Matter of Torres v Annucci
2014 NY Slip Op 30818(U)
April 2, 2014
Supreme Court, Albany County
Docket Number: 5993-13
Judge: Joseph C. Teresi
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
ALBERTO TORRES, # 89-A-7710,

Petitioner,

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

-against-

DECISION and ORDER
RJI NO.: 01-13-ST5287
INDEX NO.: 5993-13

ANTHONY J. ANNUCCI, ACTING
COMMISSIONER NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,

Respondent.

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

APPEARANCES:

Alberto Torres
Petitioner, Pro Se
89-A-7710
Livingston Correctional Facility
P.O. Box 91
7005 Sonyea Road
Sonyea, New York 14556

Eric T. Schneiderman, Esq.
Attorney General of New York State
Attorneys for the Respondent
Melissa A. Latino, AAG
Department of Law
The Capitol
Albany, New York 12224

TERESI, J.:

Petitioner, a state inmate, challenges a disciplinary determination that he was guilty of refusing to obey both an order to take an assignment to the top bunk in a cell and to double cell, each of which are infractions of the New York State Department of Correctional and Community Services' ("DOCCS") Standards of Inmate Behavior.

Petitioner has some difficulty expressing himself in English and the hearing transcript presented by Respondent appears to omit significant portions of Petitioner's testimony. To the extent that the transcript and records permit meaningful review of the hearing, they reflect that Petitioner has allegedly suffered back pains since 1996 and been exempted on medical grounds from being forced to sleep in a top bunk bed. A May 7, 2013 memorandum to Petitioner's medical file shows that between May 7, 2013 and August 31, 2013 Petitioner was exempted from assignment to a top bunk and restricted to sleeping on a bottom bunk. On June 15, 2013, Petitioner had hemorrhoid surgery.

Six days after the hemorrhoid operation, Petitioner was transferred from Otisville Correctional Facility and arrived at Gouverneur Correctional Facility late on the evening of June 21, 2013 and assigned to the top bunk of a double cell. Before being taken to his assigned cell, Petitioner was seen by Nurse Ferguson. Petitioner alleged that a correctional sergeant influenced Nurse Ferguson not to recognize Petitioner's need for a lower bunk. Nurse Ferguson allegedly gave Petitioner a pro forma examination, asked "the same questions they ask," accused Petitioner of just wanting to have a lower bunk, and said she found nothing wrong with Petitioner.

Petitioner was then brought to his assigned housing unit where at approximately 8:30 pm he was ordered to take a top bunk in a two-person cell. Petitioner stated that he was physically unable to climb up to a top bunk and would not take the assignment to a top bunk. Petitioner was escorted off the housing unit and placed in the Special Housing Unit. A misbehavior report was prepared charging Petitioner both with refusing a direct order and refusing to double cell.

Petitioner requested that his medical records be brought to the disciplinary hearing and that Nurse Ferguson and Dr. Kasulke testify at the hearing. The hearing officer acknowledged

these three requests, indicated in the record that they had been granted, but in fact failed to bring either the medical records or Nurse Ferguson to the hearing. The hearing officer also failed to state that he was denying the requests or explain why he was failing to bring the medical records or Nurse Ferguson to the hearing.

The hearing officer instead placed a call to the Nurse Administrator Lisa Cota. Nurse Cota made the conclusory statement that Petitioner had been evaluated upon his arrival at Gouverneur Correctional Facility and it was determined that Petitioner did not meet the criteria for a bottom bunk at Gouverneur Correctional Facility. Nurse Cota did not cite any specific part of the medical record supporting her conclusion that Petitioner had actually been evaluated regarding the suitability for a top bunk assignment. Nurse Cota did not explain what Gouverneur Correctional Facility's criteria are for exempting inmates from top bunk assignments and did not explain her conclusion that Petitioner did not meet the criteria for not accepting a top bunk. Nurse Cota testified that there was nothing in the medical records that would preclude Petitioner from taking a top bunk. Although Nurse Cota claimed that she had examined Petitioner's medical file, when questioned about the exemption from Otisville Correctional Facility she stated that she did not know about the bottom bunk permit.

Despite the absence of any testimony from Nurse Ferguson or medical records reflecting the extent of any medical evaluation of Petitioner's physical capability of climbing to a top bunk, the hearing officer rejected out of hand both Petitioner's testimony that there was no real inquiry into Petitioner's physical ability to climb up to a top bunk, that Petitioner was unable to climb up to a top bunk, or that the correctional sergeant placed a role in Nurse Ferguson's determination. The hearing officer speculated on behalf of the medical staff regarding the actions that the medical staff could have taken in the face of issues presented by Petitioner's

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recent surgery, and vouched for the thoroughness and professionalism of the medical department staff.

The hearing officer asked Petitioner why Nurse Ferguson would not have followed the proper course in this case. Petitioner explained that she was possibly influenced by the correctional sergeant who was biased against petitioner and allegedly told Petitioner that he doubted that Petitioner could even be a United States citizen given Petitioner's Hispanic ethnicity. The sergeant also allegedly accused Petitioner of being "only a spic homosexual and that ["Petitioner's"] hemorrhoid will remove me cause ["Petitioner"] was fucking with black dudes" and told Petitioner that Petitioner was either going to take a top bunk assignment or the Sergeant would "break [Petitioner] down or [the sergeant would] cube [Petitioner] two week."

Despite having asked Petitioner for an explanation for why Nurse Ferguson would have failed to properly evaluate Petitioner's ability to climb up to a top bunk, the hearing officer dismissed Petitioner's argument that the sergeant influenced Nurse Ferguson out of hand as having "nothing to do with this." The hearing officer declared the story of the sergeant's influence over Nurse Ferguson's initial evaluation was irrelevant because:

> "you're claiming that, uh, you are unable to take a top bunk assignment and that's the whole thing. However, our medical department determined upon your arrival here that you were more than able to take a top bunk assignment. Okay, that's what in question here (emphasis added)."

In addition to implicitly assuming that Nurse Ferguson could not be influenced by the allegedly racist and homophobic correctional sergeant, the hearing officer overstated Nurse Cota's conclusory testimony regarding Petitioner's capabilities. Nurse Cota stated that Petitioner did not meet the criteria for a lower bunk restriction. The hearing officer stated that the testimony established that Petitioner was "more than able to take a top bunk assignment."

By the time the hearing officer called Dr. Kasulke, the hearing officer was not merely vouching for the thoroughness and professionalism of the medical staff and overstating Nurse Cota's testimony but attempting to make Petitioner appear to be a false witness by mischaracterizing Petitioner's earlier testimony regarding the allegedly pro forma evaluation by Nurse Ferguson. On page 9 of the hearing transcript, the hearing officer repeatedly misinformed Dr. Kasulke that Petitioner was claiming that no medical personnel ever saw Petitioner prior to Petitioner's being seen by Dr. Kasulke days after the incident in question.

Dr. Kasulke's testimony confirmed Petitioner's testimony by stating that from Dr. Kasulke's reading of the medical record there was some examination on June 21, 2013 that included "the usual stuff, vital signs." Dr. Kasulke did not testify that there was anything in Petitioner's medical record to indicate that Petitioner's ability to climb up onto a top bunk bed had been evaluated by anyone at the time of Petitioner's initial evaluation.

Dr. Kasulke's testimony also does not support a finding that Petitioner could climb to a top bunk. Dr. Kasulke testified that he did not evaluate Petitioner's ability to climb to a top bunk. Dr. Kasulke stated that a couple of days before the hearing he had evaluated Petitioner's recovery from the hemorrhoid surgery. Dr. Kasulke had not evaluated whether Petitioner could climb to a top bunk and explained that it was irrelevant in his opinion because there are no top bunk beds in the Special Housing Unit where Petitioner was being confined following the incident.

At the conclusion of the hearing, the hearing officer found Petitioner guilty of both charges. The hearing officer punished Petitioner with three months in the Special Housing Unit and loss of recreation, packages, commissary, phone calls, and special events. To better justify his finding of guilt, the hearing officer amended the charges against Petitioner without

acknowledging it. Whereas earlier, the hearing officer stated that the question was whether Petitioner was "unable to take a top bunk assignment," at the end, the hearing officer mischaracterized both the charges against Petitioner as well as the witnesses' testimony:

> "the testimony of the nurses' and doctor in which was stated that after review of [Petitioner's] medical records and after [Petitioner's] medical evaluation upon arrival at Gouverneur Correctional Facility, there were no mitigating circumstance to preclude [Petitioner] from accepting a <u>double bunk</u> assignment substantiating 106.10 refusing a direct order and 109.5 refusing double celling (emphasis added)."

There was certainly no medical testimony regarding Petitioner being precluded from accepting all double cell assignments, the real question was always confined to the permissibility of assigning Petitioner to a top bunk. The hearing officer avoided having to address the question of whether Petitioner could physically have climbed up to a top bunk by substituting "double bunk" for "top bunk" and suggesting that the direct order had been for Petitioner to double bunk as opposed to take the top bunk in a double cell.

Even assuming for the purposes of the argument that the hearing officer meant to say "top bunk" assignment, the hearing officer clearly mischaracterized Dr. Kasulke's testimony. As noted previously there was no testimony by Dr. Kasulke either that he had evaluated Petitioner's ability to climb to a top bunk or that there was any evidence in the medical record of any evaluation by anyone else at Gouverneur Correctional Facility regarding Petitioner's ability to climb to a top bunk. Furthermore, there was only the conclusory statement from Nurse Cota, who had never evaluated Petitioner. Nurse Ferguson, who performed the initial medical evaluation of Petitioner, did not testify regarding whether she had performed any medical examination or whether she had been pressured by a correctional sergeant. Petitioner's medical record had never been submitted to the hearing officer.

The Court is not authorized simply to substitute its judgment for that of the agency responsible for making the determination (Flacke v Onondaga Landfill Sys., 69 NY2d 355, 363 [1987]; Awl Indus., Inc. v Triborough Bridge & Tunnel Auth., 41 AD3d 141, 142 [1st Dept 2007]). The scope of judicial review of such administrative determinations is limited to analyzing whether (1) Respondent agency took the action without or in excess of its jurisdiction or (2) Respondent's determination was (a) made in violation of lawful procedure or of positive statutory or constitutional requirements, (b) affected by an error of law, (c) an abuse of discretion, or (d) arbitrary and capricious in that the agency took action without a sound basis in reason or without regard for the facts. Barring at least one of those wrongs, the Court must confirm the determination (Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]).

Petitioner challenges the determination on the ground that his top-bunk assignment was improper based on Petitioner's medical condition and existing medical restrictions; that Petitioner never refused doublecelling, but was medically unable to climb to a top bunk; that the disciplinary charges and hearing were technically and constitutionally defective, and the evidence before the hearing officer was insufficient to support finding Petitioner guilty of either infraction.

This proceeding clearly raises a substantial evidence question because Petitioner alleges that there is insufficient factual basis for either determination made by Respondent after a hearing held, at which evidence was taken, pursuant to direction of law (CPLR § 7803[4]). Having determined that this proceeding raises substantial evidence issues, the Court must examine both Petitioner's non-substantial-evidence arguments and Respondent's objections in point of law to the proceeding and decide whether or not the proceeding may be resolved as a

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matter of law without reaching the substantial evidence question (Matter of Secreto v County of Ulster, 228 AD2d 932, 933 [3d Dept 1996]; Matter of Westmount Health Facility v Bane, 195 AD2d 129, 131 [3d Dept 1994]; Maliszewski v Regan, 144 AD2d 170, 171 [3d Dept 1988]; Matter of Mountain v City of Schenectady, 100 AD2d 718, 718-719 [3d Dept 1984]). For example, issues of the proper interpretation and/or application of statutes or regulations should be addressed by the Court in the first instance (Matter of Westmount Health Facility v Bane, 195 AD2d 129, 131 [3d Dept 1994]; Maliszewski v Regan, 144 AD2d 170, 171 [3d Dept 1988]).

Petitioner contends that the hearing officer was not impartial and that the determination flowed from the alleged bias (see Matter of Burgess v Goord, 34 AD3d 948, 949 [3d Dept 2006]; Matter of Nelson v Goord, 33 AD3d 1135, 1136 [3d Dept 2006]; Matter of Steward v Selsky, 266 AD2d 605, 606 [3d Dept 1999]; Matter of Couch v Goord, 255 AD2d 720, 722 [3d Dept 1998]; Matter of Martinez v Scully, 194 AD2d 679, 680 [2d Dept 1993]). The record supports Petitioner's conclusion and establishes that Petitioner was denied a fair and impartial hearing and that the outcome of the hearing flowed from the hearing officer's biases. Petitioner's guilt was predetermined by virtue of the hearing officer's prejudgment that the facility staff would never violate the proper procedures, the hearing officer's willingness to accept Nurse Cota's conclusions rather than to inquire whether there was any specific support for those conclusions, avoiding taking testimony from the nurse who actually evaluated Petitioner, and mischaracterization of the witnesses' testimony so as to make Dr. Kasulke appear to support Nurse Cota's conclusion and Petitioner appear to be lying.

The hearing officer's assumption that facility staff would always follow the proper procedures and/or desire to protect staff from any inquiry into whether they had violated proper procedures appears to have also played a role in the hearing officer's interfering with Petitioner

constitutional right to call and examine Nurse Ferguson and introduce the medical record demonstrating that: Petitioner had been issued an exemption from being assigned to a top bunk within a week of being assigned to a top bunk at Gouverneur Correctional Facility and there had been no legitimate medical evaluation of the appropriateness of ordering Petitioner to climb up to a top bunk before the Gouverneur Correctional Facility staff countermanded the medical exemption issued days prior at Otisville Correctional Facility. The hearing officer demonstrated his bias by repeatedly vouching for the integrity of the staff, mischaracterizing Petitioner's statements so as to make Petitioner appear to be lying, mischaracterizing Dr. Kasulke's testimony so as to make it appear to corroborate the hearing officer's conviction that Petitioner would not have been cleared for assignment to a top bunk without a proper medical evaluation of his ability to climb, and relying on the conclusory statements of Nurse Cota, without inquiring into any specific facts or observations that would support Nurse Cota's conclusions.

The determination that Petitioner was guilty of refusing to double cell was also arbitrary and capricious. The hearing officer had earlier acknowledged that the whole issue was whether Petitioner could climb to a top bunk. The hearing officer acted without either a sound basis in reason or regard for the facts by equating a refusal to accept an assignment to a top bunk as a refusal to double cell. There was no testimony that Petitioner ever refused anything more than the top bunk assignment or that he had ever been told to take the lower bunk in a double cell and refused.

For these reasons, the determination in question must be vacated and it is therefore unnecessary for the matter to be transferred to the Appellate Division for the purpose of determining whether there was substantial evidence to support the determination. It being necessary to reverse the disciplinary determination in question, the Court turns to the question of

whether the record should be expunged or the matter should be remanded to Respondent for a rehearing. It is well settled that expungement will be ordered only where there has been a showing that (1) the challenged disciplinary determination is not supported by substantial evidence; (2) there has been a violation of one of Petitioner's fundamental due process rights enunciated in Wolff v McDonnell, 418 US 539 [1974], which include advance written notice of claimed violation, the right to call witnesses and present documentary evidence where such would not be unduly hazardous to institutional safety or correctional goals, impartial hearing officer(s), written statement of fact findings, punishment that is in keeping with the misbehavior, and non-arbitrary decisionmaking; or (3) any other equitable considerations dictate expungement of the record rather than remittal for a new hearing (Matter of Barnes v Fischer, 108 AD3d 990, 990-991 [3d Dept 2013]; Matter of Hayes v Fischer, 95 AD3d 1587, 1588 [3d Dept 2012]; Matter of La Van v New York State Dept., of Correctional Servs., 47 AD3d 1153, 1153 [3d Dept 2008]).

There has been no determination regarding substantial evidence in this case because substantial evidence is a matter reserved for the Appellate Division. The Court finds that there have been due process violations that warrant expungement rather than a remand for a new hearing. Petitioner was deprived of his right to be judged by an impartial hearing officer. Petitioner was deprived of his right to non-arbitrary decisionmaking by the hearing officer. The hearing officer's decision regarding double celling was arbitrary and capricious. Petitioner was deprived of his right to call witnesses and present documentary evidence, without an explanation by the hearing officer.

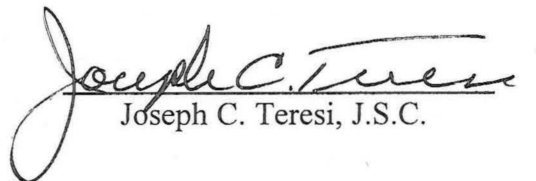
Accordingly, it is hereby

ORDERED, that petition is granted to the extent of reversing the disciplinary determination and ordering that the records of the charges and punishment be expunged from Respondent's records, except that one copy that may be maintained in Respondent's counsel's litigation file.

This Decision and Order is being returned to the Petitioner. 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. Petitioner is not relieved from the applicable provisions of that Rule respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
April 2 , 2014



Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause dated November 19, 2013; Petition dated October 22, 2013, with attached exhibits.
2. Answer dated January 30, 2014; Affirmation of Melissa A. Latino, AAG dated January 30, 2014, with attached exhibits A-E.