND JUDGMENT**  
**RJI #16-1-2011-0526.99**  
**INDEX # 2011-1189**  
**ORI #NY016015J**

-against-

**BRIAN FISCHER,** Commissioner,  
NYS Department of Corrections and  
Community Supervision,

Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Julio C. Cumba, verified on November 29, 2011 and filed in the Franklin County Clerk's office on December 7, 2011. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Bare Hill Correctional Facility and concluded on June 13, 2011. The Court issued an Order to Show Cause on December 13, 2011 and has received and reviewed respondent's Answer, verified on January 31, 2012 and supported by the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated January 31, 2012. The Court has received no Reply thereto from petitioner.

As the result of an incident that occurred at the Bare Hill Correctional Facility on June 3, 2011 petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 105.13 (possession of gang-related material). The inmate misbehavior report, authored by Correction Sergeant Demmon alleged, in relevant part, as follows: ". . .a pat frisk was conducted on you inmate Cumba . . .by officer R. Gray, I Sgt. Demmon was present during this. During the pat frisk Officer Gray found in your

I.D. Card holder a folded up piece of paper. Officer Gray opened the paper and discovered that it contained possible gang related material. Officer Gray turned the paper over to me for review. The paper had a drawing of 3 clown faces, one was smiling slightly, one was crying and one had a large smile. The face in the middle was wearing a five point crown and had a \$ in one eye. I have confirmed that all of these noted details of the drawing are associated with the gang 'Latin Kings.'"

A Tier III Superintendent's Hearing was conducted at the Bare Hill Correctional Facility commencing on June 7, 2011. At the conclusion of the hearing, on June 13, 2011, petitioner was found guilty as charged and a disposition was imposed confining him to the special housing unit for 6 months (deferred for 6 months with 3 months suspended), directing the loss of various privileges for a like period of time and recommending the loss of 3 months good time. Upon administrative appeal the dispositional penalties were modified to 3 months confinement in the special housing unit, the loss of various privileges for a like period of time and the recommended loss of 3 months good time. This proceeding ensued.

Petitioner first asserts that the inmate misbehavior report failed to comply with the provisions of 7 NYCRR §251.3.1(b) since C.O. Gray did not make a separate report or endorse his name on the report authored by Sergeant Demmon. 7 NYCRR §251-3.1(b) provides as follows: "The misbehavior report shall be made by the employee who has observed the incident or who has ascertained the facts of the incident. Where more than one employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees." Notwithstanding the foregoing, the Court finds that C.O. Gray's failure to endorse his name on the inmate misbehavior report authored by Sergeant Demmon (or make his own report) does not, under the facts and circumstances herein,

constitute a fatal defect since petitioner failed to demonstrate any resultant prejudice. In this regard it is noted that C.O. Gray was present during the incident in question and his name appeared in the inmate misbehavior report authored by Sergeant Demmon. Petitioner thus had the opportunity to call C.O. Gray as a witness. *See Parks v. Smith*, 49 AD3d 1123, *Winbush v. Goord*, 6 AD3d 821 and *Crawford v. Girdich*, 301 AD2d 921. Although the hearing officer presiding at the Tier III Superintendent's Hearing concluded on June 13, 2011 ultimately denied petitioner's request that C.O. Gray be called to testify, such denial does not affect this Court's finding that petitioner was not prejudiced by C.O. Gray's failure to endorse Sergeant Demmon's misbehavior report or make his own misbehavior report. The key point is that petitioner was aware, at all relevant times, of C.O. Gray's identity as well as C.O. Gray's role in the incident underlying the issuance of the inmate misbehavior report authored by Sergeant Demmon.

The only other claim advanced by petitioner is that his constitutional right to call witnesses was violated when the hearing officer denied the request that C.O. Gray testify at the Tier III Superintendent's Hearing concluded on June 13, 2011. 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 566 and 7 NYCRR §254.5(a).

Petitioner requested the testimony of only two witnesses: Sergeant Demmon and C.O. Gray. After stating her intention to receive testimony from Sergeant Demmon, the hearing officer asked petitioner to provide clarification as to the relevance of potential testimony from C.O. Gray. The respondent replied that it was C.O. Gray who discovered the paper with the alleged gang-related drawing. The hearing officer then asked petitioner what questions he intended to pose to C.O. Gray and the following colloquy occurred:

“I/M [Inmate]: My question would be how he [presumably, C.O. Gray] . . .could determine what, what was in this paper. And what reason was there for him to even frisk me in the first place.

HO [Hearing Officer]: Well, I believe that those two things we could answer with the Sgt. [Demmon] . . . [I]f those are two questions you have for the officer [Gray] uh, the Sgt. [s]hould be familiar with why you were pulled over because he was right there and why you were pat frisked and also why the officer passed that document to him . . .as the area supervisor. So I think we can handle that without having testimony without having Officer Gray . . . So at this point um, I am going to deny uh testimony of Officer Gray because I feel as though that from what you are asking so far um, Sgt. Demmon’s going to adequately be able to handle the questions that you have because he was there at the time.”

Sergeant Demmon then testified. During the course of his testimony the Sergeant stated that the frisk of petitioner in front of the facility mess hall was random in nature and that random pat frisks “happen frequently” when inmates enter or exit the mess hall. Sergeant Demmon also testified that C.O. Gray was not trained in gang identification but that he (Sergeant Demmon) “. . .had that gang training approximately three months ago, so when gang paraphernalia is found it [is] turned over [to] a staff member that has been trained in gangs . . .” After Sergeant Demmon completed his testimony the hearing officer, referring back to the two questions petitioner proposed to ask C.O. Gray, stated as follows: “I think that it was clarified through Stg. [sic] Demmon that the officer [Gray] found the paper and immediately . . .turned it over to the Sgt. [f]or the Sgt. [t]o assess the value of the material and what it was. And um, why you were pat frisked was answered by the Sgt. [s]o there, there’s uh, I’m going to deny the witnesses [sic] cause there is no more relevant testimony. Do you have any further questions for Officer Gray?” The petitioner responded in the negative and the following colloquy took place:

- “HO: Okay. Um, so I am gonna go over this ticket again. So in in just kinda as a quick review and uh, during the above date and time the pat frisk was conducted um, I am seeing here that uh, Officer Gray started the pat frisk, he did find the drawing on your person, and on which you have admitted that the drawing was yours. Do you not?”
- I/M: Ya.
- HO: Okay, you admitted the drawing was yours, um it was found on your person. They [presumably, then], it was turned over by Officer Gray to review, for review, by the Sgt... [D]o you have anything else you would like to have me consider before I make my decision?
- I/M: Ya, you know like I said before maam, you know I’m not here to drag you on and all that, make anything worse that [sic] what it is and all that. You know I am just here to get this over and done with and move on with my life . . .
- HO: Okay, so you do not have anything further, no additional witnesses, nothing
- I/M: No, maam.”

The hearing was then briefly adjourned and , upon reconvening, the determination at issue herein was rendered. The Hearing Officer also issued a written statement explaining why petitioner’s request to call C.O. Gray as a witness was denied. That statement read as follows: “Inmate wanted to ask the same two questions to of C.O. R. Gray that he asked Sgt. Demmon during the hearing #1 - How could C.O. Gray not determine that the picture was gang related? #2 - Why was he (inmate Cumba-03-B-2175) pat frisked? Sgt. Demmon provided adequate testimony and answered both questions during the hearing. Inmate Cumba had no further questions of C.O. R. Gray.”

For the reasons set forth below the Court concludes that petitioner's constitutional/regulatory right to call witnesses on his behalf was not violated when the Hearing Officer denied his request that C.O. Gray testify at the Tier III Superintendent's Hearing concluded on June 13, 2011. A determination with respect to the relevancy of the testimony of a potential witness cannot be rendered in a vacuum. Rather, the relevancy of the potential testimony must be examined against the backdrop of the contested issue(s) at play in the underlying hearing. In the case at bar the inmate misbehavior report authored by Sergeant Demmon alleged that a piece of paper, subsequently determined to depict gang-related symbols, was found on petitioner's person by C.O. Gray during the course of a pat frisk. It was further alleged in the inmate misbehavior report that Sergeant Demmon was present during the pat frisk and that C.O. Gray turned the paper over to the Sergeant for review. Petitioner, for his part, provided no testimony contradicting these allegations and admitted that the paper in question was found on his person and belonged to him. Against this backdrop the issues of why petitioner was subject to C.O. Gray's pat frisk and why C.O. Gray turned the recovered paper over to Sergeant Demmon are of no relevancy to the ultimate determination of whether or not petitioner violated inmate rule 105.13.

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:** May 22, 2012 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice