

Matter of Smtih v Prack
2014 NY Slip Op 30850(U)
March 11, 2014
Supreme Court, Albany County
Docket Number: 5222-13 13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of PAUL SMITH,

Petitioner,

-against-

ALBERT PRACK,

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-ST5129 Index No. 5222-13

Appearances: Paul Smith
Inmate No. 96-A-4204
Petitioner, Pro Se
Five Points Correctional Facility
6600 State Route 96
Caller Box 119
Romulus, New York 14541

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State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Stephen M. Kerwin,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Five Points Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated April 2, 2013 in which he was found guilty of violating prison rules (see generally 7 NYCRR § 270.2). Specifically, he was found guilty of violating Rule 104.11, violent conduct; Rule

104.13, creating a disturbance; Rule 100.10, assault on an inmate; Rule 100.13, fighting; Rule 113.10, possession of a weapon; Rule 113.11, possession of an altered weapon; and Rule 106.10, refusing a direct order. The misbehavior report dated March 18, 2013 recites as follows:

“On [March 18, 2013 at approximately 12:10 p.m.] while releasing P-Gallery South for the afternoon chow, I observed inmate Smith P 96A4204 fighting with inmate Smith R 00A6587. Both inmates were on the ground throwing close fist punches at each other about the head and body area. Inmate Smith, P was on top of inmate Smith, R. I immediately responded to the area of P-24 cell and gave both inmates direct orders to stop fighting at which time they refused. I then activated my PAS and responding staff gave the inmates orders to stop fighting. The inmates complied and were escorted off the gallery. Inmate Smith, R sustained several lacerations to his left facial area which were consistent with the use of a cutting instrument. Officer A. Valentin found a can with the lid partially attached in the area of P-24 cell. The lid had pieces of red threading on it which were consistent with the red sweat shirt inmate Smith R was wearing. The weapon was photographed and secured in the watch commander’s evidence locker.”

The petitioner entered a plea of not guilty to all the charges except fighting, to which he entered a plea of guilty. The Hearing Office found him guilty of all of the charges.

The petitioner alleges that he was denied production of certain documents, and that he was denied permission to call the victim, inmate R. Smith, and inmate L. Cabrera. Witness refusal forms, signed only by the employee assistant, indicate that both inmates refused to testify, but do not provide a reason why they did so. Although the Hearing Officer indicated he would inquire further with regard to why the inmate witnesses refused to testify, there is nothing in the record which indicates that he ever did.

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 instant determination must be annulled, and the matter remitted for a new hearing (see id.; Matter of Dickerson v Fischer, 105 AD3d 1232, 1232 [3d Dept., 2013]; Matter of McFadden v Beziro, 92 AD3d 988, 989 [3d Dept., 2012]; Matter of Pitts v Fischer, 98 AD3d 762, 762-763 [3d Dept., 2012]).

The Court need not address the remaining arguments and contentions.

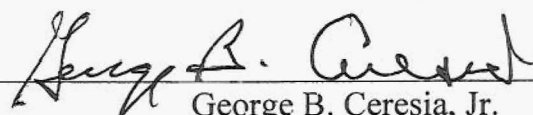
Accordingly it is

ORDERED and ADJUDGED, that the petition is granted to the limited extent that the determination is annulled, without costs, and the 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: March 11, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated October 2, 2013, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated January 16, 2014, Supporting Papers and Exhibits

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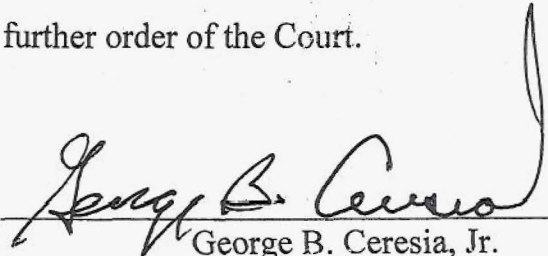
SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera* review in connection with the above matter, namely, respondent's Exhibit B, Confidential Portion of Unusual Incident Report, it is hereby

ORDERED, that the foregoing designated documents, including all duplicates and copies thereof, shall be filed as sealed instruments and not made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: March 11, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice