Matter of Joseph v LaClair
2013 NY Slip Op 32275(U)
September 23, 2013
Supreme Court, Franklin County
Docket Number: 2013-448
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
NIGEL JOSEPH, #97-A-3826,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2013-0221.60
INDEX # 2013-448
ORI #NY016015J

-against-

DARWIN LACLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Nigel Joseph, dated April 30, 2013 and filed in the Franklin County Clerk's office on May 21, 2013. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Franklin Correctional Facility and concluded on February 26, 2013. The Court issued an Order to Show Cause on May 29, 2013 and has received and reviewed respondent's Answer and Return, verified on July 19, 2013 and supported by the Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, dated July 19, 2013. The Court has also received and reviewed petitioner's Reply thereto, dated July 24, 2013 and received directly in chambers on July 31, 2013.

As the result of an incident that occurred at the Franklin Correctional Facility on February 14, 2013 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 107.11 (inmate shall not harass an employee with obscene language), 104.13 (creating a disturbance), 107.10 (inmate shall not interfere with an employee) and 106.10 (direct order). The inmate misbehavior report, authored by C.O.

Dvornski, alleged, in relevant part, as follows: " . . . I . . . instructed Inmate Joseph, Nigel . . . to have a seat and I would answer his question after I was done answering the inmates ahead of him. Inmate Joseph who was approximately 2 feet in front of me then stated 'this guy's a fucking idiot.' Inmate Joseph stating this caused the 22 inmates I had in the law library at the time to stop what they were doing and focus their attention on Inmate Joseph. Inmate Joseph's disturbance interfered with me performing the law library duties at the time due to the fact I had to stop what I was doing and deal with him. Inmate Joseph was then given a direct order to have a seat on the bench in which he refused." A Tier II Disciplinary Hearing was held at the Franklin Correctional Facility commencing on February 18, 2013. At the conclusion of the hearing, on February 26, 2013, petitioner was found guilty of all four charges and a disposition was imposed confining him to keeplock status for a period of 30 days (suspended and deferred) and denying him various privileges for a period of 30 days. Upon administrative appeal the results and disposition of the disciplinary hearing were affirmed. This proceeding ensued.

The only argument advanced by petitioner is that his constitutional/regulatory right to call witnesses was violated when the hearing officer failed to call certain DOCCS staff members whose testimony had been requested by petitioner.

Petitioner's defense at the underlying disciplinary hearing was two-pronged. He first maintained that the February 14, 2013 incident simply did not occur in anything resembling the manner described in the inmate misbehavior report. Petitioner also maintained that the misbehavior report was written by C.O. Dvornski as part of a pattern of harassment against him (and other inmates) and/or in retaliation for the filing of complaints with regard to such harassment.

At the outset of the hearing, after he requested testimony from two potential inmate witnesses, the petitioner made the following statement: " . . . I'd like to call the Sgt.

Dumas or Shorette or the Captain because this, ya know, I complain I complain about this this situation . . ." Although some general discussion of petitioner's claim of harassment/retaliation ensued, the Hearing Officer made no ruling with respect to the relevancy of the staff witnesses requested by petitioner nor did the hearing officer ever state an intent to call such witnesses. Indeed, the subject of the potential DOCCS staff witnesses requested by petitioner was not directly brought up again during the course of the hearing.

After taking testimony from one of petitioner's inmate witnesses (the other refused) as well as testimony of the author of the inmate misbehavior report, there was an extended discussion with respect to the difference between C.O. Dvornski's and petitioner's versions of the February 14, 2013 incident. When that discussion seemingly concluded the following colloquy occurred:

"Hearing Officer:	Do you wanna call any other witnesses?
Inmate Joseph:	No sir.
Hearing Officer:	Do you have any further testimony?
Inmate Joseph:	No sir.
Hearing Officer:	Do you have any procedural objections?
Inmate Joseph:	None that none that none that I could um think about but I would like to object to the entire proceeding because, ya know, I said, ya know I don't think that this is fair, ya know."

After a brief renewal of the discussion with regard to petitioner's version of the underlying incident, the hearing officer asked petitioner if he had any further testimony and petitioner responded in the negative. The hearing officer then asked "[d]o you wanna call

any witnesses? Any more witnesses?" Petitioner responded "[n]o sir." The hearing was then closed and the disposition rendered.

An inmate at a Tier II Disciplinary Hearing is entitled by regulation to " . . . call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals." 7 NYCRR §253.5(a). Petitioner clearly requested that testimony be received from Sgt. Dumas or Sgt. Shorette or an unnamed captain. *See* 7 NYCRR §253.5(c)(2). It is also clear that the hearing officer made no ruling with regard to the relevancy/redundancy of the proposed staff witnesses or whether their proposed testimony would jeopardize institutional safety or correctional goals. Rather, it appears that the hearing officer simply ignored or forgot petitioner's request for testimony from the proposed DOCCS staff witnesses. Under the facts and circumstances of this case, moreover, the Court is simply not persuaded that petitioner's regulatory right to call the specific staff witnesses he requested (two of three were named) could be considered waived by his response to the hearing officer's non-specific inquiries with respect to whether or not petitioner wanted to call other/more witnesses. In addition, the Court finds that petitioner, having specifically requested testimony from the DOCCS staff witnesses, was not required to reiterate his request and/or interpose an objection when the hearing officer purported to close the hearing without addressing petitioner's request. *See Johnson v. Combe*, 244 AD2d 664.

Upon consideration of equitable principals, the Court concludes that expungement, rather than rehearing, is the appropriate remedy. In reaching this conclusion it is noted that the charges against petitioner were not particularly serious, as evidenced by the fact that such charges were heard at the Tier II, rather than Tier III, level. It is also noted the penalties imposed upon disposition have long since run their courses.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier II Disciplinary Hearing concluded on February 26, 2013 are vacated and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records; and it is further

ADJUDGED, that the respondent is directed to reimburse petitioner's inmate account for any surcharge imposed.

Dated: September 23, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice