

Matter of Ortiz v Prack
2015 NY Slip Op 30372(U)
March 18, 2015
Supreme Court, Franklin County
Docket Number: 2014-616
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

X

In the Matter of the Application of
JAI DAVID ORTIZ, #12-A-2302,
Petitioner,

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

**ORDER OF TRANSFER
RJI #16-1-2014-0325.63
INDEX # 2014-616
ORI #NY016015J**

-against-

ALBERT PRACK, Director, Special Housing
ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision,

Respondents.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Jai David Ortiz, verified on July 23, 2014 and filed in the Franklin County Clerk's office on August 11, 2014. Petitioner, who is an inmate at the Cape Vincent Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Franklin Correctional Facility and concluded on April 2, 2014. The Court issued an Order to Show Cause on August 20, 2014 and has received and reviewed respondents' Answer and Return, verified on October 17, 2014, as well as Petitioner's Letter Reply dated November 5, 2014 and filed in the Franklin County Clerk's office on November 12, 2014.

As a result of incidents that occurred at the Franklin Correctional Facility between July 1, 2012 and March 14, 2014 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 103.10 (Extortion/Attempted Extortion) (two counts), 103.20 (Solicitation), 107.20 (lying) and 180.17 (Providing Legal Assistance

Without Authorization). The inmate misbehavior report, authored Senior Investigator Stephen F. Weishaupt, DOCCS Inspector General's office, alleged as follows:

“In connection with an official investigation, conducted by the Inspector General's Office, and concluded on 03/14/14 at 530pm, the following information was developed:

103.10 Extortion/Attempted Extortion (Count 1); ‘An inmate shall not bribe or extort or attempt to bribe or extort any person.’ To wit: On or about January 13, 2014, inmate Ortiz sent a letter to Mr. Bernard Ascher of Briar Cliff, NY. Mr. Ascher is the father-in-law of inmate Arthur Fisher, 12A0393. In that letter inmate Ortiz set forth his knowledge of inmate Fisher and stated that he was responsible for doing Fisher's legal work. Ortiz intimates that he is aware of letter sent to the Attorney General's Office, by inmate Fisher, in which Fisher reportedly accuses Ascher of stealing certain proprietary information from [sic] his former employer. Ortiz offers to fix this situation by providing affidavits from other inmates claiming that Fisher told them he was fabricating his story to get even with Ascher. In return for this, Ortiz sought an unnamed sum of money. The letter referred to is attached hereto and made a part hereof by reference^[1]. In addition, further evidence exists that identifies inmate Ortiz as the author of the letter. All contrary to the provisions of the regulations in such case made and provided.

103.10 Extortion/Attempted Extortion (Count 2); To wit: Between February 2013 and August 2013, inmate Ortiz sent a letter to Gail Sheperd, mother of inmate Arthur Fisher, in Ossining, NY. In that letter, Ortiz said that he needed additional monies to continue with Fisher's legal work. Ortiz threatened that without his help Fisher would lose his appeal and remain in prison. This information is based on the statements of witnesses interviewed in connection with this investigation. All contrary to the provisions of the regulations in such case made and provided.

130.20 Solicitation; ‘An inmate shall not request or solicit goods or services from any business or any person other than an immediate family member without the consent and approval of the facility superintendent or his designee.’ To wit: Between June 2012 and March 2013, inmate Ortiz on numerous occasions solicited funds and other remuneration from inmate Arthur Fisher for legal work that Ortiz was conducting on behalf of Fisher, without requisite authorization. Funds were paid to Ortiz through payments

¹ Notwithstanding this allegation, it is apparent from the transcript of the superintendent's hearing that a copy of Mr. Ascher's letter was not attached to the copy of the inmate misbehavior report served on petitioner.

made to individuals at various locations throughout the New York metropolitan area and Puerto Rico, as directed by Ortiz. Additionally, a bank check was sent to Ortiz' daughter and a laptop computer was sent to his brother. All contrary to the provisions of the regulations in such case made and provided.

107.20 Lying; 'An inmate shall not lie or provide an incomplete, misleading and/or false statement of information.' To wit: On 03/14/14 Ortiz was interviewed by the Inspector General's Office regarding his knowledge of an extortion letter sent to Bernard Asher, father-in law. Of inmate Arthur Fisher. During that interview Ortiz stated that he knew inmate Fisher only from being on the same dorm and that he would occasionally say hello to him. Ortiz also stated that he has never done any legal work for Fisher and that he did not have any knowledge of the extortion letter. Subsequent investigation and interviews has shown those statements to be lies. All contrary to the provisions of the regulations in such case made and provided.

180.17 Providing Legal Assistance without Authorization; 'An inmate may not provide legal assistance to another inmate without prior approval of the superintendent or designee. An inmate shall not receive compensation for providing legal assistance.' To wit: From about June 2012 until March 2014, inmate Ortiz provided a myraid of legal assistance to inmate Arthur Fisher. This assistance included but was not limited to legal research, writing of letters and briefs and review of materials prepared by Fisher. Additionally, Ortiz sought and received payment from Fisher for these services. The payments being made by transfer of funds to individuals, identified by Ortiz, at various locations throughout the New York metropolitan area and Puerto Rico, as directed by Ortiz. Additionally, a bank check was sent to Ortiz' daughter and a laptop computer was sent to his brother. All contrary to the provisions of the regulations in such case made and provided."

A Tier III Superintendent's Hearing was conducted at the Franklin Correctional Facility commencing on March 25, 2014. At the conclusion of the hearing, on April 2, 2014, petitioner was found not guilty of violating inmate rule 107.20 but guilty of the remaining charges. A disposition was imposed confining him to the special housing unit for 135 days (partially suspended and deferred) directing the loss of various privileges for a like period of time and recommending the loss of two months good time. Upon

administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on April 2, 2014 were affirmed. This proceeding ensued.

Petitioner advances a variety of arguments in support of his ultimate contention that the results and disposition of the Tier III Superintendent's Hearing concluded on April 2, 2014 must be overturned. In their Answer and Return respondents do not address petitioner's claims on the merits but, rather, argue that this proceeding must be transferred to the Appellate Division, Third Department for disposition. In this regard the following is asserted in paragraph 12 of the Answer and Return: "[Respondents] [r]espectfully submit that Petitioner - at Paragraphs 19 and 33 of the Petition and elsewhere - has raised the substantial evidence issue specified in question four of CPLR 7803, and Respondents have not raised any objections as could terminate this proceeding."

Although the precise import of the allegations set forth in the somewhat rambling, 45-paragraph Petition is not always easily discernable, the Court ultimately concludes that petitioner has - albeit inartfully - raised the substantial evidence question as specified in CPLR §7803(4). In this regard it is noted that petitioner, after observing that the letter to Bernard Ascher referenced in the inmate misbehavior report did not bear his signature, states that he "... objected to the fact that there was no evidence offered to support the conclusion in the [misbehavior] report that I was the author of said letter." See paragraph 17 of the Petition. Similarly petitioner, after referencing the "legal packet" alleged to constitute materials he prepared on behalf of Inmate Fisher, states that "... there was absolutely no evidence that petitioner had possessed the legal packet." See paragraph 19 of the Petition. In paragraph 21 of the Petition, moreover, it is alleged that although Senior Investigator Weishaupt "... testified as to the veracity and substance of statements made by [Inmate] Fisher's mother Gail Shepherd, however, he ultimately

admitted that he did not personally interview Ms. Shepherd.” (Emphasis in original). Petitioner goes on to assert that the investigator “. . . never bothered to independently verify the veracity of what [Inmate] Fisher said Gail Shepherd said. In this instance, the investigator never claimed to have personally observed or interviewed any person that witnessed Petitioner engaged in any misbehavior alleged in the report.” See paragraph 33 of the Petition (Emphasis in original).

It thus appears clear to the Court that petitioner has, in fact, called into question the quantum or quality of evidence relied upon by the hearing officer in reaching the determination of guilt. Although the *pro se* inmate petitioner does not specifically mention the substantial evidence issue, the Courts examination of the petition (as detailed in the preceding paragraph) leads it to conclude that such issue has sufficiently, although inartfully, been raised. See *Argentina v. Fischer*, 98 AD3d 768 and *Abreu v. Coughlin*, 157 AD2d 1028. Since the respondents interpose no objection constituting an objection as could terminate the proceeding within the meaning of CPLR §7804(g), this matter must be transferred to the Appellate Division, Third Department.

It is, therefore, the decision of the Court and it is hereby

ORDERED, that this proceeding, in its entirety, is transferred for disposition to the Appellate Division, Third Department.

Dated: March 18, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice