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| <b>Matter of Hyatt v Annucci</b>   |
| 2015 NY Slip Op 31292(U)   |
| June 22, 2015  |
| Supreme Court, Franklin County   |
| Docket Number: 2014-731  |
| 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  
**SHANE HYATT, # 05-A-4430,**

Petitioner,

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

**DECISION AND JUDGMENT  
RJI # 16-1-2014-0398.76  
INDEX # 2014-731  
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 Civil Practice Law and Rules commenced upon the Petition of Shane Hyatt, verified on September 10, 2014 and filed in the Franklin County Clerk's office on September 24, 2014. Petitioner, who is an inmate at Upstate Correctional Facility (hereinafter "Upstate"), is challenging the results and disposition of a Tier III Superintendent's Hearing that was conducted at Upstate on March 15, 2014. *See* 7 NYCRR Part 254.

The Court issued an Order to Show Cause on September 30, 2014 providing for service of the Verified Petition and respondent's Reply thereto. The Court has since received and reviewed respondent's Answer and Return, including *in camera* materials, verified on December 19, 2014 and supported by the December 19, 2014 Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General. The Court is also in receipt of petitioner's Reply, which was filed with the office of the Franklin County Clerk on February 5, 2015.

In his pleading, petitioner raises two causes of action. Initially, petitioner claims that he “was denied and deprived of his Federal and State Constitutional Rights to Due Process and Regulatory Right, in violation of the U.S. Const. Amend. 14, N.Y.S. Const. Art 1 §6, and 7 NYCRR §254.5(a), when the Hearing Officer Failed (*sic*) to call the witness or inquire about his refusal to testify and did not provided (*sic*) Petitioner with a copy of the witness refusal form.” In his second cause of action, petitioner asserts that his due process rights were further denied and deprived when his employee assistant (7 NYCRR Part 251, Subpart 251-4) “failed to interview requested witness (*sic*), get a written statement from the requested witness, failed to obtain DVD, and failed to report to Petitioner the results of his interview and investigation.”

Based upon the purported violations, Petitioner requests that a Judgment be issued pursuant to Article 78 of the CPLR granting him the following relief: (1) Reversal of Respondent’s determination which affirmed the disposition of Petitioner’s Tier III Superintendent’s Hearing and that said determination be declared null and void; (2) Expungement of all entries, records and disposition relating to the underlying Tier III Superintendent’s Hearing from Petitioner’s institutional, departmental and parole records; (3) Refund of the \$5.00 surcharge to Petitioner’s inmate account, along with the costs associated with commencement of the instant proceeding; (4) Petitioner’s restoration in all respects to the status he enjoyed prior to the commencement of the underlying hearing, including Petitioner’s release from Upstate’s Special Housing Unit (hereinafter “SHU”) and (5) such other and further relief as the Court may deem just and proper.

Annexed to respondent’s Answer and Return as Exhibit “A” is a copy of an Inmate

Misbehavior Report (hereinafter “IMR”), dated March 6, 2014. As is asserted in the IMR, Correctional Officer M. Colombe charges petitioner with violating inmate rules 106.10, disobeying a direct order; 102.10, making threats; 104.13, creating a disturbance; 107.11, harassment and 104.11, violent conduct. *See* 7 NYCRR §§251-3.1 and 270.2. According to the IMR, the incident allegedly occurred on March 6, 2014 at 9:15 a.m., within the SHU corridor between Upstate’s buildings numbered eight and nine. The IMR’s description of the incident is as follows:

“On the above date and approximate time. I officer M. Colombe was escorting Inmate Hyatt 05A4430 Back to 8 Bld (*sic*) from the infirmary P.T. Room, when Inmate Hyatt stated, ‘Next Time I go up there will be trouble’, and ‘If I get out of this jail I’ll kill you and Rape your family[?]’. I gave Inmate Hyatt several direct orders to stay quiet. He denied by saying Fuck you and more [derogatory] remarks. I gave my orders to stay quiet and he refused. While escorting Inmate Hyatt I encounter (*sic*) Sgt. Orpallo in hall way and Sgt. witness Inmates behavior (*sic*).” Respondent’s Answer and Return as Exhibit “A”.

The record reflects that petitioner was served with a copy of the IMR on March 8, 2014 by Officer T. Rabideau. *See* Respondent’s Answer and Return as Exhibit “D”. Pursuant to the provisions of 7 NYCRR Subpart 251-4, petitioner was given an opportunity to choose an Upstate employee to assist petitioner in preparing a defense to the charges against him. Correctional Officer C. Soucia was assigned to serve as petitioner’s employee assistant and, as indicated in the Assistant Form annexed to respondent’s Answer and Return as Exhibit “B”, Officer Soucia met with petitioner on March 8, 2014 at 3:00 p.m. *See* 7 NYCRR §§251-4.1 (a)(2) and 254.4. During their meeting, petitioner requested that Officer Soucia interview an inmate named Lopez as a potential witness. Moreover, petitioner also requested a DVD recording of the alleged

incident, along with the following documents or reports:

- “1. Any and all To/From Memoranda pertaining to the alleged incident.
2. Any and all Unusual Incident Report pertaining to the alleged incident.
3. Any and all Investigation Report pertaining to the alleged incident.
4. Any and all papers (documents) pertaining to the alleged incident.
5. Video and audio of me leaving the hospital and being escorting down the corridors back to 8 building on March 6, 2014.
6. Any and all Use of Force Report pertaining to the alleged incident.
7. Video and audio of me being escorted into 8 building and back to my cell on March 6, 2014.
8. Video and audio of me in the lower holding pens on February 28, 2014, at approx. 10:00 am, when C.O. M. Colombe and I had an issue which can prove he is only retaliating.
9. A written statement from the Prisoners in 8-A1-50cell (*sic*) who was in the holding pen with me on Feb. 28, 2014, on what transpire (*sic*) that day with C.O. Colombe and I.” Respondent’s Answer and Return as Exhibit “B”.

On March 10, 2014, the employee assistant made a request that a copy of the video monitoring footage of the alleged incident to be provided. *See* Respondent’s Answer and Return as Exhibit “B”. The record further reflects that the employee assistant interviewed inmate E. Lopez on March 8, 2014, at approximately 3:00 p.m. According to the form annexed to respondent’s Answer and Return as Exhibit “B”, Inmate Lopez refused to testify on behalf of petitioner, claiming that he had “no recollection of [the] incident”. As

is indicated on the Assistant Form, the materials requested by petitioner would be made available to him, if possible, at the hearing. *See Id.* At the conclusion of his assistance, Officer Soucia subscribed the Assistant form beneath a statement which states that he “interviewed the witnesses and assisted as requested and reported the result to the inmate charged”. *Id.* A notation stating “refused” is written in the inmate’s signature line of the Assistant Form. *Id.* Petitioner’s refusal to sign and acknowledge the Assistant Form was witnessed by a supervising Sergeant, who also subscribed the form.

Petitioner’s Tier III Superintendent’s Hearing was scheduled for March 15, 2014. By Memorandum dated the 15th of March, 2015, Superintendent S. Racette designated Lieutenant J. Tatro as an Acting Captain to serve as a hearing officer for purposes of commencing and completing petitioner’s disciplinary hearing in accordance with 7 NYCRR §254.1. *See Respondent’s Answer and Return as Exhibit “C”.*

A cover sheet attached to the transcript of petitioner’s Tier III Superintendent’s Hearing indicates that the proceeding commenced on March 15, 2014 at 6:58 p.m. and subsequently completed later that evening at 7:37 p.m. Upon the Hearing Officer’s inquiry, petitioner’s acknowledged being served with the IMR on March 8, 2014 at 8:45 a.m. *See Respondent’s Answer and Return as Exhibit “G” at page 3.* Thereafter, the Hearing Officer discussed with petitioner the witness and documentary evidence which petitioner had requested through his employee assistant. The Hearing Officer noted that the only documentation or memoranda in his possession was the IMR. *Id.* He informed petitioner that no unusual incident report had been filed, as the alleged misbehavior did not constitute an unusual incident. The Hearing Officer further indicated that no investigation report had been submitted, as no such report had been prepared, apart from

the IMR itself. Similarly, the Hearing Officer informed petitioner that no use of force report was proffered, as the IMR did not reference that physical force was used during the course of the alleged incident. *Id.*

In relation to the audio and video recordings requested by petitioner, the Hearing Officer informed him that he was in possession of the recording of petitioner “leaving the hospital and being escorted down the corridor back to 8 building on March 6<sup>th</sup>, 2014.” Respondent’s Answer and Return as Exhibit “G” at pg. 3. Moreover, the Hearing Officer also indicated that he had been provided with the “video and audio of [petitioner] being escorted into 8 building and back to [petitioner’s] cell on March 6, 2014. However, in relation to petitioner’s eighth evidentiary request, which consisted of “video and audio of [petitioner] in the lower holding pens on February 28, 2014, at approximately 10 a.m. when C.O. M. Colombe and [petitioner] had an [alleged] issue which can prove he is only retaliating”, the Hearing Officer informed petitioner that no such recording was available. *Id.*

Finally, with regard to petitioner ninth request, which was for “a written statement from prisoners in 8, a, 1, 50 cell, who was (*sic*) in the holding pen with [petitioner] on February 28<sup>th</sup>, 2014”, the Hearing Officer informed petitioner that the “inmate was Lopez I believe. E. Lopez, 95a8039, and he signed a refusal stating that he did not want to testify.” *Id.* at pg. 4. Thereafter, the Hearing Officer gave petitioner the opportunity to review the inmate witness refusal form. Petitioner then objected to the same, asserting that the inmate’s signature on the refusal form was in the same handwriting as the signature of petitioner’s employee assistant. The Hearing Officer noted petitioner’s objection for the record and proceeded on with the hearing. *Id.*

The Hearing Office thereafter, read the IMR into the record and inquired of petitioner how he wanted to plead on each charge. Petitioner entered a not guilty plea to all four charges contained in the IMR. *See Id.* at pgs. 5-6. The Hearing Officer then inquired of petitioner as to whether he had any defense, statement or explanation he wished to provide in relation to the charges set forth in the IMR. Petitioner indicated that he did, but requested that he first be permitted to watch the requested video recordings. The Hearing Officer played the video recording, and petitioner objected to the fact that only the last portion of the recordings had an audio recording. The Hearing Officer explained to petitioner that “[i]n the hallways, there’s no audio; there’s only video”, as equipment that recorded both audio and video was cost prohibitive. Respondent’s Answer and Return as Exhibit “G” at pgs. 7 and 11.

Upon review of the video footage, petitioner objected to the charges of 104.13, creating a disturbance (104.13) and violent conduct (104.11), as the footage did not show violent or disruptive conduct on the part of petitioner. Petitioner also asserted that the video footage shows one of officers who was escorting him tried to trip him. Upon further review of the video footage, the Hearing Officer concluded that he observed no such alleged attempt to trip petitioner and that the inmate never stumbled or staggered during the course of the escort. *See Id.* at pgs. 16.

Upon the Hearing Officer’s inquiry, petitioner objected to being denied access to his requested witness, and further objected that the inmate’s signature on the witness refusal form was in the same handwriting as employee assistant’s signature. Moreover, petitioner objected to not being provided with a copy of the inmate witness refusal form, which the Hearing Officer informed him was available via a Freedom of Information Law

(hereinafter “F.O.I.L.”) request to the disciplinary office. Petitioner also objected to his employee assistance and to the hearing itself. *See Id.* at pgs. 17-18. Finally, petitioner objected to the content of the IMR, claiming that the allegations set forth therein do not support the charges of creating a disturbance and violent conduct. *See Id.* at pg. 17.

The record reflects that at 7:27 p.m., the Hearing Officer closed the testimony in the hearing and took a brief recess to render a written disposition. Thereafter, the Hearing Officer read his disposition into the record, finding petitioner not guilty of violent conduct (104.11) and creating a disturbance (104.13). *See Respondent’s Answer and Return as Exhibit “G”* at pg. 19. Petitioner was found guilty of harassment (107.11), refusing a direct order (106.10) and making threats (102.10). *See Id.* at pgs. 19-20. Petitioner received a penalty of 60 days SHU, with a 30-day suspension of one-half of the penalty. *See* 7 NYCRR §254.7. Petitioner’s penalty also included a commensurate loss of privileges, including loss of commissary and loss of phone “to coincide” with the SHU penalty. *See Id.* at pg. 20. The Hearing Officer noted that his disposition was “intended to dissuade this inmate from acting in this manner in the future.” *Id.* at pg. 20; *see also* Respondent’s Answer and Return as Exhibit “F”.

Petitioner commenced an administrative appeal of the results and disposition of the tier III Superintendent’s disciplinary hearing, with a hand-written submission, dated March 30, 2014. *See Respondent’s Answer and Return as Exhibit “H”*. On May 30, 2014, Albert Prack, Director, Special Housing/Inmate Disciplinary Program, issued a determination in accordance with 7 NYCRR §254.8, which affirmed the outcome of petitioner’s disciplinary proceeding. *See Respondent’s Answer and Return as Exhibit “I”*. The instant proceeding ensued.

In relation to petitioner's first cause of action, "an inmate has a conditional constitutional right to call witnesses at a prison disciplinary proceeding and, if a request for a particular witness is denied, the inmate must be provided with a statement of the reason for the denial". *Moye v. Fischer*, 93 A.D.3d 1006, 1006-1007. (Citation omitted). "A deprivation of the inmate's right to present witnesses will be found when there has been *no* inquiry at all into the reason for the witness's refusal, without regard to whether the inmate previously agreed to testify". *Hill v. Selsky*, 19 A.D.3d 64, 66. (Citation omitted). However, "no violation of the right to call witnesses will be found when there was no prior assent to testify, but the reason for the refusal appears in the record" *Hill v. Selsky*, *supra* 19 A.D.3d at 66-67, citing *Moore v. Senkowski*, 13 A.D.3d 683, *Boyd v. Selsky* 232 A.D.2d 929, *Boyd v. Coughlin*, 220 A.D.2d 913, 914 and *Luna v. Coughlin*, 210 A.D.2d 757.

In the instant proceeding, "[a]s there is no indication in the record that he requested inmate ever agreed otherwise, the witness refusal form signed by the inmate indicating the reason he would not testify adequately protected petitioner's right". *Jamison v. Fischer*, 119 A.D.3d 1306, citing *Procopio v. Fischer*, 100 A.D.3d 1292, 1293; *Tulloch v. Fischer*, 90 A.D.3d 1370, 1371; *see also Cortorreal v. Annucci*, 123 A.D.3d 1337, 1338 (*holding* that "[i]nasmuch as the requested witnesses had not previously agreed to testify and each signed a witness refusal form indicating the reason for refusal, petitioner's right to present witnesses was adequately protected").

Inmate Lopez's proffered reason for refusing to testify was that he did not recollect the underlying incident. *See* Respondent's Answer and Return as Exhibit "B". The record is devoid of any evidence to indicate that Lopez' refusal to testify is motivated by any other

reason, apart from his stated inability to recollect. Petitioner was given the opportunity to review the inmate refusal form and the basis of Lopez' refusal to testify was placed on the record. As such, the record reflects that the Hearing Officer adequately protected petitioner's conditional right to call witnesses in his defense, and the inmate's refusal to testify does not amount to a deprivation of petitioner's rights.

Petitioner further claims that his right to call witnesses on his behalf was violated, as he was not provided with a physical copy of the inmate witness refusal form. The record demonstrates that the Hearing officer read the inmate witness refusal form into the record and gave petitioner an opportunity to review the document itself. The Hearing Officer further informed petitioner that the inmate witness refusal form was available from Upstate's disciplinary office via a F.O.I.L. request.

The inmate witness' refusal is confirmed in the record, and petitioner has failed to demonstrate how he was prejudiced by Upstate's failure to provide him with a copy of the form. Accordingly, the Court finds that "the failure to provide petitioner with a written refusal form is harmless error (*see, Matter of Covington v. Goord*, 262 A.D.2d 803, 693 N.Y.S.2d 250)." *Shannon v. Goord*, 282 A.D.2d 909, 910; *see also Jamison v. Goord*, 8 A.D.3d 860.

In petitioner's second cause of action, he asserts that he received ineffective employee assistance, as the correctional officer "failed to interview requested witness (*sic*), get a written statement from the requested witness, failed to obtain DVD, and failed to report to Petitioner the results of his interview and investigation."

"Departmental regulations require that an inmate who is confined pending a superintendent's hearing is to be provided an assistant (*see* 7 NYCRR 251-4.1 [d]; 254.4).

The assistant's role is to, among other things, 'interview witnesses and to report the results of his [or her] efforts to the inmate' (7 NYCRR 251-4.2)." *Rivera v. Prack*, 122 A.D.3d 1226, 1227.

"[T]he 'right to assistance is a right of constitutional dimension' (*Matter of Krall v. Selsky*, 309 A.D.2d 1027, 1027, 766 N.Y.S.2d 153 [2003] [internal quotation marks and citation omitted]) and the failure to provide assistance is a violation of 7 NYCRR 251-4.2." *Rivera v. Prack*, *supra*, 122 A.D.3d at 1227. To establish a *prima facie* showing of inadequate employee assistance, petitioner must demonstrate "that the assistance he received was so deficient as to prevent, or in any way impair, his ability to prepare and present a defense to the charges filed against him at the hearing". *Scott v. Fischer*, 57 A.D.3d 1035, 1036, *lv. denied*, 12 N.Y.3d 705. However, any potential prejudice from the purported ineffective assistance can be alleviated by corrective action taken by the hearing officer. *See Jackson v. Fischer*, 87 A.D.3d 775, *Harris v. Selsky*, 28 A.D.3d 982 and *Blackwell v. Goord*, 5 A.D.3d 883, *lv. denied*, 2 N.Y.3d 708.

A claim that an inmate received inadequate employee assistance shall be denied, where the record demonstrates that the assistant made a good-faith effort to obtain, and produce at the disciplinary hearing, all witnesses and documentation that the inmate has requested. *See Melluzzo v. Selsky*, 287 A.D.2d 850, 851 and 83 N.Y. Jur.2d Penal and Correctional Institutions §160.

In the instant proceeding, petitioner's employee assistant met with him on March 8, 2014 to discuss preparation of petitioner's defense. *See* Respondent's Answer and Return as Exhibit "B". According to the Assistant Form, Officer Soucia made a request for the video recording of the alleged incident and indicated that the other materials that

petitioner requested “will be made available at hearing if possible”. *Id.* Furthermore, Officer Soucia interviewed inmate Lopez as a potential witness, and, as is discussed above, Lopez executed an inmate witness refusal form, claiming that he had no recollection of the alleged incident. *See* Respondent’s Answer and Return as Exhibit “B”.

At the hearing, the Hearing Officer informed petitioner that a majority of the requested documents did not exist and that the IMR constituted the only report prepared in relation to the alleged incident. Petitioner was given an opportunity to watch the video recording of the March 6th incident, which was played several times during the course of the disciplinary hearing. The Hearing Officer explained to petitioner that the February 28, 2014 video and audio recording from the lower holding pens was unavailable. Finally, the Hearing Officer provided petitioner with a cogent explanation as to why no written statements from other prisoners in the holding pen on the 28th of February had been proffered. Accordingly, “[a]lthough the assistant did not provide petitioner with a copy of each document requested, petitioner was provided with those documents that were relevant and available. Moreover, the Hearing Officer discussed each of petitioner’s requests with petitioner to ensure that he had received all of the documents and information to which he was entitled”. *Hernandez v. Fischer*, 111 A.D.3d 1042, 1043; *see also Martin v. Fischer*, 109 A.D.3d 1026, 1027, *Matthews v. Fischer*, 95 A.D.3d 1529, 1530 and *Mitchell v. Bezio*, 69 A.D.3d 1281, 1282. As such, the Court finds that petitioner was provided with adequate and meaningful employee assistance in accordance with 7 NYCRR Subpart 251-4.

The Court has duly considered petitioner’s remaining contentions and finds that they are without merit.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

**ADJUDGED**, that the Verified Petition of Shane Hyatt, filed September 24, 2014, is dismissed.

**Dated:** June 22, 2015 at  
Indian Lake, New York

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S. Peter Feldstein  
Acting Justice, Supreme Court