Matter of Fuqua v Annucci
2015 NY Slip Op 30954(U)
March 22, 2015
Supreme Court, Franklin County
Docket Number: 2014-759
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
WENDELL FUQUA, #09-B-1915,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2014-0412.81
INDEX # 2014-759
ORI #NY016015J

-against-

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community Supervision,
Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Wendell Fuqua, verified on September 5, 2014 and filed in the Franklin County Clerk's office on October 2, 2014. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Mid-State Correctional Facility and concluded on May 15, 2014. The Court issued an Order to Show Cause on October 7, 2014 and has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on December 15, 2014 and supported by the December 15, 2014 Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General. The Court has also received and reviewed petitioner's Reply thereto, dated January 29, 2015 and filed in the Franklin County Clerk's office on February 2, 2015.

As the result of an incident(s) that occurred at the Mid-State Correctional Facility the petitioner was issued an inmate misbehavior report, dated April 30, 2014, charging him with violations of inmate rules 113.25 (an inmate shall not conspire with any person

to introduce any narcotic into the facility), 114.10 (smuggling), 121.11 (call forwarding/third party phone call) and 121.10 (exchanging pins). The inmate misbehavior report, authored by Inspector General Investigator Stewart, alleged, in relevant part, that on April 29, 2014 " . . . an ongoing investigation being conducted by NYSDOCCS, Inspector General's Office, Narcotics Unit was concluded. This investigator found that inmate Fuqua . . . is in violation of the above rule violations and did conspire with, inmate Coleman . . . to have a civilian employee smuggle contraband and a quantity of Subxone into the facility. Inmate Fuqua also utilized another inmate . . . Humphrey . . . PIN in an attempt to disguise his identity and use this pin number to have drugs smuggled into the facility."[1]

A Tier III Superintendent's Hearing was commenced at Mid-State on May 4, 2014. At the conclusion of the hearing, on May 15, 2014, petitioner was found guilty of all four charges and a disposition was imposed confining him to the special housing unit for 24 months, directing the loss of certain privileges for 24 months and others for 36 months, directing the loss of contact visitation for 6 months and recommending the loss of 18 months good time. Upon administrative appeal the dispositional penalties were modified by reducing the special housing unit confinement period from 24 to 9 months and the recommended loss of good time from 18 months to 12 months. The results and disposition of the superintendent's hearing were otherwise affirmed. This proceeding ensued.

Petitioner asserts five causes of action in support of his ultimate contention that the results and disposition of the Tier III Superintendent's Hearing concluded on May 15,

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[1] For reasons unknown to the Court, the copy of the inmate misbehavior report annexed to respondent's Answer and Return as part of Exhibit A thereof was redacted. The more compete language of the inmate misbehavior report, as quoted in the body of this Decision and Judgment, is taken from the transcript of the superintendent's hearing, as read into the record by the Hearing Officer.

2014, as modified on administrative appeal, must be overturned. Before addressing those causes of action the Court first notes that petitioner's failure to interpose specific objections during the course of the hearing to certain alleged procedural errors plays a significant role in the ultimate disposition of this proceeding. Other than the vague objection discussed below in connection petitioner's third cause of action, petitioner interposed no procedural objections - specific or otherwise - prior to the close of the hearing. Just before the evidentiary portion of the hearing was closed, moreover, the hearing officer specifically asked petitioner if there were " . . . [a]ny other statements you want to make, procedural issues, objections." Petitioner responded "[n]o sir." It is noted that after the evidentiary portion of the superintendent's hearing was closed and after the hearing officer read her disposition into the record and advised petitioner of his rights on administrative appeal, petitioner was asked if he had any statements he wished to make. Petitioner responded as follows: " . . . I just want to object to this whole hearing because I feel like its (inaudible) due to the fact that like I stated, I never conspired with any individual. The investigator with his testimony, you know, I feel like he's hitting me hard. I object to this (inaudible)[.]" The Court finds, however, that this general, post-disposition "objection" was insufficient to constitute a specific objection to any of the alleged procedural errors encompassed in petitioner's causes of action.

In his first cause of action petitioner asserts that during the course of the superintendent's hearing he " . . . requested a copy of the Unusual Incident report, Photos, Area log, Search log, Evidence log stamp, request for test of suspected contraband drugs, Contraband test procedure, and Search contraband report (form 2062) which were prepared and/or should have been prepared in connection with incident. The Hearing Office failed to provide Petitioner with request to review and access to the evidence although the requested evidence was made available to the Hearing Officer. Petitioner

objected to improper denial." Notwithstanding such assertions, the Court finds nothing in the hearing record to suggest that petitioner ever requested that he be provided with copies of the materials referenced in paragraph 17 of his petition, as quoted above. In any event, even if petitioner had requested that he be provided with such materials and such request was improperly denied by the hearing officer, there is nothing in the record to suggest that petitioner interposed a specific objection during the course of the hearing, when corrective action could have been taken. Under such circumstances the issue would not be preserved for judicial review in this proceeding. *See Correnti v. Prack*, 93 AD3d 970.

