

Matter of Turner v Schriro

2012 NY Slip Op 32822(U)

November 19, 2012

Supreme Court, New York County

Docket Number: 401378/12

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SCHLESINGER ALICE SCHLESINGER
Justice

PART IA PART 16

TURNER, ALLEN

INDEX NO. 401378/12

MOTION DATE _____

-v-
DR. DORA B. SCHRIER,
ETAL.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Article 78 proceeding
is granted to the extent provided in
the accompanying memorandum
decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

NOV 19 2012

Dated: November 19, 2012

Alice Schlesinger

ALICE SCHLESINGER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application

ALLEN TURNER, B&C no. 349-11-15032

Petitioner,

Index No. 401378/12
Motion Seq. No.001

-against-

DR. DORA B. SCHRIRO, Commissioner of the
NYC Department of Correction; and ARTEMIO
COLON, Warden, Manhattan Detention Center,

Respondents.

-----X
SCHLESINGER, J.:

Petitioner Allen Turner, an incarcerated person representing himself, commenced this Article 78 proceeding to annul the decision by respondent Department of Correction placing him on Central Monitoring Cases (CMC) status and to expunge any CMC designation from his records. The Department has opposed the petition, asserting that the CMC designation was properly assigned to Turner and that the Department correctly denied Turner's challenge to his CMC status.

Background Facts

According to the papers filed by the parties, petitioner Allen Turner was first taken into custody on September 14, 2011 under indictment number 04495/2011 for kidnaping in the second degree. He was not placed on CMC status until on or about April 2, 2012, nearly seven months after his arrest. The Department's CMC Information Sheet, dated July 5, 2012 (Exhibit A to Answer), states that Turner was given CMC status because he was determined to be an "escape risk." The precise reason stated for the CMC designation is:

SUBJECT IMPERSONATED A YONKERS RACEWAY POLICE OFFICER & WAS FOUND IN POSSESSION OF A SERGEANTS SHIELD. IN ADDITION, HE WAS FOUND IN POSSESSION OF A FORGED NYC CORRECTION PARKING PERMIT.

The July 5 Information Sheet further appears to indicate that Turner shall be transferred to CMC housing with security to include "waist chains to be worn when outside the facility," along with leg irons, and that transport be "by emergency service unit only." The bottom of the form bears the following note:

DUE PROCESS SAFEGUARDS AND HEARINGS ARE REQUIRED IF THIS PLACEMENT IS INVOLUNTARY/SECURITY REASONS.

In his petition, sworn to on May 5, 2012 before the July 5, 2012 Information Sheet was prepared, Turner indicates that he objected to the CMC designation when he was told of it in April by contacting the Deputy of Security of the Manhattan Detention Center where he was being held and also to the Warden there, Artemio Colon. Turner asserts in his petition (at ¶3) that he was told that the CMC designation was made because a Yonkers Raceway Police Badge and a Riker's Island parking permit had been found on him when he was arrested. Turner apparently attempted to explain that, in fact, those items had been found on another individual charged the day before Turner was arrested, and not on Turner.

Not having received a response to his initial challenge, Turner appealed to Department Commissioner Schriro. As far as he knew when the petition was filed, the Department's sole response was to advise Turner that the matter would be investigated (¶7). Turner further states in his petition that he never received a hearing about the CMC designation, and he implies that he never received a substantive response to his appeal, though that point is unclear. Lastly, in his petition, sworn to on May 5, 2012,

Turner states (at ¶ 9) that he "will be re-arrested on May 10th, 2012, for lesser included charges and current indictment will be dismissed."

Although the Department does provide as Exhibit B a copy of its eight-page directive regarding CMC designations, its papers are not particularly satisfactory because counsel does little to clarify precisely what happened and when. For example, while admitting that Turner was placed on CMC status on April 2, 2012, the only confirmation it provides is the July 5, 2012 Information Sheet prepared months after Turner commenced this proceeding. (Answer, Exh A). No explanation is offered as to what occurred between the September 2011 arrest and the April 2012 CMC designation to prompt the designation, nor why an Information Sheet was prepared that post-dates the designation by three months.

