Matter of Williams v Annucci
2016 NY Slip Op 30597(U)
March 31, 2016
Supreme Court, Franklin County
Docket Number: 2015-810
Judge: S. Peter Feldstein

STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
TYRELL WILLIAMS, #12-B-3800,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0474.66
INDEX # 2015-810
ORI #NY016015J

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

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Tyrell Williams, by and through his attorney, Alissa R. Hull, Esq., Prisoners' Legal Services of New York, verified on October 27, 2015 and filed in the Franklin County Clerk's office on October 27, 2015. Counsel's Memorandum of Law in Support of Petition, dated October 27, 2015, was also filed in the Franklin County Clerk's office on that date. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing (third rehearing) held at the Upstate Correctional Facility and concluded on May 7, 2015.

The Court has received and reviewed respondent's Answer and Return, including *in camera* materials, verified on January 19, 2016 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated January 19, 2016. The Court has also received and reviewed the January 28, 2016 Reply Memorandum of Law in Support of Petition of Alissa R. Hull, Esq., Prisoners' Legal Services of New York, filed in the Franklin County Clerk's office on February 2, 2016.

As the result of an incident that occurred at the Riverview Correctional Facility on April 5, 2014 petitioner was issued an inmate misbehavior report, dated April 7, 2014, charging him with violations of inmate rules 100.11 (assault on staff), 104.11 (violent conduct), 113.10 (weapon), 113.11 (altered item), 104.13 (creating a disturbance), 107.10 (interference with employee) and 106.10 (refusing direct order). The inmate misbehavior report, authored by Correction Sergeant Pickman, alleges, in relevant part, that petitioner " . . . was involved in an assault on Staff . . . This assault started at the Officers Station and ended in cube #49. Officer W. Bresett was the Staff member who received injuries from you [petitioner] during this assault. Officer Bresett had injuries to his face and right arm and hand. These injuries were consistent with the use of a [sic] unknown and unrecovered cutting instrument. The assault included the use of this unrecovered cutting instrument along with the use of your fists. Officer Bresett [sic] injuries included mass swelling of his face and right arm and hand. You Inmate Williams refused direction from Officer Bresett to stop this assault and comply with his directions to cease. Body holds were used by Officers Bresett and W. Ploof and C. Hewko to get you to comply with Staff directions."

Final administrative (DOCCS) disposition of the charges set forth in the April 7, 2014 inmate misbehavior report occurred at the end of a convoluted procedural path involving an initial Tier III Superintendent's Hearing and three rehearings. Petitioner, then acting *pro se,* previously commenced a CPLR Article 78 proceeding in this Court (Index No. 2015-30) wherein he purported to challenge the November 7, 2014 determination administratively reversing the results and disposition of the first rehearing and ordering a second rehearing. In that proceeding petitioner also sought judgment directing that the results and disposition of the first rehearing be reversed and that all

reference thereto be expunged from his institutional records[1]. The ensuing description of the procedural history of this case is drawn not only from the record in this proceeding (Index No. 2015-810) but also from the record in the proceeding under Index No. 2015-30.

The initial Tier III Superintendent's Hearing was held at the Mid-State Correctional Facility commencing on April 15, 2014. At the conclusion of the hearing, on April 19, 2014, petitioner was found not guilty of violating inmate rules 104.13 (creating a disturbance) and 113.11 (altered item) but guilty of the five remaining charges. A disposition was imposed confining him to the special housing unit for 42 months (April 5, 2014 to October 5, 2017), directing the loss of various privileges for a like period of time and recommending the loss of 42 months of good time. On June 18, 2014, upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing concluded on April 19, 2014 were reversed and a rehearing was ordered (*see* 7 NYCRR §254.8(d)).

The first rehearing was commenced at the Upstate Correctional Facility on June 25, 2014. At the conclusion thereof, on September 5, 2014, petitioner was again found not guilty of violating inmate rules 104.13 and 113.11 but guilty of the five remaining charges. A disposition was imposed confining him to the special housing unit for 42 months (April 5, 2014 to October 5, 2017), directing the loss of various privileges for a like period of time and recommending the loss of 42 months of good time. On November 7, 2014, upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing

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[1] After the respondent in the proceeding under Index No. 2015-30 moved to dismiss, Prisoners' Legal Services filed a notice of appearance on behalf of the petitioner and opposing papers were submitted. By Decision and Order dated September 30, 2015, however, respondent's motion was granted and the petition filed under Index No. 2015-30 was dismissed ". . . subject . . . to petitioner's right to challenge, on the merits, the results and disposition of the third re-hearing concluded on May 7, 2015, as affirmed on administrative appeal on June 26, 2015."

(first rehearing) concluded on September 5, 2014 were reversed and a second rehearing was ordered.

The second rehearing was commenced at the Upstate Correctional Facility on November 25, 2014. At the conclusion thereof, on January 8, 2015, petitioner was again found not guilty of violating inmate rules 114.13 and 113.11 but guilty of the five remaining charges. A disposition was imposed confining him to the special housing unit for 24 months (April 5, 2014 to April 5, 2016), directing the loss of various privileges for a like period of time and recommending the loss of 24 months of good time. On March 10, 2015,upon administrative appeal, the results and disposition of the Tier III Superintendent's Hearing (second rehearing) concluded on January 8, 2015 were administratively reversed and a third rehearing was ordered.

The third rehearing - which is the subject of this proceeding - was commenced at the Upstate Correctional Facility on March 19, 2015. At the conclusion thereof, on May 7, 2015, the charges that petitioner violated inmate rules 113.10 (weapon) and 113.11 (altered item) were dismissed but he was found guilty of the remaining five charges, including the charge of violating inmate rule 104.13 (creating a disturbance). A disposition was imposed confining petitioner to the special housing unit for 24 months, with four months suspended (April 5, 2014 to December 5, 2015), directing the loss of various privileges for a like period of time and recommending the loss of 24 months of good time. Notwithstanding the foregoing, these dispositional penalties were apparently reduced at the facility level (7 NYCRR §254.9) to confinement in the special housing unit for 16 months and 26 days, with 4 months suspended (April 5, 2014 to August 31, 2015), directing the loss of various privileges for a like period of time and recommending the loss of 24 months of good time. On June 26, 2015 the results and disposition of the Tier III Superintendent's Hearing (third rehearing) concluded on May 7, 2015, as apparently

modified at the facility level, were affirmed on administrative appeal. 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 (third rehearing) concluded on May 7, 2015 must be overturned. One argument, in particular, resonates with the Court. In paragraphs 49 and 50 of the petition (SECOND CLAIM OF RELIEF) petitioner asserts that the Hearing Officer presiding at the third rehearing violated his conditional constitutional right to call witnesses " . . . by failing to conduct a personal interview of inmate witness Mr. Bell, who testified at all three of petitioner's previous hearings, but refused to do so at this rehearing, without a genuine reason for Mr. Bell's refusal in the record."

During the course of the third rehearing petitioner took the position that the incident of April 5, 2014 did not take place in the manner described in the inmate misbehavior report (and/or, for that matter, in the manner described in the hearing testimony of C.O. Bresett). According to petitioner's testimony, he had a verbal disagreement with C.O. Bresett over the use of a vegetable chopper. Petitioner testified that he walked away from the verbal disagreement "mumbling under [his] breath." Petitioner went on to testify that C.O. Bresett yelled at him to return to his cube, pursued him, pushed him multiple times and challenged him to a fight. After describing a further verbal discussion/disagreement with respect to petitioner's compliance/non-compliance with C.O. Bresett's direction to return to his cube, petitioner testified as follows:

> "So as I'm walking through the door, right here, soon as I got past the Officers Station he [C.O. Bresett] pulled the um, the radio, pin, whatever he did. Pushed the button or something and threw the radio down and immediately began swinging at me. Now, from that point on we go, backin up, I'm trynna get away from him. He's trynna to grab me and slam me like on, on a wrestling uh, move like I'm trynna tell you. He's trynna slam me

> up against the um the dividers in the dorm, the lockers. So at one point we both slipped. He hit his head on a locker of Inmate Bell's. I hit my head on something, a divider or something which I had a scrape. He's bleeding and I'm already half way to my cube so now I'm like backing up toward my cube and he's following me into my cube cuz he's upset now that he's bleeding all over his uniform. So he said, get down on the floor. That's when I got down on the floor. Right then and there. There was no need for Use of Force and there was no force used so the whole point I'm making now is Officer Bresett's injuries is more consistent with what I just said . . . But there's no way his injuries were caused by a razor blade, knife, or my fists punchin him up like that making him bleed like that or whatever."

An inmate involved in a Tier III Superintendent's Hearing has a fundamental due process right to call relevant, non-redundant witnesses on his/her behalf provided the calling of such witnesses would not be unduly hazardous to institutional safety or correctional goals. *See Wolff v. McDonnell*, 418 US 539 at 565-566. Such right is implemented by the provisions of 7 NYCRR §254.5(a) which provide, in relevant part, that "[i]f permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial . . ." The above-quoted regulatory mandate is applicable, moreover, where the denial of a requested inmate witness is based upon the refusal of the requested witness to testify. *See Barnes v. LeFevre*, 69 NY2d 649 and *Moye v. Fischer*, 93 AD3d 1006.

The level of scrutiny that must be applied when a hearing officer at a Tier III Superintendent's Hearing denies a requested inmate witness based upon the prospective witness's refusal to testify varies depending upon the facts and circumstances attending such refusal. In this regard the Appellate Division, Third Department, has noted that its ". . . decisions reveal that the interplay of several criteria will dictate whether a hearing officer must personally interview a requested inmate witness who refuses to testify. These include whether the witness has previously agreed to testify, whether the inmate's reason for refusing appears in the record, and whether some inquiry into the reason for the

refusal has been conducted." *Hill v. Selsky*, 19 AD3d 64, 66. "When an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate's unwillingness to testify . . . A witness's statement that he '[did] not want to be involved' is not a sufficient reason to excuse a personal interview by the hearing officer . . ." *Id*. at 67 (citations omitted).

In the case at bar petitioner sought the testimony of Inmate Joshua Bell in connection with the third rehearing. According to petitioner, Inmate Bell would be able to testify that the laceration above the eye of C.O. Bresett was the result of a fall into Inmate Bell's locker rather than any assaultive behavior on the part of petitioner. Although this Court does not have before it the record of the previous three hearings (original hearing, first rehearing and second rehearing) petitioner alleges that Inmate Bell testified on his behalf at each of these hearings. Respondent, for his part, does not dispute this assertion.

DOCCS staff at the Ulster Correctional Facility (where Inmate Bell was then incarcerated) approached the inmate with respect to petitioner's request but Inmate Bell apparently stated that he did not wish to testify. On April 14, 2015 Inmate Bell signed a written statement wherein the specific reason for his refusal to testify at the third rehearing was stated as follows: "I do not wish to testify." Although a DOCCS employee (presumably at Ulster) also signed Inmate Bell's inmate witness refusal form, the name of that DOCCS employee cannot be determined from the record.

The respondent takes the position that since Inmate Bell did not agree to testify in connection with the third rehearing it was not necessary for the presiding hearing officer to personally interview Inmate Bell to try to ascertain the reason for his unwillingness to testify. According to respondent, the petitioner's due process rights were adequately

protected when the hearing officer elicited testimony by speakerphone from Correction Sergeant Scalamanere at the Fishkill Correctional Facility[2]. The hearing officer presiding at the third rehearing first contacted Sergeant Scalamanere on April 27, 2015 and requested that Inmate Bell be interviewed to see if he would testify on behalf of petitioner at the third rehearing. The sergeant obviously met with Inmate Bell on that date and the inmate signed a second inmate witness refusal form at Fishkill on April 27, 2015. The specific reason for the refusal to testify was stated on the second inmate witness refusal form as follows: "Does Not Want to Be Involved." The second inmate witness refusal form was also signed by Sergeant Scalamanere on April 27, 2015.

Sergeant Scalamanere's speakerphone testimony was taken during a May 7, 2015 session of the third rehearing. The sergeant testified that Inmate Bell stated no reason why he did not want to testify on behalf of the petitioner other than he did not want to get involved. Sergeant Scalamanere also testified that he did not coerce Inmate Bell or threaten him with retaliation if he testified on behalf of the petitioner. There is nothing in the record, however, to suggest that the hearing officer made any effort to personally contact Inmate Bell to attempt to ascertain a more specific reason for his refusal to testify.

Although unaware of any on-point judicial authority, this Court ultimately concludes that the heightened level of scrutiny - requiring the personal intervention of the hearing officer - that must be applied when a requested inmate witness who previously agreed to testify subsequently refuses to do so, is mandated where, as here, an inmate witness actually testifies at an initial Tier III Superintendent's Hearing but refuses to testify at a rehearing after the results and disposition of the original hearing were reversed on administrative appeal. Although the Court takes note of respondent's argument that

[2] Inmate Bell was apparently transferred from the Ulster Correctional Facility to the Fishkill Correctional Facility sometime after he signed the inmate witness refusal form at Ulster on April 14, 2015.

Inmate Bell never agreed to testify at the third rehearing, the fact remains that Inmate Bell not only agreed to testify, he actually did testify, at the original superintendent's hearing and the first two rehearings.

Apparently underlying the judicial mandate that a hearing officer personally attempt to ascertain the reason why a requested inmate witness who agreed to testify later refused to do so is the concern that once such inmate's intent to testify becomes known, improper pressure might potentially be exerted in order to persuade the potential inmate witness to remain silent. This Court finds that such concern is equally, if not more, applicable where, as here, Inmate Bell actually testified at the original superintendent's hearing, the first rehearing and the second rehearing but refused to testify at the third rehearing. Accordingly, the Court finds that the hearing officer presiding at the third rehearing was obligated to personally interview Inmate Bell to try to determine the reason why he refused to testify. Petitioner's right to call a witness, moreover, was not adequately protected when Correction Sergeant Scalamanere interviewed Inmate Bell since the hearing officer lacked the opportunity to judge the authenticity of the refusal. *See Hill v. Selsky*, 19 AD3d 64.

In *Alvarez v. Goord*, 30 AD3d 118, the Appellate Division, Third Department, as part of its attempt to clarify the parameters of constitutional violations requiring expungement, stated as follows:

> ". . . This Court has consistently held that where an inmate witness agreed to testify but later refuses to do so without giving a reason, the hearing officer must personally attempt to ascertain the reason for the inmate's unwillingness to testify; failure to make a personal inquiry constitutes a regulatory violation tantamount to a constitutional violation, thus requiring expungement." *Id.* At 121 (Citations omitted).

Accordingly, this Court finds that reversal and expungement is the proper remedy. In this regard it is noted that even it was authorized to weigh equitable considerations in determining whether expungement, rather than remittal for a new hearing, would be a proper remedy (*see Barnes v. Fischer*, 108 AD3d 990, *lv denied* 22 NY3d 855, and *Hayes v. Fischer*, 95 AD3d 1587), this Court would, somewhat reluctantly, find in favor of expungement. Although ordinarily loathe to direct expungement where, as here, extremely serious charges of assault on DOCCS staff are involved, the Court is simply not prepared to remit for a fifth hearing (fourth rehearing) with respect to an inmate misbehavior report alleging an incident that occurred just short of two years ago. It is also noted that with the exception of the recommended loss of good time, petitioner has completed serving all of the dispositional penalties imposed following the third rehearing, as modified at the facility level.

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

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Hearing (third rehearing) concluded on May 7, 2015 are vacated and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records; and it is further

ADJUDGED, that the respondent is directed to reimburse petitioner's inmate account for any surcharge imposed.

Dated: March 31, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice