

<b>Matter of Thousand v Prack</b>
2015 NY Slip Op 31511(U)
July 16, 2015
Supreme Court, Franklin County
Docket Number: 2014-692
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  
**ROBERT THOUSAND, #11-B-0026,**  
Petitioner,

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

**ORDER OF TRANSFER  
RJI #16-1-2014-0370.70  
INDEX # 2014-692  
ORI #NY016015J**

-against-

**ALBERT PRACK**, Director, Special Housing  
and Community Supervision DOCCS,  
Respondent.

**X**

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Robert Thousand, verified on August 31, 2014 and filed in the Franklin County Clerk's office on September 9, 2014. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing (rehearing) held at an unspecified location commencing on April 23, 2014 and concluded on May 1, 2014. The Petition is divided into six separately numbered causes of action.

The Court issued an Order to Show Cause on September 12, 2014 and an Amended Order to Show Cause on October 21, 2014. The Court next received and reviewed respondent's Answer and Return, including *in camera* materials, verified on December 23, 2014. Respondent's Answer and Return did not address the underlying petition on the merits. Rather, in paragraph 14 of his Answer and Return the respondent submitted "... that Petitioner - at page 14 of the Petition and elsewhere - has raised the substantial evidence issue specified in question four of CPLR 7803, and Respondent has not raised any objection as could terminate this proceeding." Accordingly, respondent

requested that this proceeding to be transferred to the Appellate Division, Third Department. In response thereto the Court received and reviewed petitioner's undated letter, filed in the Franklin County Clerk's office on January 30, 2015. In that letter petitioner stated that he wished ". . . to abandon the portion of the petition that claims substantial evidence."

By Letter Order dated February 17, 2015 the Court sought clarification as to which of petitioner's six causes of action he proposed to abandon. In this regard the Letter Order states, in relevant part, as follows:

"It seems clear that petitioner's Third Cause of Action, as set forth in paragraph 14 of the petition, raises the substantial evidence question and is to be abandoned . . . [H]owever, in respondent's answering papers it is asserted that the substantial evidence question was raised in paragraph 14 of the petition 'and elsewhere.' In this regard the Court notes that petitioner's Sixth Cause of Action, as set forth in paragraph 16 of the petition, focuses on alleged evidentiary inconsistencies and thus appears to call into question the quantum or quality of evidence relied upon by the hearing officer in reaching the determination of guilt. Petitioner's Sixth Cause of Action might therefore be construed as inartfully raising the substantial evidence question."

Accordingly, the Court directed the parties ". . . to advise chambers of their respective positions as to whether or not petitioner's proposed abandonment of the substantial evidence issue would apply to any cause of action in addition to his Third Cause of Action."

By Letter dated February 19, 2015 counsel for the respondent took the position that petitioner's proposed abandonment of the substantial evidence claim would encompass both his Third and Sixth Causes of Action. By Letter dated March 4, 2015 petitioner argued, in effect, that only his Third Cause of Action represented a substantial evidence claim.

In a Letter Order dated April 23, 2015 the Court stated that it remained “. . . uncertain as to which of petitioner’s six causes of action he intends to abandon. It is imperative, therefore, that to the extent petitioner seeks leave to abandon one or more cause(s) of action, he must re-submit such request in a writing that specifically identifies by number the cause or causes of action he seeks to abandon. If petitioner does not re-submit the request on or before May 15, 2015, the Court will proceed with the disposition of the petition as currently drafted.” In response thereto the petitioner, by letter dated May 12, 2015 received directly in chambers on May 14, 2015, reiterated the position that his Sixth Cause of Action did not implicate the substantial evidence question and stated that he only wished “. . . to abandon his third cause of action and proceed with the remaining causes of action before this court . . . Petitioner, under no circumstances wants to transfer to the Appellate division.”

