Matter of Tolliver v Fischer
2014 NY Slip Op 30793(U)
April 1, 2014
Sup Ct, Albany County
Docket Number: 5824-13
Judge: Joseph C. Teresi

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
ERIC TOLLIVER, # 94-B-1563,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

DECISION and ORDER
RJI NO.: 01-13-ST5208
INDEX NO.: 5824-13

BRIAN FISCHER, DOCCS,

Respondent.

Supreme Court Albany County All Purpose Term, February 7, 2014
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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Petitioner, Pro Se
94-B-1563
Sullivan Correctional Facility
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TERESI, J.:

Petitioner, a state inmate, challenges a disciplinary determination that he was guilty of a series of infractions of the New York State Department of Correctional Services' (DOCS) Standards of Inmate Behavior. Petitioner challenges the determination on procedural grounds

with a barrage of unsupported conclusory allegations, some of which he waived by failing to raise them at the time of the disciplinary hearing.

The Court rejects Petitioner's conclusions that his rehearing was untimely because 7 NYCRR § 251-5.1(a) governs the time period after the Appellate Division's decision to remand in which the rehearing was required to be conducted. 7 NYCRR § 251-5.1(a) provides:

> "Where an inmate is confined pending a disciplinary hearing or superintendent's hearing, the hearing must be commenced as soon as is reasonably practicable following the inmate's initial confinement pending said disciplinary hearing or superintendent's hearing, but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee."

By its express terms, 7 NYCRR § 251-5.1 (a) only applies to hearings, not to court-ordered rehearings (Matter of Spaulding v Goord, 15 AD3d 768, 769 [3d Dept 2005]).

The timing of rehearings on remand is governed by the timeliness requirements stated in the court order, if any, or, if there is no court order, the Departmental Review Board order (Matter of Spaulding v Goord, 15 AD3d 768, 769 [3d Dept 2005]). Thus, 7 NYCRR § 251-5.1(a) would only be applicable where no time requirements are stated in either a court order or Departmental Review Board order (Matter of Spaulding v Goord, 15 AD3d 768, 769 [3d Dept 2005]).

There being no specific direction by the Appellate Division regarding the time in which to hold the rehearing in this case, analysis of the timeliness of the rehearing upon remand depends on the Departmental Review Board order. Petitioner has failed to address the question of what, if anything, the Departmental Review Board order provides.

Assuming for the purposes of the argument that the Departmental Review Board order did not set a time for commencing the rehearing and 7 NYCRR § 251-5.1(a) applied, Petitioner

is clearly incorrect in assuming that the time automatically began to run at the moment the Appellate Division issued its decision. Even in the absence of either a court order or the Departmental Review Board order setting forth the time in which to commence the rehearing, the time would only begin to run if Petitioner was in disciplinary confinement at the time the decision issued. Petitioner has failed to allege that he was in disciplinary confinement at the time the court order issued. Thus, Petitioner has failed even to state a cause of action for an untimely commenced rehearing.

As for Petitioner's complaint that the hearing was not completed within fourteen days, extensions of these time limits by the Commissioner or his designee are authorized by the regulation (7 NYCRR § 251-5.1). The regulation does not require anything more than the proper authorizations, a statement of the reasons for the delay and making the inmate aware of the reasons unless to do so would jeopardize institutional safety or correctional goals. The record shows that Respondent did not violate either the commencement or the extension provisions of the regulation. However, even if there were a violation of the time limit, the time limits imposed by the regulations are directory, not mandatory. Thus, Respondent would only be ousted of jurisdiction where "substantial prejudice" is demonstrated by Petitioner (Matter of Mack v Goord, 49 AD3d 1045, 1046 [3d Dept 2008]; Matter of Konigsberg v Selsky, 255 AD2d 702, 702-703 [3d Dept 1998]).

Petitioner has failed to demonstrate any prejudice to himself resulting from the alleged delays in the hearings. Petitioner complains in conclusory fashion that there is some connection between the delay stemming from his challenge to the first hearing determination in 2012 and his being prejudiced by his inability to produce as a witness the visitor he was observed having intercourse with while standing in the visiting area. Petitioner explained at the hearing that his

witness had broken off her relationship with him and changed her telephone number. Petitioner does not allege that his witness' unwillingness to testify on his behalf even occurred during the months between the Appellate Division's decision and the completion of the rehearing. The delay resulting from Petitioner's earlier partially-successful article 78 proceeding is not relevant to the question of whether Respondent's compliance with the hearing time requirements.

Petitioner also claims the hearing officer was not impartial, but has failed to meet his burden of supporting that conclusory claim by establishing through the record that the hearing officer was guilty of a conflict of interest, prejudgment, or other record of evidence of real bias (Matter of Couch v Goord, 255 AD2d 720, 722 [3d Dept 1998]), that there was actual bias and substantial prejudice (Matter of Steward v Selsky, 266 AD2d 605, 606 [3d Dept 1999]), and that the outcome of the hearing flowed from the alleged bias (Matter of Martinez v Scully, 194 AD2d 679, 680 [2d Dept 1993]).

Petitioner's claim that he did not attend all but the first part of the hearing is factually incorrect. The record reveals that Petitioner attended between May 16 through June 4, 2013 and refused to attend on June 6, 2013. The record further demonstrates that Petitioner's refusal to attend was knowing and voluntary and Petitioner's rights were protected. Since Petitioner refused to appear, he forfeited his right to challenge the determination on the ground that the hearing should not have been conducted in absentia (Matter of Watson v Coughlin, 72 NY2d 965 [1988] affd on 132 AD2d 831[3d Dept 1987]; Matter of Hamilton v Goord, 32 AD3d 642, 643 [3d Dept 2006]; Matter of Craggan v Coombe, 229 AD2d 1014 [4th Dept 1996]). Petitioner also failed to preserve the claims that he now advances which should have been raised at the hearing. Unpreserved issues are not issues of law subject to judicial review in a CPLR Article 78 proceeding (Matter of Hamilton v Goord, 32 AD3d 642, 643 [3d Dept 2006]).

Accordingly, it is hereby

ORDERED, that petition is denied and the relief requested in this proceeding is in all respects denied.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall 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.

So Ordered.

Dated: Albany, New York
April / , 2014

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated November 6, 2013; Petition dated October 13, 2013, with attached exhibits A-D.
2. Answer dated January 31, 2014; Affirmation of Kristen Quaresimo, AAG dated January 31, 2014, with attached exhibits A-I.
3. Affidavit of Eric Tolliver dated February 11, 2014.