Also unclear is the procedure followed by the Department to address Turner's April 2012 challenge to the determination. The Department has attached to its Answer two documents referencing Turner's challenge, but they are offered out of chronological order and their status as a final determination is unclear. The first document is a letter dated April 25, 2012, from the Executive Director of Constituent Services and External Affairs that contains no substantive information. (Answer, Exh C). Presumably that is the letter that Turner received because it merely states that the Department will investigate the matter, which is how Turner described the Department's response in his petition.

The next document provided with the Department's Answer (Exh D) is a letter dated April 19, 2012, which pre-dates the prior exhibit by six days. The letter is from Captain Bowden, O.S.I.U., the individual who signed the July 5, 2012 CMC Information Sheet discussed above. In his letter, the Captain indicates that Turner's CMC status will

be retained for the following reason, which is based solely on a review of charges that make no mention of a Yonkers Raceway badge or a Riker's Island parking permit:

A review of the evidentiary fact utilized to initiate the placement included Arrest Report: M11678729-Z, which is assigned to your NYSID number, 0820921J. The charges entered on the document include criminal impersonation of a Police/Federal Officer. The accusatory instrument also details that you, Allen Turner, stated that you were a police officer, displayed a shield, radio and handcuffs and had a handgun in your waist.

It is unclear whether Turner ever received this April 19 document, as he at no point refers to it in any of his papers, which are fairly detailed. However, in his reply papers he nevertheless attempts to provide further support for his position that the CMC designation is erroneous. The first document, dated September 14, 2011 and entitled "Arrestment and Designation Risk Screening Form," was completed a few days after his arrest. As Turner correctly indicates, the form makes no mention of him as an escape risk, nor includes any mention of a CMC designation. (Exh A). Nor does it list any property purportedly found on his person at the time of the arrest.

Attached as part of Exhibit B is a Notice of Right to Due Process Hearing, dated April 3, 2012 and issued apparently at or about the time when the CMC designation was first made. That document indicates that the designation was made based on Turner's possession of a Yonkers Raceway Sergeant's Shield and a NYC Correction Parking Permit. Significantly, the Notice indicates that Turner will be placed in "non-Routine Security Restraints" and it states at the bottom that: "If you disagree with this placement you are entitled to a hearing before an Impartial Hearing Officer from the Adjudication Unit within three (3) business days from the time after you receive this notice." Turner has also provided a CMC Information Sheet dated April 3, 2012, that

describes him as an "Escape Risk" and is otherwise similar to the July 5 Information Sheet relied upon by the Department with its Answer.

Equally significant is a document included by Turner as part of Exhibit B to his reply papers. This document, also dated April 3, 2012 and entitled "Protective Custody/General Population Escort Determination Form," suggests that Turner is *not* an escape risk and that instead he was concerned for his own safety. It states as follows:

OBCC processed inmate Turner into Protective Custody based on concerns for this safety, and his written request. The IIS indicates inmate Turner has been in DOC custody since September 14, 2011 without incident, has a designation score of 7, and 8 prior incarceration. Although inmate Turner has concerns for his safety, there is no evidence that would substantiate that inmate Turner's safety is at risk. At this time inmate Turner has not forwarded any evidences that would warrant retaining him in PC [Protective Custody] housing. Based on the information provided inmate Turner shall be relegated to General Population @ MDC.

Also with his reply (Exh C), Turner has provided an arrest report for another individual Shaquan Taylor, who was arrested on September 7, 2011, four days before Turner. Turner says that he is "not affiliated with" Taylor, and that Taylor, and not he, was the one arrested with the Yonker's Raceway Sergeant's shield and Riker's Island parking permit in his possession. The documentation provided does, in fact, confirm that those were the charges against Taylor.

Lastly, Turner has provided as Exhibit D the charges against him for kidnaping, robbery, coercion and criminal impersonation. While the document does indicate that Turner was charged with impersonating a police officer, it says nothing about possession of a shield from a Sergeant at Yonkers Raceway or possession of a Riker's

Island parking permit. Although not explicit, Turner appears to be suggesting that, because of the impersonation charge common to the two inmates, the Department somehow confused the details relating to each inmate and mistakenly attributed to petitioner Turner the possession of the Yonker's Raceway Sergeant's shield and the Riker's Island parking permit which were found on Taylor's person, and not his. Thus, the basis for the CMC designation was factually incorrect, he claims. He further asserts that he was entitled to a due process hearing in connection with his CMC designation.

Discussion

As explained by the Department in its answer, the CMC status system was first implemented in 1981 to monitor the status of certain inmates with respect to their housing, transport and case status. The Department maintains that the designation is "not punitive and, indeed, in no way affects the inmate's conditions of confinement." (Answer, ¶15). Therefore, notwithstanding the suggestion on the form notice that the Department gives to an inmate¹, a CMC designation "does not entitle an inmate to a due process hearing, because it does not significantly restrict his liberty beyond the fact of his confinement and it does not depreciate the inmate's rights or privileges within the correctional setting." (¶8).

Counsel goes on to note that the CMC designation does not automatically subject an inmate to enhanced security measures, such as waist chains and/or leg irons. However, it is undisputed that Mr. Turner has been subjected to enhanced

¹ See Notice of Right to Due Process Hearing, Exhibit B to Turner's Reply, discussed above. Because Turner did not attach the Notice to his Petition, the Department does not directly address it in its Answer. However, the July 5 Information Sheet attached to the Department's Answer bears a similar note at the bottom advising the inmate of the right to a due process hearing, which counsel suggests is wrong.

security measures. Counsel seeks to justify those measures, explaining that the Department's Operation Security Intelligence Unit (OSIU) determined that Mr. Turner was an escape risk because he was "found in possession of the Department's Riker's Island parking permit." (¶19). Based on the "escape risk" finding, OSIU determined that enhanced security in the form of leg irons, a waist chain, and a "black box" securing Turner's handcuffs was needed for transport outside the facility. However, Mr. Turner was not placed in restrictive housing, nor was his participation in activities limited, counsel maintains, even though the July 5 Information Sheet provided with the Department's Answer here indicates that Turner will be placed in "CMC" housing, and not with the "general population."

Citing *Turner v Safley*, 492 US 78, 89 (1987), the Department insists that the requirement of transport with leg irons and chains "does not entitle the inmate to a Due Process hearing" (¶26). There the Supreme Court acknowledged the power of the Department to impose regulations that impinge on an inmate's constitutional rights so long as the regulations are reasonably related to a legitimate penological interest. The regulations at issue in *Turner*, which were upheld, governed inmate-to-inmate correspondence. The Department maintains that the secure transport is reasonable in light of the finding that Mr. Turner is an escape risk, but it cites no case directly addressing that issue or the subject of restraints pursuant to a CMC designation as it relates to an inmate's due process rights.

Those brief statements constitute the sum and substance of the Department's papers. As noted earlier, no statement is provided explaining how, when or where the Riker's Island parking permit was allegedly found to be in Mr. Turner's possession and

by whom. Nor is an explanation offered regarding the delay in the CMC designation from the September 2011 arrest date until April 2012, and how the April 2012 Information Sheet compares to the July 2012 Information Sheet prepared after this proceeding was commenced. In addition, counsel makes no attempt whatsoever to explain why the April 19, 2012 letter determining Turner's appeal makes no mention of a Riker's Island parking permit as a grounds for the CMC designation, when counsel maintains that the permit was the primary basis for the "escape risk" finding and the CMC designation.

What is more, counsel's statements appear to be at odds with the Directive attached as Exhibit B to the Answer. For example, the Department's counsel insists that Mr. Turner is not entitled to a due process hearing in connection with his CMC designation. However, Section IIB of the Directive appears to state the opposite. While noting that not every inmate with a CMC designation is entitled to a hearing, the Directive then states that non-routine security restraints *do* impact due process:

However, as a separate decision, if the facility determines that any of the following actions are to occur in the ... treatment of a C.M.C. inmate, that inmate should have, in addition to the processes required by this Directive, a due process hearing as required by (the forthcoming) Directive #4914. ...

Placement of non-routine security restraints during transportation (i.e., leg irons, waist chains, movement by special security van, etc.).

The Directive further provides in Section IV,A2 that the CMC status "shall be based upon documented facts developed from a review of records ..." However, in Turner's case, it is unclear whether the Department is relying on documented facts, or

It is further unclear whether the Department complied with all the requisite procedures. In addition to the issue of the due process hearing raised above, a question exists whether the Department has complied with Section IVD of the Directive, entitled "NOTIFICATION OF C.M.C. DETERMINATION TO INMATE." That section requires that an inmate be given written notice of the CMC designation within seventy-two (72) hours. A supervisory officer is required to obtain the inmate's signature on the notice as evidence of service, and the notice is to be maintained in the inmate's file. The Department has only provided a July 5, 2012 Information Sheet, which post-dates the designation by three months. While Turner has provided an April 2012 Information Sheet with his Reply, it is unclear whether that document complies with the Directive. Further, it bears the follow note that describes a wholly different procedure:

YOUR CASE WILL BE REVIEWED NO LATER THAN 4 WEEKS FOR DETENTION INMATES OR 8 WEEKS FOR SENTENCED INMATE FROM THE DATE OF THIS DETERMINATION. AT THIS TIME YOU WILL RECEIVE A WRITTEN NOTIFICATION OF THAT DETERMINATION.

In sum, this Court cannot determine based on the sparse papers provided by the Department whether the Department did, in fact, comply with all governing procedures when it issued Turner's CMC designation. What is more, the basis for the designation is stated differently in different documents and may not be based on documented facts. Further, the Department's response to Turner's appeal failed to include detailed information to permit reasonable judicial review. Additionally, the Directive does contain language that tends to support Turner's claim that he was entitled to a due process hearing in connection with the CMC designation. Further, the documentation provided by Turner does tend to support his theory that the Department confused him with another inmate, Taylor.

Therefore, this Court is remanding this matter to the Department of Correction for a fuller investigation and a prompt new determination of Turner's status. Should a hearing not be held, the determination shall explain why a hearing is not required, in light of the suggestion in the Directive that a hearing be held. Further, the various discrepancies raised in this decision, including the issuance of the July 5, 2012 Information Sheet prepared after this proceeding was commenced, shall be addressed in full, and the Department shall take care to render a determination that is based on documented facts. The Department shall also review its documentation regarding Shaquan Taylor and conduct an investigation to discern whether the Department did, as Turner alleges, somehow attribute to Turner information that relates to Taylor. What is more, any new information discovered, such as the potential dismissal of the indictment anticipated by Turner, shall also be discussed as part of the determination.

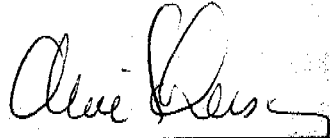
However, in light of the seriousness of the matter and the lack of clarity in the papers, this Court declines to vacate the CMC designation at this time. If Mr. Turner is not satisfied with the new determination issued after the fuller investigation ordered by this Court, then he may restore this proceeding to this Court's calendar for further relief by filing a new Order to Show Cause.

Accordingly, it is hereby

ORDERED AND ADJUDGED that this Article 78 proceeding is granted to the extent of remanding this matter for a fuller investigation of petitioner's circumstances and a new determination of his CMC status within sixty (60) days of the date of this decision.

Dated: November 19, 2012

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ALICE SCHLESINGER