As a result of incidents that occurred at the Great Meadow Correctional Facility on January 27, 2014 petitioner was issued two inmate misbehavior reports. The first report, authored by C.O. Corrigan and endorsed by C.O. Carpenter and C.O. Jones, charged petitioner with violations of inmate rules 106.10 (refusing direct order), 104.11 (violent conduct), 100.11 (assault on staff) and 113.10 (weapon). In his report C.O. Corrigan alleged, in relevant part, as follows: “[W]hile responding to a level one on C-1 company inmate Thousand . . . was being non-compliant to staff direction to place his hands on the cat walk bar and stop yelling. Thousand continued to yell . . . [‘]Fuck this, Fuck you!!’ [g]etting the attention of the other inmates going to chow. At this point Sgt. Scarlotta ordered me to escort inmate Thousand . . . back to his cell. Once back to his cell Thousand turned and punched me in the left side of face. At this point physical force by me became necessary to defend myself. During the course of this incident of force, inmate Thousand was found to be in possession of a 4½ x ½ ice pick type weapon.” The second inmate

misbehavior report, authored by C.O. Dimick, charged petitioner with a violation of inmate rule 116.10 (loss of state property). In his report C.O. Dimick alleged, in relevant part, that “[u]pon completion of packing inmate Thousand’s cell I was unable to locate his state issued razor.”

A single Tier III Superintendent’s Hearing (re-hearing) with respect to the charges set forth in both inmate misbehavior reports was commenced at the Upstate Correctional Facility on April 23, 2014. At the conclusion of the hearing, on May 1, 2014, petitioner was found guilty of all five charges and a disposition was imposed confining him to the special housing unit for twelve months and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier III Superintendent’s Hearing concluded on May 1, 2014 were affirmed. This proceeding ensued.

In his Third Cause of Action petitioner clearly and unambiguously raises the “substantial evidence” question, as specified in CPLR §7803(4), with respect to the single charge set forth in the inmate misbehavior report authored by C.O. Dimick. Inasmuch as he purports abandon his Third Cause of Action, the Court must determine whether petitioner effectively raised the substantial evidence question in any remaining cause of action - specifically in his Sixth Cause of Action<sup>1</sup>.

In his Sixth Cause of Action petitioner initially notes that he “. . . testified that CO Corrigan wrote the initial [inmate misbehavior] report due to his [petitioner’s] complaints to CO O’Brian about his cell being trashed by staff employees. Moreover, CO Corrigan’s report is a cover up for his assaultive actions on the petitioner.” Petitioner’s Sixth Cause of Action then focuses on alleged evidentiary inconsistencies manifested at the re-hearing

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<sup>1</sup> It is clear that petitioner did not raise the substantial evidence question in his First, Second, Fourth or Fifth Causes of Action.

and also upon alleged discrepancies between certain testimony at the initial hearing and testimony at the re-hearing. In view of the foregoing it is clear to the Court that petitioner's Sixth Cause of Action encompasses the claim that certain crucial allegations set forth in the inmate misbehavior report authored by C.O. Corrigan were fabricated-based upon retaliatory motivation - and that various evidentiary inconsistencies/discrepancies lent credence to the fabrication claim.

In advancing the above argument the Court finds that petitioner, in his Sixth Cause of Action, calls 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 raise the "substantial evidence" question with respect to his Sixth Cause of Action, the Court's examination of his petition 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. The argument advanced in petitioner's Sixth Cause of Action implicates the sufficiency of the evidence relied upon by the hearing officer in reaching the determination of guilt and, therefore, also implicates the substantial evidence question. *See Bonez v. Commissioner*, 65 AD3d 1411. *See also Bates v. Coughlin*, 145 AD2d 854. Since the respondent has interposed no objection constituting an objection as could terminate the proceeding within the meaning CPLR §7804(g), this matter must be transferred to the Appellate Division, Third Department notwithstanding petitioner's desire that it remain before this Court. *See CPLR §7804(g)*.

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:** July 16, 2015 at  
Indian Lake, New York.

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S. Peter Feldstein  
Acting Supreme Court Justice