Matter of Jones v Fischer
2014 NY Slip Op 30402(U)
February 17, 2014
Supreme Court, Albany County
Docket Number: 1529-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of LEROY JONES,

Petitioner,

-against-

BRIAN FISCHER,
Commissioner of D.O.C.C.S.,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-13-ST4555 Index No. 1529-13

Appearances: Leroy Jones
Inmate No. 01-A-1692
Petitioner, Pro Se
Clinton Correctional Facility
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Clinton Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated September 14, 2012 in which he was found guilty of violating prison rules (see generally 7 NYCRR 270.2).

Specifically, the petitioner was found guilty of violating Rule 104.11, violent conduct; Rule 104.12, engaging in a demonstration; Rule 100.11, assault on staff; Rule 113.10, possession of a weapon; Rule 106.10, refusing a direct order; and Rule 115.10, refusing a search or frisk.

Because it does not appear that the petitioner raised an issue of whether or not the determination was supported by substantial evidence (see CPLR 7803 [4]), the Court finds that it should retain the proceeding for disposition, rather than transferring it to the Appellate Division pursuant to CPLR 7804 (g) (see Matter of Taylor v Fischer, 80 AD3d 1037 [3d Dept., 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

The misbehavior report dated August 13, 2012, recites as follows:

> "On the above date and approximate time, while conducting random pat frisks in the vocational checkpoint #3 area, I ordered inmate Jones 01A1692 to put his hands high and flat on the wall and assume the pat frisk position. While searching inmate Jones right sock I noted red string coming from his sock. I pulled the string and an ice pick type weapon approximately 5 ½ inches long, sharpened on one end, with a thin strip of cloth wrapped on the outside came out of the sock. I then rolled the weapon to officer Tolentino's direction yelling he had a weapon. At this time the inmate came off the wall in an aggressive manner turning his upper body to the right. A code 10 emergency was called. Force was used to gain control of a struggling inmate. While trying to gain control of inmate Jones, he struck me in the rips with his right elbow. I gave Jones several direct orders to stop resisting. During this time inmate Jones was calling for assistance from inmates in the masjid. After several more orders to stop resisting and to stop yelling he complied. Area supervisor and several responding officers arrived. Inmate Jones was escorted out of the area. This incident caused several officers to respond and leave other duties."

The petitioner maintains that he is innocent of the charges, and that the entire incident was

a fabrication on the part of the correction officers, particular C.O. O'Neil, in retaliation for a series of complaints and grievances he had filed against them. He asserts that he was viciously assaulted during the incident. The petitioner alleges, *inter alia*, that during the disciplinary proceeding he was denied adequate employee assistance; denied the right to call witnesses; and denied the right to review documentary evidence. He further alleges bias on the part of the Hearing Officer.

"It is well settled that an inmate has a conditional right to call witnesses at a disciplinary hearing provided their testimony would not jeopardize institutional safety or correctional goals" (Matter of Morris-Hill v Fischer, 104 AD3d 978, 978 [3d Dept., 2013], citing 7 NYCRR 254.5 [a]; Matter of Lopez v Fischer, 100 AD3d 1069, 1070, 952 N.Y.S.2d 694, 695 [2012]; Matter of Santiago v Fischer, 76 AD3d 1127, 1127, 908 N.Y.S.2d 139 [2010]). It is also well settled that a hearing officer may properly deny witnesses who would provide testimony which is merely cumulative and redundant to that given by prior witnesses (see Matter of Gomez v Fischer, 74 AD3d 1399, 1400 [3d Dept., 2010]; Matter of McLean v Fischer, 63 AD3d 1468, 1469 [3d Dept., 2009]; Matter of Igartua v Selsky, 41 AD3d 717 [3d Dept, 2007]); or those who have no direct knowledge of the subject incident (see Matter of Toliver v New York State Commissioner of Corrections and Community Service, ___ AD3d ___, 2014 NY Slip Op 716 [3d Dept., February 6, 2014]; Matter of Hines v Prack, 109 AD3d 103, 1032 [3d Dept., 2013]; Matter of Tafari v Fischer, 94 AD3d 1324, 1325 [3d Dept., 2012]; Matter of Smalls v Fischer, 89 AD3d 1294 [3d Dept., 2011]).

In this instance the record includes the witness refusal forms of five inmates (among others): inmate Ardale, inmate Adams, inmate Biavaschi, inmate Grant, and inmate Acevedo.

None of the forms are signed by the inmate witness, and none of the forms provide the reason why the inmate refused to testify. There is nothing in the record to indicate that the Hearing Officer attempted to ascertain the reasons why the respective inmates refused to testify. Notably, the petitioner renewed his objection on this ground very near the end of the hearing (see Transcript of Hearing at p. 131).

The facts here are very close to those in Matter of Saez v Fischer (113 AD3d 961 [3d Dept., 2014). There, the employee assistant had signed the witness refusal form, but had not indicated the reason why the inmate refused to testify. The Hearing Officer in Saez made no attempt to verify the basis for the refusal. The Court found that there was a regulatory violation of petitioner's right to call witnesses and remitted the matter to DOCCS for a new hearing. In the same way, the Court finds that the determination must be annulled, and the matter remitted for a new hearing.

The Court need not address the remaining arguments and contentions.

Accordingly it is

ORDERED and ADJUDGED, that the petition is granted to the limited extent that the determination is annulled, without costs, and matter remitted to respondent for further proceedings not inconsistent with this Court's decision.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice

of entry.

ENTER

Dated: February 17, 2014
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated March 26, 2013, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Filed July 26, 2013, Supporting Papers and Exhibits
3. Petitioner's Verified Reply dated August 2, 2013 and Exhibits