In his second cause of action petitioner argues that his due process rights were violated inasmuch as he was allegedly denied the right to a fair and impartial hearing before an unbiased and impartial hearing officer. In support of his second cause of action petitioner asserts the following in paragraph 25 of the petition: "In the hearing, Hearing Officer Capt. Ad[a]mik, made several comments indicating that he had already determined the Petitioner was wrong and guilty based on a civil [sic, presumably meant to be civilian] employee involvement, one [of] the comments by Hearing Officer Capt. Ad[a]mik . . .during the hearing was (paraphrasing) 'Don't lie to me about the civilian employee involvement because I don't believe you,' and more comments of this caliber was [sic] made by Hearing Officer Capt. Ad[a]mik during the hearing. Petitioner objected to the entire proceeding." The Court, however, has reviewed the transcript of the superintendent's hearing and finds no comments by the hearing officer that even remotely resemble those alleged in paragraph 25 of the petition, as quoted above. The Court finds no basis in the record to otherwise conclude that the hearing officer was biased against petitioner or that the determination of guilt flowed from any alleged bias. *See Ramos v.*

Prack, 125 AD3d 1036, *lv dismissed* __ NY3d __, 2015 NY Slip Op 72935, *Brown v. Fischer*, 120 AD3d 1517 and *Gimenez v. Artus*, 63 AD3d 1461.

Petitioner's third cause of action appears to focus on the alleged insufficiency of the allegations set forth in the inmate misbehavior report and on the hearing officer's alleged failure " . . . to provide Petitioner with requests to give the details of evidence although the requested evidence was made available to the Hearing Officer. Petitioner objected to improper denial." In paragraph 35 of the petition it is alleged that the hearing officer " . . . denied petitioner['s] requests to be provided with enough particularity to prepare a defense and failed to articulate any justification for denial of access to evidence based on concern for legitimate correctional goals or institutional safety . . ."

The Court first notes that petitioner never clearly and unambiguously communicated to the hearing officer a challenge to the sufficiency of the inmate misbehavior report as, in effect, a charging instrument. Rather, he interposed a vague objection that was obviously interpreted by the hearing officer as an objection to the sufficiency of the materials provided to petitioner by his employee assistant. Thus, at the outset of the superintendent's hearing on May 4, 2014, after the Hearing Officer read the misbehavior report into the record and asked petitioner for his pleas, the following colloquy occurred:

"Fuqua: I can't plead. I don't have no knowledge of when and where or how they say this took place. That's what I was waiting for, like the evidence that they supposedly have against me. To see how I could actually plead to these charges.

Adamik [Hearing Officer]: Alright, well you didn't ask for that stuff, as I said, at the time you were assisted. There's no mention, other than the phone call records which, you couldn't

> have the phone call records in your possession but they would have been gone over here. Alright, the rest of the stuff, you didn't ask for it so because you didn't ask for it on here [presumably on the Assistant Form] and you signed your assistance as complete, I'm gonna take your plea right now. Alright, and that stuff will be provided to you."

Petitioner responded "[a]lright," and went on to enter pleas of not guilty to violating inmate rules 113.25 and 114.10, but guilty to the charges of violating inmate rules 121.11 and 121.14. In this regard he acknowledges placing telephone calls to his girlfriend and brother using the PIN number of Inmate Humphrey but denied discussing the subject of drugs or the introduction of drugs into the facility or otherwise conspiring to promote prison contraband or drugs. The Hearing Officer then announced that he would adjourn the hearing " . . . to make copies of the records of the U.I. [presumably Unusual Incident] and I'm going to arrange for Investigator Stewart to testify because he is the one that has all the information. He wrote the report and he did the investigation . . ." The hearing was reconvened - and ultimately concluded - on May 15, 2015.

As noted previously, the petitioner never clearly and unambiguously communicated to the hearing officer a challenge to the sufficiency of the inmate misbehavior report as, in effect, a charging instrument. Accordingly, no challenge to the sufficiency of the inmate misbehavior report has been preserved for review in this proceeding. As far as petitioner's vague objection to entering a plea prior to receiving unspecified evidentiary material is concerned, the Court notes that petitioner acquiesced in the procedures outline by the hearing officer. In addition, after testimony from Inspector Stewart was received into evidence, subject to cross examination, and after the audiotape of at least a portion of an April 22, 2014 telephone conversation acknowledged

[* 7]

to be between petitioner and a woman named Odette was played, petitioner specifically declined the opportunity offered by the hearing officer to interpose any procedural objections prior to the close of the hearing. Under these circumstances the Court finds petitioner's third cause of action to be without merit.

In his fourth cause of action petitioner asserts that he " . . . was denied the right to receive a written statement saying the reasons for the denial of the inmate witness [Coleman], including the specific threat to institutional safety or correctional goals presented." More specifically, in paragraphs 40 and 42 of the petition the following is alleged: "During the hearing, the Petitioner had requested to see witness refusal form and why witness refusal form was redacted. The Hearing Officer Capt. Ad[a]mik failed to provide Petitioner with proper request . . . Here the Hearing Officer . . . denied Petitioner['s] right to witness refusal form and right to call witness to support his defense and failed to articulate any justification for denial of access to requested information evidence based upon concern for legitimate correctional goals or institutional safety, requiring that the Court order reversal of the hearing and expungement from Petitioner's record."

There is no doubt that at the time employee assistance was being provided to petitioner he requested that Inmate Coleman be called as a witness at the upcoming superintendent's hearing. It was noted on the written Assistant Form signed by petitioner on May 2, 2014, however, that Inmate Coleman had refused to testify. At the outset of the superintendent's hearing, on May 4, 2014, the following colloquy occurred with respect to the requested testimony of Inmate Coleman:

"Adamik: . . . Inmate Coleman declined to testify on your behalf and Mr. Rena [petitioner's employee assistant] explained that to you, correct?

Fuqua:	Yes sir.
Adamik:	Did he show you this [signed refusal form].
Fuqua:	No he didn't.
Adamik:	Alright, it's a refusal form. It says MidState Correctional Facility, Coleman . . . refused to testify on behalf of Fuqua. . . for his Tier III hearing for a misbehavior report 4/29/14, for the following reasons: #1 - I don't want to be involved and no knowledge of the incident. #2 - as stated above, signed by Mr. Rena and Inmate Coleman. Here is a copy of it. Do you see that.
Fuqua:	Yes sir."

The Court notes that the copy of the refusal form attached to respondent's Answer and Return as part of Exhibit C thereof is redacted so as to leave intact Inmate Coleman's general statements that he did not wish to be involved and that he did not know enough about the incident to provide relevant testimony but to black out Inmate Coleman's specific reasons/explanations. The Court further notes that the refusal form also indicates that Inmate Coleman refused to testify for "Other" reasons but, again, his specific reasons/explanation are blacked out. The language of the refusal form read into the record by the presiding hearing officer, as set forth in the body of this Decision and Judgment, includes only the general, non-redacted language.

During the course of the Tier III Superintendent's Hearing concluded on May 15, 2014 the hearing officer referenced Inmate Coleman's refusal to testify two additional times. Notwithstanding the foregoing, petitioner never interposed a specific objection with respect to either the refusal itself or the sufficiency of the redacted refusal form.

Petitioner, moreover, did not raise any issue with respect to Inmate Coleman's refusal to testify or the sufficiency of the redacted refusal form on administrative appeal. Accordingly, the Court finds that the issue(s) comprising petitioner's fourth cause of action have not been preserved for judicial review in this proceeding.

In petitioner's fifth and final cause of action he challenges the hearing officer's alleged failure to have the entire hearing electronically recorded. More specifically, in paragraph 47 of the petition it is alleged that the hearing officer stopped the recording tape "during the listening of an alleged phone call between Petitioner and girlfriend. Petitioner objected to entire proceeding." It is clear from the record that the hearing tape was turned off while the hearing officer and petitioner listened to the audiotape of the April 22, 2014 telephone conversation. Just before the tape was played the hearing officer announced that " . . . I'm going to adjourn the hearing. We're going to listen to that tape a little bit and, uh, we'll see where we're at after that." When the hearing was reconvened, approximately 12 minutes later, the hearing officer asserted for the record that "[w]e listened to, there's a cassette tape, audiotape, of a phone call made on 4/22/14 . . . [O]n it . . . clearly is Inmate Fuqua. He's admitted to that. He listened to it. He can hear the conversation between him and another female talking about an address and a name, Robert's [the civil employee referenced in the inmate misbehavior report] name. The civilian's name is mentioned. The post office box number that he gives is the post office box number that the drugs were mailed to. You listened to the tape with me, did you not?" Petitioner responded in the affirmative and a discussion of what was heard on the audiotape ensued. Petitioner's assertions to the contrary notwithstanding, however, there is nothing in the record to suggest that petitioner ever interposed a specific objection with respect to the hearing officer's decision to listen to the audiotape of the April 22, 2014 telephone conversation with the hearing tape shut off. Under such circumstances the

issue is not preserved for judicial review in this proceeding. *See Correnti v. Prack*, 93 AD3d 970.

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 22, 2015 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice