

**Matter of Great God White v Annucci**

2014 NY Slip Op 30346(U)

February 5, 2014

Sup Ct, Franklin County

Docket Number: 2013-763

Judge: S. Peter Feldstein

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This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK  
SUPREME COURT**

**COUNTY OF FRANKLIN**

**X**

In the Matter of the Application of  
**GREAT GOD WHITE, #97-B-2692,**  
Petitioner,

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

**DECISION AND JUDGMENT**

**RJI #16-1-2013-0397.99**

**INDEX # 2013-763**

**ORI #NY016015J**

-against-

**ANTHONY J. ANNUCCI**, Commissioner,  
NYS Department of Corrections and  
Community Supervision, and **MICHAEL  
CAPRA**, Superintendent, Sing Sing Correctional  
Facility,

Respondents.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Great God White, verified on August 21, 2013 and filed in the Franklin County Clerk's office on September 5, 2013. Petitioner, who is now an inmate at the Wende Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Sing Sing Correctional Facility and concluded on May 23, 2013. The Court issued an Order to Show Cause on September 12, 2013 and has received and reviewed respondents' Answer and Return, including *in camera* materials, verified on November 7, 2013 and supported by the November 7, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has received no Reply thereto from petitioner.

As a result of an incident that occurred at the Sing-Sing Correctional Facility on April 15, 2013 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules of 100.10 (assault on inmate), 104.11 (violent conduct) and

113.10 (weapon). The inmate misbehavior report, authored by Correction Sergeant Correa, alleged, in relevant part, as follows: “On 4/15/13 during an investigation of a possible assault in the HBA gym Inmate Neglia . . . reported to me that while playing paddleball in the HBA gym Inmate White, Great . . . approached him demanding that he was next to play the game. An argument ensued and Inmate White took out a small green handled cutting instrument and cut him several times with it. I then interviewed Inmate White. He refused to make a statement except to insist that he had nothing to do with the incident. I ordered a complete search of the gym and all inmates and found no weapon.” It should be noted that although the alleged assault was not reported until approximately 3:40 PM on April 15, 2013, inmate Neglia testified that he left the gym during “early go-back,” which normally occurred between 2:15 PM and 2:30 PM, and had been cut before leaving the gym.

A Tier III Superintendent’s Hearing was commenced at the Sing-Sing Correctional Facility on April 19, 2013. At the conclusion of the hearing, on May 23, 2013, petitioner was found guilty of all three charges and a disposition was imposed confining him to the special housing unit for 12 months and recommending the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier III superintendent’s Hearing concluded on May 23, 2013 were affirmed. This proceeding ensued.

Citing *Woodward v. Governor's Office of Employee Relations*, 279 AD2d 725, the petitioner first asserts that the Tier III Superintendent's Hearing was held in contravention of Civil Service Law §61(2), and therefore violated his constitutional rights. Civil Service Law §61(2) provides, in relevant part, that “. . . except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed

. . . to such position . . .” In *Woodward*, a grade 22 Senior Correction Counselor regularly assigned to conduct Tier III Superintendent's Hearings filed an out-of-title work grievance seeking either the removal of his name from the list of individuals assigned to conduct such hearings or, in the alternative, that he be properly compensated for performing the tasks of a grade 25 Hearing Officer. Although the Appellate Division, Third Department, ultimately upheld the Senior Correction Counselor's grievance, nothing in *Woodward* even remotely suggests that the results and disposition of a Tier III Superintendent's Hearing's presided over by a Senior Correction Counselor are subject to reversal on that basis. Even if the hearing officer in the case at bar, who identified herself as “Senior Offender Coordinator, Offender Rehabilitation Coordinator,” had a basis to challenge her assignment(s) as a Hearing Officer at Tier III Superintendent’s Hearings, the Civil Service Law §61(2) remedy would be hers to pursue but could not, in effect, be enforced by an inmate who was the subject of a Tier III Superintendent’s Hearing wherein she presided. The Court further notes that under the relevant provisions of 7 NYCRR §254.1 “[t]he person appointed to conduct the superintendent's hearing shall be either the superintendent, a deputy superintendent, captain or commissioner's hearing officer employed by the department's central office, but the superintendent may, in his or her discretion, designate some other employee to conduct the proceeding.” (Emphasis added). In the case at bar the Hearing Officer stated on the record that she had been designated by the superintendent to conduct the hearing pursuant to 7 NYCRR §254.1. There is no evidence in the record to suggest otherwise. The Court finds, therefore, that the Tier III Superintendent's Hearing in the case at bar was properly presided over by Ms. Taylor. *See Seegars v. Goord*, 245 AD2d 640, *lv den* 91 NY2d 811.

Petitioner next asserts that the Hearing Officer improperly took the testimony of Deputy Superintendent for Security Keyser outside of his presence. It is not disputed that

the testimony of DSS Keyser was recorded outside the presence of petitioner and that the recording of the witnesses statement was not made available to the petitioner. 7 NYCRR §254.5(b) provides as follows: “Any witness shall be allowed to testify at the [tier III] hearing in the presence of the inmate unless the hearing officer determines that so doing will jeopardize institutional safety or correctional goals. Where an inmate is not permitted to have a witness present, such witness may be interviewed out of the presence of the inmate and such interview tape recorded. The recording of the witness’ statement is to be made available to the inmate at the hearing unless the hearing officer determines that so doing would jeopardize institutional safety or correctional goals.” At the close of the hearing, on May 23, 2013, petitioner was provided with a written statement indicating that DSS Keyser testified outside petitioner’s presence and that petitioner was not permitted to review such testimony. According to the Hearing Officer’s written statement, “[c]onfidential tape recorded of DSS Keyser testimony regarding information received concerning misbehavior of Great God White . . .”

Although the Hearing Officer’s written “[e]xplanation” for proceeding in this fashion does not indicate any specific basis for concluding that institutional safety and/or correctional goals would have been jeopardized in allowing DSS Keyser to testify in the presence of the petitioner or by allowing petitioner to review such testimony, the Court’s examination of the confidential transcript of the testimony of DSS Keyser leads it to conclude that the potential jeopardy to institutional safety or correctional goals if the petitioner had been granted access to such testimony is obvious. Accordingly, petitioner’s argument on this point is rejected. *See Laureano v. Kuhlmann*, 75 NY2d 141.

In paragraph 5C of petitioner’s Exhibit B (which was incorporated by reference into the petition) the following is alleged: “Hearing officer . . . violated petitioner[’]s rights when she failed to inform petitioner of alleged evidence that was being considered against

him. Furthermore, she denied petitioner his right to present his own information in defense against evidence.” The Court, however, finds these allegations to be so conclusory in nature that they fail to state a cause of action.

Petitioner next argues that the hearing officer violated the provisions of 7 NYCRR §254.7(a)(5) when she failed to render a written disposition within 24 hours after the conclusion of the hearing. In this regard it is noted that the transcript of the hearing indicates that at the close of testimony on May 16, 2013 the hearing officer made the following statement: “Um, yes, um, Mr. Great White, I am gonna be doing the dep, d-disposition but I’m not gonna be writing the deposition [disposition?] right now. I’m gonna look over the evidence and I’m going to make the decision so I am adjourning right now and then when, when we meet, I will be in position to write the deposition [disposition ?] and you will receive it. [T]hen we’ll start the tape back up and I will read it into the record. Okay? So we’re adjourning for now.” The written hearing disposition, however, was not signed by the hearing officer until May 23, 2013. At the time the written disposition was issued the petitioner had been brought back before the hearing officer and it was noted for the record that a confidential witness testified on that date (May 23, 2013). Although petitioner does not dispute that he received a copy of the written disposition on May 23, 2013, it is his position that the hearing, in fact, concluded on May 16, 2013. Whatever the merits, or lack thereof, of petitioner’s assertion that the hearing should be considered to have been concluded on May 16, 2013 - notwithstanding the subsequent taking of confidential testimony - it is clear that any 7 NYCRR §254.7(a)(5) deficiency was cured when petitioner received a copy of the written disposition on May 23, 2013 and therefore, in the absence of any demonstrable prejudice to petitioner, the results and disposition of the Tier III Superintendent’s Hearing need not be disturbed. *See Hinton v. Fischer*, 102 AD3d 1018.

Finally, to the extent petitioner also argues that the Hearing Officer failed to independently assess the credibility of the informant's credibility, the Court agrees with respondents that "[t]here is no evidence on the record that the Hearing Officer relied upon information given by a confidential informant."

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:** February 5, 2014 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice