

<b>Matter of Nelson v Yelich</b>
2015 NY Slip Op 30374(U)
March 19, 2015
Supreme Court, Franklin County
Docket Number: 2014-774
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  
**DEON L. NELSON, #93-B-3023,**  
Petitioner,

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

**DECISION AND JUDGMENT**

**RJI #16-1-2014-0421.84**

**INDEX # 2014-774**

**ORI #NY016015J**

-against-

**BRUCE S. YELICH**, Superintendent,  
Bare Hill Correctional Facility,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Deon L. Nelson, verified on September 29, 2014 and filed in the Franklin County Clerk's office on October 7, 2014. Petitioner, who is now an inmate at the Mohawk Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Bare Hill Correctional Facility on September 4, 2014. The Court issued an Order to Show Cause on October 15, 2014 and has received and reviewed respondent's Answer and Return, verified on December 11, 2014 and supported by the Letter Memorandum of Glen Francis Michaels, Esq, Assistant Attorney General, dated December 11, 2014. The Court has also received and reviewed petitioner's Reply thereto, dated December 31, 2014 and filed in the Franklin County Clerk's office on January 20, 2015.

As the result of an incident that occurred at the Bare Hill Facility (the date of the incident is an issue in this proceeding) petitioner was issued an inmate misbehavior

report on August 30, 2014 charging him with a violation of inmate rule 109.10 (out of place). The inmate misbehavior report, authored by C.O. Burke, alleged in relevant part as follows: “. . . WHILE WORKING IN THE MESSHALL I WITNESSED INMATE NELSON TALKING LOUDLY TO INMATES THAT WERE ON THE LINE WAITING TO PICK UP TRAYS. THIS SLOWED THE PROGRESS OF THE LINE. I HAD COUNSELED INMATE NELSON EARLIER IN THE MEAL ABOUT THIS TYPE OF BEHAVIOR. INMATE NELSON WAS ASSIGNED TO TABLE TOPS AND HAD NO BUSINESS BEING AT THE TRAY PICK UP AREA.” A Tier II Disciplinary Hearing was held at the Bare Hill Correctional Facility on September 4, 2014. At the conclusion of the hearing petitioner was found guilty as charged and a disposition was imposed confining him to his cube (except for meals) for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing of September 4, 2014 were affirmed. This proceeding ensued.

Petitioner argues that the results and disposition of the Tier II Disciplinary Hearing of September 4, 2014 must be overturned because the inmate misbehavior report specified the wrong date for the underlying incident. In this regard it is noted that although the typed inmate misbehavior report was dated August 30, 2014 the incident date was specified at September 30, 2014. Petitioner brought this error to the attention of the hearing officer at the outset of the hearing and testimony was subsequently elicited from the author of the report to the effect that the September 30, 2014 reference was a typographical error and that the incident actually took place on August 30, 2014.

Petitioner also argues that the results and disposition of the Tier II Disciplinary Hearing of September 4, 2014 must be overturned because the inmate misbehavior report was not signed by C.O. Burke. In this regard it is noted that although C.O. Burke's name is typed on the inmate misbehavior report under the heading "REPORTED BY," he did not sign the document under the "SIGNATURE" heading. Petitioner brought this issue to the attention of the hearing officer and testimony was subsequently elicited from C.O. Burke to the effect that his failure to sign the misbehavior report was an oversight on his part.

7 NYCRR §251-3.1(c)(3) provides that an inmate misbehavior report shall include "the date, time and place of the incident" underlying the issuance of the report. In addition, 7 NYCRR §251-3.1(b) provides, in relevant part, that "[t]he misbehavior report shall be made by the employee who has observed the incident . . ." (Emphasis added). Notwithstanding these regulatory provisions, a minor defect/inaccuracy in a misbehavior report is not fatal where the inmate is not prejudice by reason of the defect/inaccuracy. See *Costa v. Connolly*, 94 AD3d 1322, *McGowan v. Fischer*, 88 AD3d 1038, *Linares v. Fischer*, 59 AD3d 761, *lv denied* 12 NY3d 709, *DiRose v. New York State Department of Correctional Services*, 270 AD2d 675 and *Rivera v. Goord*, 248 AD2d 902. The measure of a misbehavior report's legal sufficiency is whether it provides the inmate with sufficient particulars of the charge to enable him/her to make an effective response. See *Abdur-Raheem v. Mann*, 85 NY2d 113 at 123 and *Faison v. Senkowski*, 255 AD2d 625, *app dis* 93 NY2d 847.

In the case at bar the incorrect incident date set forth in the inmate misbehavior report of August 30, 2014 clearly represented a clerical/typographical error since it

would obviously be impossible for a September 30, 2014 incident to be the subject of an August 30, 2014 report and September 4, 2014 disciplinary hearing. At the outset of the hearing, after inmate misbehavior report had been read into the record and a not guilty plea received, petitioner was asked by the hearing officer if he had pled not guilty simply because of the erroneous incident date set forth in the inmate misbehavior report. Petitioner responded in the negative and went on as follows: “I pled not guilty because . . . I didn’t do it. I didn’t do it . . . [M]y defense . . . is I wasn’t talking to anybody on the line. I was doing tables I was doing table tops[.]” When the hearing officer then asked petitioner if he was over by the tray pick up area, petitioner responded “no not at all[.]” Testimony was then taken from the author of the inmate misbehavior report (C.O. Burke), who made clear that the reference to an incident date of September 30, 2014 was the result of a typographical error on his part and that the correct date for the incident at the Bare Hill Correctional Facility messhall was August 30, 2014. C.O. Burke went on to testify with respect to the August 30, 2014 incident in a manner not inconsistent with the allegations set forth in the inmate misbehavior report. Petitioner did not cross-examine C.O. Burke with respect to any aspect of the officer’s testimony.

In view of the foregoing the Court finds no basis to conclude that petitioner was prejudiced, and therefore unable to effectively respond to the charges against him, by reason of the erroneous incident date (September 30, 2014) set forth in the inmate misbehavior report. The clerical error in the inmate misbehavior report was explained in the hearing testimony of the author of the report and there was no evidence at the hearing of any confusion on the part of petitioner as to the actual date of the incident.

In this regard the Court finds petitioner's reliance on *Howard v. Coughlin*, 190 AD2d 1090, to be misplaced. The petitioner in *Howard* was issued an inmate misbehavior report following an April 16, 1991 incident where another inmate was fatally stabbed. The inmate misbehavior report, however, stated that the incident took place on April 19, 1991. According to the Appellate Division, Fourth Department, in *Howard*:

“We reject respondents' contention that the petition was improperly granted because petitioner was not prejudiced by the inaccurate date on the misbehavior report. The regulation requiring the misbehavior report to include the specific, time and location of the incident is designed to safeguard an inmate's due process right to advance notice of the alleged violation; that report must be sufficiently detailed to afford an opportunity for preparing a defense . . . Petitioner's assistant, with the aid of the inaccurate misbehavior report, interviewed potential witnesses regarding an alleged incident that occurred on April 19 rather than April 16. Nearly all of the inmate witnesses refused to testify on the ground that they did not know enough about the incident to provide relevant testimony. Thus, the Commissioner's failure to follow his own regulations seriously prejudiced petitioner's ability to prepare his defense.” *Id.* at 1091 (citations omitted).

Thus, the *Howard* court did not base its reversal simply on the fact that an erroneous incident date had been set forth in the underlying inmate misbehavior report but, rather, based upon its perception of the prejudice that flowed to Inmate Howard by reason of the error. As noted previously, however, petitioner was not prejudiced in the case at bar.

With respect to C.O. Burke's failure to sign the inmate misbehavior report, the Court similarly finds that petitioner was not prejudiced by the omission and, therefore, his argument on this point is also rejected. The typed name of C.O. Burke on the inmate misbehavior report clearly identified him as the maker of the report and his testimony at the disciplinary hearing confirmed that his failure to sign the report was merely an oversight. This is not a case, moreover, where the hearing officer's determination of guilt was based solely upon the written inmate misbehavior report since C.O. Burke appeared and testified at the hearing, subject to cross examination by petitioner.

In addition, a review of the record demonstrates to the Court's satisfaction that the outcome of the Tier II Disciplinary Hearing of September 4, 2014, as affirmed on administrative appeal, flowed from the evidence presented at the hearing and not from any alleged bias on the part to the hearing officer. *See Gimenez v. Artus*, 63 AD3d 1461, *Arnold v. Fischer*, 60 AD3d 1177 and *Arrington v. Burge*, 57 AD3d 1032. Finally, the Court finds that the dispositional penalties imposed following the findings of guilt were not so shocking to the Court's sense of fairness as to be excessive. *See Wilson v. Artus*, 71 AD3d 1294.

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:** March 19, 2015 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice