| **Matter of Cucuta v Rock** |
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| 2014 NY Slip Op 33380(U) |
| December 17, 2014 |
| Supreme Court, Franklin County |
| Docket Number: 2013-805 |
| Judge: S. Peter Feldstein |
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**STATE OF NEW YORK**
**SUPREME COURT** **COUNTY OF FRANKLIN**

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In the Matter of the Application of
**EDGARDO CUCUTA, #11-A-3761**,
Petitioner,

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

-against-

**DECISION AND JUDGMENT**
**RJI #16-1-2013-0419.103**
**INDEX # 2013-805**
**ORI #NY016015J**

**DAVID ROCK,** Superintendent,
Upstate Correctional Facility,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Edgardo Cucuta, verified on August 26, 2013 and filed in the Franklin County Clerk's office on September 17, 2013. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of two Tier III Superintendent's Hearings held at the Upstate Correctional Facility and concluded on March 25, 2013 and July 18, 2013, respectively. Petitioner is also challenging the March 29, 2013 denial of several FOIL requests.

The Court issued an Order to Show Cause on September 25, 2013 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on October 29, 2013 and supported by the November 29, 2013 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Answer in Affirmation, sworn to on December 16, 2013 and filed in the Franklin County Clerk's office on December 19, 2013. By Letter Order dated May 1, 2014 the Court directed respondent to submit supplemental answering papers with

respect to the FOIL issue. In response thereto the Court has received and reviewed respondent's Supplemental Answer and Return, verified on May 28, 2014 and supported by the May 28, 2014 Letter Memorandum of Hilary D. Rogers, Esq., Assistant Attorney General, as well as petitioner's Supplemental Reply thereto, sworn to on August 13, 2014 and received directly in chambers on August 18, 2014.

As the result of an incident that occurred at the Upstate Correctional Facility on March 4, 2013[1] petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 100.11 (assault on staff), 104.11 (violent conduct), 104.13 (disturbance), 106.10 (direct order) and 109.12 (inmate movement). The inmate misbehavior report, authored by C. O. Dumas, alleged, in relevant part, as follows: " . . . [W]hile placing Inmate Cucuta . . . back in his cell he closed his hands together locking my right hand between the restraints. He then grabbed my wrist and dropped to the floor pulling my hand and arm into the cell through the hatch. Cucuta refused several direct orders to stop pulling on my arm and bring his hands out through the hatch. I was then able to pull restraints to the hatch opening at which time responding staff used force to pull restraints and Cucuta's arms through the hatch. Once control was gained restraints were removed and hatch was closed." Tier III Superintendent's Hearing was held at the Upstate Correctional Facility commencing on March 18, 2013. At the conclusion of the hearing, on March 25, 2013, petitioner was found guilty of all five charges and a disposition was imposed confining him to the Special Housing Unit for 9 months, directing the loss of various privileges for a like period of time and

[1] The inmate misbehavior report actually sets forth the date of the incident as March 4, 2012. This is an obvious typographical error.

recommending the loss of 9 months of good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on March 25, 2013 were affirmed.

During the course of the Tier III Superintendent's Hearing concluded on March 25, 2013 the hearing officer and petitioner viewed a security DVD depicting, in some fashion, the March 4, 2013 incident. After the viewing petitioner was asked if he had any comments and he responded as follows:

> "Its obvious that on the video shows that the officer automatically blocked any view of anything. Why would an officer stick his hand in my slot before my doors closed and tell me to put my hands out of the slot. The doors not even closed yet. That's obvious. You saw that on the video. You got Officers standing there, they responded, and there were three officers, only two officers say that they were there at the incident. Officer Dumas says in his report that I've locked my hands, and, and he, he locked his hands in between the cuffs. And everybody else is [sic, presumably else's] reports is I grabbed his hand. So where are all the contradictions coming from?"

The hearing officer then asked petitioner " . . . other than the UI [presumably Unusual Incident] and UF [presumably Use of Force] reports and the DVD is there any other evidence you want to present in the form of any documents or witnesses?" Petitioner responded by citing a variety of perceived contradictions in the two written reports. The hearing officer then advised petitioner that his responsive statement was noted but again asked "[i]s there any other evidence you want to present form [sic] or any other documents or witnesses?" Petitioner continued on with commentary regarding the security DVD that had been viewed and the sufficiency of the Unusual Incident Report. The hearing officer ultimately stated in his written disposition that petitioner had presented no evidence substantially controverting the inmate misbehavior report and that such report was corroborated by the security DVD that had been viewed at the hearing.

With respect to the Tier III Superintendent's Hearing concluded on March 25, 2013, petitioner asserts that he requested security videos/audios " . . . for March 4th 2013 in front of and behind 8-c-12 [petitioner's cell location] as well as the 8 building bull pen, and 8-c Gallery . . ." According to petitioner, " . . . these videos and audios where [sic, presumably were] petitioner[']s unblinking eye witnesses with first hand uncontrovertible evidence in petitioner's defense. Petitioner was never permitted to review them. Yet they were relied upon by respondent as supposed evidence to find petitioner guilty . . ."

Petitioner's above-quoted argument to the contrary notwithstanding, the Court finds nothing in the record before it (including the transcript of the superintendent's hearing) to suggest that petitioner requested the production of any security DVD other than the one viewed at the hearing, which depicted the March 4, 2013 incident. In this regard it is noted that after the security DVD depicting the March 4, 2013 incident was viewed the hearing officer afforded petitioner several opportunities to request the introduction of additional evidence. Petitioner never availed himself of such opportunities. The Court also notes that there is nothing in the hearing officer's statement of evidence relied upon to suggest that the determinations of guilt were supported by any security DVD other than the one actually viewed during the course of the hearing.

To the extent petitioner submitted FOIL requests for the production of various security DVD's that he deemed relevant with respect to the March 4, 2013 incident, the Court notes that there is nothing in the record to suggest that petitioner ever took an administrative appeal(s) from the March 29, 2013 FOIL denial determinations. Accordingly, the Court finds that he failed to exhaust administrative remedies with respect

to such determinations. *See* CPLR §7801(1) and *White v. State of New York*, 117 AD3d 1250. In this regard it is noted each of the March 29, 2013 FOIL denial determinations contained language advising petitioner of his right to take an administrative appeal to the DOCCS Office of Counsel.

As the results of incidents that occurred at the Upstate Correctional Facility on July 5, 2013 petitioner was issued two inmate misbehavior reports. The first report, authored by Correction Sergeant Laravia, charged petitioner with a violation of inmate rule 102.10 (threats). The first report alleged, in relevant part, as follows: " . . . I SERGEANT LARAVIA RECEIVED INFORMATION THAT INMATE CUCUTA . . . HAD SENT A LETTER TO THE SUPERINTENDENT DATED 07/05/13, THREATENING TO KILL HIS CELL MATE, IF STAFF HARASSED HIM ONE MORE TIME BY TAKING MATTERS INTO HIS OWN HANDS. I ASKED INMATE CUCUTA IF HE WROTE THIS LETTER AND HE STATED MAYBE I DID MAYBE I DIDN'T, BUT WERE [sic] GOING TO PLAY THE GAME NOW." The second inmate misbehavior report, authored by C.O. Marshall, charged petitioner with violations of inmate rules 106.10 (direct order), 107.10 (interference) and 109.12 (movement). The second report alleged, in relevant part, as follows: " . . . [W]hile attempting to give Inmate Cucuta . . . his level one property. I gave Inmate Cucuta a direct order to lockout in the exercise pen. [T]o place his level one property in the cell. Once the property was in the cell and the inmate was let back in from the exercise pen, he refused to close the pen door. I gave the inmate several direct orders to secure the exercise pen door. The inmate refused to comply with my orders. Area supervisor was notified. Inmate entered his cell and secured the pen door at a later time without further incident."

A single Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on July 15, 2013 with respect to the charges set forth in both July 5, 2013 misbehavior reports. At the conclusion of the hearing, on July 18, 2013, petitioner was found guilty of all four charges and a disposition was imposed confining him to the special housing unit for 3 months, directing the loss of various privileges for a like period of time and recommending the loss of 3 months of good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on July 18, 2013 were affirmed.

With respect to the Tier III Superintendent's Hearing concluded on July 18, 2013, petitioner first argues that he was unlawfully denied the right to call then Upstate Correctional Facility Superintendent Rock as a witness in connection with the single charge set forth in the inmate misbehavior report authored by Correction Sergeant Laravia. At the hearing petitioner took the position that he did not write the letter referenced in the misbehavior report. When petitioner requested that the superintendent be called to testify, the following colloquy occurred:

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| "Bullis [Hearing Officer]: | What evidence are you proposing to be presented on your behalf in your defense? |
| Cucuta: | I proposing that, I proposing that letter to him. |
| Bullis: | That may very well be but the question is not whether or not that he received the letter. The question is whether or not you wrote the letter which was sent to [. . .] |

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| Cucuta: | Alright well he received the letter. Or why did he fear the letter. |
| Bullis: | What? |
| Cucuta: | If he was supposed to have threatened he received the letter. That was not addressed by him. |
| Bullis: | Well you may request a witness to present evidence on your behalf in your defense. At this point you've proposed no evidence to be offered on your behalf in your defense . . . from the Superintendent. |
| Cucuta: | Well well one I don't have to tell you what evidence he is going to propose. |
| Bullis: | Yes you do. |
| Cucuta: | No I don't. |
| Bullis: | Now, first of all I am looking at the report here now and it states that letter was sent to the Superintendent. It does not say that the Superintendent actually received it. First of all we're going to hear from [ . . . ] |
| Cucuta: | Well if he didn't receive it how did that get there, how did I get a ticket? |
| Bullis: | Well that's the appropriate question to ask the Sergeant [presumably Laravia]." |

Petitioner objected to the hearing officer's determination not to call then Superintendent Rock as a witness and the hearing ultimately concluded without further discussion of the

issue. Upon such conclusion the hearing officer issued the following written statement with respect to the denial of petitioner's request for testimony from the facility superintendent[2]: "Inmate Cucuta proposed no material + relevant evidence to be offered on his behalf + in his defense through this requested witness."

An inmate at a Tier III Superintendent Hearing has a limited constitutional and regulatory right to call witnesses on his/her behalf provided institutional safety and correctional goals are not jeopardized and the proposed testimony is material/relevant and not redundant. *See Wolff v. McDonnell*, 418 US 539 at 556 and 7 NYCRR §254.5(a). In the case at bar there is nothing in the record to suggest that the facility superintendent was in position to provide any testimony relevant to the crucial issue of whether or not petitioner wrote the letter in question. In this regard it is noted that the hearing officer offered petitioner an opportunity to describe how the superintendent's testimony might be relevant, but petitioner was unable to do so. Accordingly, the Court finds that petitioner's constitutional/regulatory right to call witnesses on his behalf was not violated by the hearing officer's denial of his request that then Superintendent Rock be called as a witness. *See Williams v. Fischer*, 114 AD3d 977, *lv denied* 23 NY3d 903.

As far as the inmate misbehavior report authored by C.O. Marshall is concerned, the petitioner argues that in reaching the determination of guilt the hearing officer " . . . relied upon a video and audio that he [petitioner] was never permitted to review . . ." Notwithstanding such argument, the record reveals that the security DVD presumably

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[2] In the written statement the hearing officer erroneously checked the box indicating that the requested witness would testify outside the presence of petitioner rather than the box indicating that permission to call the requested witness had been denied. This error was clearly inadvertent as there is no suggestion in the record that then Superintendent Rock would testify outside of petitioner's presence.

depicting C.O. Marshall delivering property to petitioner's cell (and briefly entering the cell) was viewed at the hearing, albeit without audio. Petitioner's assertions to the contrary notwithstanding, there is nothing in the record to suggest that the hearing officer in any way relied upon the security DVD in reaching his determination of guilt with respect to the charges set forth in the inmate misbehavior report authored by C.O. Marshall. Rather, in his statement of evidence relied upon the hearing officer referenced the description of the incident set forth in the misbehavior report, as corroborated by the hearing testimony of C.O. Marshall.

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:** December 17, 2014 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice