

Matter of Boston v Fischer

2013 NY Slip Op 31887(U)

August 1, 2013

Supreme Court, Franklin County

Docket Number: 2013-199

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
TERRENCE BOSTON, #12-A-3668,
Petitioner,

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

-against-

BRIAN FISCHER, Commissioner,
NYS Department of Corrections and
Community Supervision,
Respondent.

DECISION AND JUDGMENT
RJI #16-1-2013-0092.29
INDEX # 2013-199
ORI #NY016015J

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The Court has before it the Amended Petition for judgment pursuant to Article 78 of the CPLR of Terrence Boston, verified on March 13, 2013 and received directly in chambers on March 15, 2013. Petitioner, who is now an inmate at the Greene Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Great Meadow Correctional Facility on November 28, 2012. The Court issued an Order to Show Cause on March 18, 2013 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on May 7, 2013 and supported by the May 7, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. No Reply thereto has been received from petitioner.

As the result of an incident that occurred at the Mt. McGregor Correctional Facility on November 20, 2012 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (Direct Order), 104.11 (Violent Conduct) and 102.10 (Threats). The misbehavior report, authored by C.O. Johnson, alleged, in relevant part, as follows:

“On 11/20/12 . . . I returned to Mt. McGregor C.F. from escorting inmate Boston . . . from his court trip. While standing behind Boston, in the D Basement frisk area, I ordered him to turn right so I could remove his restraints. Boston was handcuffed in the front. I ordered Boston to place his right hand in his right front pocket once I removed his handcuff. As I removed his handcuff from his right hand, Boston spun all the way around to his right with his right uncuffed hand clenched in a fist held head high. Boston’s actions were both threatening and violent and force became necessary.”

A Tier III Superintendent’s Hearing was conducted at the Great Meadow Correctional Facility on November 28, 2012. At the conclusion of the hearing petitioner was found guilty of all three charges and a disposition was imposed confining him in the special housing unit for 4 months, directing the loss of various privileges for a like period of time and recommending the loss of 2 months of good time. Upon administrative appeal the results and disposition of the Tier III Superintendent’s Hearing of November 28, 2012 were affirmed. This proceeding ensued.

During the course of the Tier III Superintendent’s Hearing of November 28, 2012 petitioner took the position that the events described in the inmate misbehavior report simple never occurred. Petitioner testified that on the date in question he had been transported from the Mt. McGregor Correctional Facility to the Schenectady County Courthouse for an appearance. According to the petitioner’s testimony, the author of the inmate misbehavior report became agitated and verbally abusive/threatening when petitioner requested to be taken to a bathroom at the courthouse. Petitioner went on to testify that upon returning to Mt. McGregor, while still in full restraints, the author of the inmate misbehavior report “ . . . came over to me, punched me in my mouth . . . grabbed me pushed my head into the back of the wall and he said ‘You pussy, you gotta use the bathroom now huh pussy . . .’” Petitioner went on to testify that when his restraints,

including handcuffs, were eventually removed no incident such as that described in the inmate misbehavior report occurred.

In this proceeding petitioner first argues that he was unlawfully denied adequate employee assistance. In this regard the following is alleged in paragraph 16 of the Amended Petition: “On or about November 24, 2012, a GMCF [Great Meadow Correctional Facility] assigned Employee Inmate Assistant visited petitioner, stated he had no documents, no idea about the charges, never seen IMR [Inmate Misbehavior Report], could not render any assistance, then directed petitioner to sign off on further need of assistance. The Petitioner complied with order given.” A review of the transcript of the underlying hearing reveals after petitioner advised the hearing officer that the assistance had been inadequate the following colloquy occurred:

“DSA Steinbach [Hearing Officer]:	Ok. What was it that you were looking for? Anything in particular?
Inmate Boston:	UI [presumably, Unusual Incident report].
DSA Steinbach:	The UI form? Ok. We’ll be reading [it] in front of you . . .”

The Unusual Incident report was then read into the record and petitioner interposed no further objection with respect to the adequacy of his assistance. It is also noted that prior to the conclusion of the hearing the hearing officer asked petitioner if he had any procedural objections with respect to the matter in which the hearing had been conducted. Petitioner responded “[n]ope.”

7 NYCRR §251-4.2 provides, in relevant part, that “the assistant’s role is to speak with the inmate charged, to explain the charges to the inmate, interview witnesses and to report the results of his efforts to the inmate. He may assist the inmate in obtaining

documentary evidence or written statements which may be necessary.” In order to prevail on a claim of inadequate employee assistants, an inmate petitioner must establish that prejudice resulted from the assistant’s failure to comply with applicable regulations. *See Serrano v. Coughlin*, 152 AD2d 790. Any potential prejudice, moreover, can be alleviated by corrective action taken by the hearing officer. *See Jackson v. Fischer*, 87 AD3d 775, *Harris v. Selsky*, 28 AD3d 982 and *Blackwell v. Goord*, 5 AD3d 883, *lv den* 2 NY3d 708. In the case at bar, where petitioner’s only articulated claim of inadequate employee assistance related to the failure of the assistant to provide a copy of the Unusual Incident report, any potential prejudice to petitioner was alleviated when the hearing officer read the report into the record without further objection.

Petitioner also argues that the underlying hearing was not timely commenced pursuant to 7 NYCRR §251-5.1(a). Under the relevant provisions of that regulation, “[w]here an inmate is confined pending a . . . superintendent’s hearing, the hearing must be commenced as soon as is reasonably practicable following the inmate’s initial confinement . . . but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee.” Since petitioner was initially confined on November 20, 2012 the hearing would have been required to be commenced on or before November 27, 2012 in the absence of an authorized extension. A review of the record herein reveals that an extension was timely granted to commence petitioner’s Tier III Superintendent’s Hearing on or before November 28, 2012. In any event, the 7-day time limit in question is directory, not mandatory, and petitioner does not allege any prejudice suffered even if there was a one-day delay. *See Freeman v. Leclair*, 50 AD3d 1329, *lv denied* 11 NY3d 705.

Finally, to the extent petitioner also argues that the inmate misbehavior report provided insufficient notice with respect to the underlying charges, the Court finds that

petitioner failed to interpose an objection during the course of the hearing and failed to raise the sufficiency of notice issue on administrative appeal. Accordingly, such issue is not preserved for review in this proceeding. *See Correnti v. Prack*, 93 AD3d 970 and *Colon v. Fischer*, 83 AD3d 1500.

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: August 1, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice