Matter of Tafari v Annucci
2016 NY Slip Op 31197(U)
June 27, 2016
Supreme Court, Franklin County
Docket Number: 2014-0610
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
INJAH UNIQUE TAFARI, #89-A-4807,
Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

ANTHONY J. ANNUCCI, Commissioner, NYS Department of Correctional Services,

Respondent.

DECISION, ORDER AND JUDGMENT
RJI #16-1-2014-0320.60
INDEX#2014-0610
ORI #NY016015J

This is a proceeding to reverse, expunge and annul a Tier III determination. The Petition was originated by Injah Tafari, verified on August 6, 2014 and filed in the Franklin County Clerk's Office on August 8, 2014. Petitioner, who is now an inmate at Elmira Correctional Facility, challenged the results of the Tier III Superintendent's Hearing held at the Upstate Correctional Facility and concluded on May 23, 2014, and thereafter affirmed on administrative appeal. The Court references herein and incorporates hereto its previous Decisions and Orders dated March 6, 2015, June 30, 2015 and November 18, 2015.[1]

The Court issued an Order to Show Cause on August 20, 2014 and received and reviewed Respondent's Notice of Motion to Dismiss, supported by the Affirmation of Glen Francis Michaels Esq., Assistant Attorney General in Charge, dated November 7, 2014. In response thereto, the Court received and reviewed Petitioner's Reply Affidavit,

[1] The previous Decisions and Orders related to procedural issues and did not pertain to the merits of the underlying petition as further described herein.

verified on November 19, 2014 and filed in the Franklin County Clerk's Office on November 24, 2014, as well as his Addendum Reply "Affidavit," dated December 11, 2014 and filed in the Franklin County Clerk's Office on December 15, 2014. By Decision and Order dated March 6, 2015, Respondent's motion to dismiss was denied and he was directed to serve answering papers on or before April 10, 2015. As part of the Decision and Order of March 6, 2015, Petitioner was directed to ". . . mail his original Reply to the Respondent's answering papers to the Court Clerk's office . . . on or before April 24, 2015." The Court has received and reviewed Respondent's Answer and Return verified on March 19, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated March 19, 2015. The Court has also received and reviewed Respondent's Supplemental Return, also verified on March 19, 2015. The Court has also considered the Reply Affidavit of the Petitioner verified on March 26, 2015, together with exhibits, and received by the Franklin County Clerk's Office on December 21, 2015[2].

The Court next received and reviewed Petitioner's letters dated April 12, 2015 (filed in the Franklin County Clerk's Office on April 15, 2015) and April 26, 2015 (filed in the Franklin County Clerk's Office on May 4, 2015). In these letters, Petitioner sought to consolidate various actions and proceedings in this Court (including this proceeding under Index No. 2014-610) for the ultimate purpose of securing an injunction directing the various defendants/respondents to lift a DOCCS-imposed restriction on Petitioner's receipt of advanced postage for legal mail. In this regard, Petitioner annexed to his

[2] The length of delay in receipt of the March 26, 2015 affidavit shall be discussed more fully herein.

April 26, 2015 letter a copy of a memorandum, dated April 21, 2015, purporting to be from Kevin P. Bruen, DOCCS Deputy Commissioner and Counsel (the Bruen Memorandum). The Bruen Memorandum reads, in relevant part, as follows:

> "After very careful consideration of all of the circumstances involved in this case, this is the determination that we have reached with respect to the negative balance in Inmate Tafari's account and his unrelenting demands for legal mail advances. Inmate Tafari is to be informed that henceforth, a formalized process will be used for any future requests on his part for legal mail advances so that he will not be permitted to future extend his negative balance in any significant amount beyond its present level. It is completely unacceptable to allow individual inmates to run up balances of the kinds that inmate Tafari has caused, which presently is over $30,000.00. As of April 21, 2014 (*sic*), there are approximately 52,000 inmates in the custody of the Department.
>
> To be fair to the rest of the inmate population, no single inmate can be permitted to obtain legal advances that lead to these types of negative balances. To address the issue on a going forward basis, on an annual basis, inmate Tafari will be permitted a total of no more than $25.00 additional dollars in legal advances, nor more than five individual requests. This means that one year from today's date, inmate Tafari (*sic*) negative balance cannot exceed its present balance by more than $25.00. He is to be placed on notice about this procedure. Henceforth, it will be up to him to determine which matters warrant priority, in the same manner that every one of us must make decisions in our personal lives about setting priorities within our existing means. Ultimately, in order for inmate Tafari to learn to live as a law abiding citizen as required by Correction Law Section 70, he must learn how to set priorities and avoid exceeding his means."

By Decision and Order dated June 30, 2015, the Court found it appropriate to deem Petitioner's letters of April 12, 2015 and April 26, 2015 to constitute a motion returnable on July 24, 2015. In response thereto, the Court received and reviewed the Affirmation in Opposition to Petitioner's Motion of Christopher J. Fleury, Esq., Assistant Attorney

General, dated July 23, 2015. The Court also received and reviewed Petitioner's Reply Affidavit sworn to on July 31, 2015 and filed in the Franklin County Clerk's Office on August 7, 2015.

By Decision and Order dated November 18, 2015, this Court declined to undertake broad judicial review of the advance postage restriction as it applies to all actions and proceedings (those then pending and those yet to be commenced). Nevertheless, the Court did address the advance postage restriction as pertained to the instant proceeding, which was commenced eight months prior to the imposition of the restriction of April 21, 2015. The Court extended the time for Petitioner to submit his reply until December 18, 2015 and further directed that the advance postage restriction not apply to this one specific submission. The Court provided specific instructions to the Petitioner, particularly that the submission may not be any more than twenty (20) pages in length, that the Reply should not include copies of any exhibits that are already contained in the record and that the original only shall be mailed to the Franklin County Clerk's Office, who would thereafter provide a copy to Chambers and, if requested, to the Attorney General's Office in Plattsburgh.

Notwithstanding the advance postage restriction of April 21, 2015 and the specific relief thereto as described in the Court's November 18, 2015 Decision and Order, the Petitioner filed an additional Notice of Motion on December 10, 2015 seeking to enforce the Court's order of November 18, 2015 to allow the Petitioner to utilize the legal mail advance relative to the instant matter. Furthermore, the Petitioner included the following unrelated and unconsolidated petitions to the caption: *Tafari v. Fischer*, Index No. 2011-0007; *Tafari v. Rock*, Index No. 2011-0329; *Tafari v. Fischer*,

Index No. 2012-0830; *Tafari v. Boll*, Index No. 2014-0394; *Tafari v. Uhler*, Index No. 2014-0419; and, *Tafari v. Collyer*, Index No. 2014-0479. In opposition thereto, the Court has received and reviewed the Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated December 17, 2015, together with exhibits. In further support thereof, the Court has received and reviewed the Reply "Affidavit"[3] dated December 28, 2015 and received in the Franklin County Clerk's Office on January 4, 2016.

Preliminarily, it is apparent that the Petitioner is attempting to circumvent the legal mail advance restrictions imposed in the Bruen Memorandum by including additional, non-related matters into these proceedings. This Court has directed that the restriction not be applied in three matters, to wit: Index Nos. 2014-0394, 2014-0419 and 2014-0610 (the matter at bar). On December 21, 2015, the Court has received the original Reply, dated March 26, 2015, as well as an unauthorized Notice of Motion and Reply Affidavit thereafter. As such, the Respondent has complied with the Court's Decision and Order dated November 18, 2015 and the motion to enforce filed December 10, 2015 is denied as moot.

As to the underlying matter at bar, on April 22, 2014, Petitioner was issued a misbehavior ticket by C.O.J. Willett with charges for Interference with Employee (107.10), Harassment (107.11), Refusing a Direct Order (106.10), Threats (102.10) and Visibility Obstruction (112.22). An Employee Assistant was assigned and the Petitioner requested that the Employee Assistant ORC R. Allen contact four (4) inmate witnesses, as well as secure the relevant video of both the incident occurring on April 22, 2014, and another

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[3]The Petitioner's signature was not notarized nor did he indicate that he sought notary services but same were unavailable. Nonetheless, the Court will consider the affidavit as if it were duly sworn.

purported related incident which occurred on March 29, 2014. Employee Assistant Allen contacted the four inmate witnesses, to wit: Wallason, Sidney, Hutchinson and Rodriquez and, initially, all four inmates agreed to testify for the Petitioner.

The Tier 3 hearing began before Hearing Officer Oey on May 6, 2014 and an extension was sought for the continuation of the hearing to May 13, 2014 to secure the testimony of the inmate witnesses. Due to scheduling issues, the hearing recommenced on May 14, 2014 at which time the refusal forms of the requested four inmate witnesses were entered into the record. The hearing was again adjourned due to the unavailability of an employee called to testify. The hearing recommenced and concluded on May 23, 2014.

In addition to the inmate witnesses, the Petitioner requested the following employees to testify: Sgt. Smith, C.O. Dimick, Inspector General Y. Fonda, Acting Commissioner Annucci, Superintendent Uhler, and Sgt. Gokey. With the exception of C.O. Dimick, who was present immediately prior to the alleged incident, the other employees requested by the Petitioner were denied by the Hearing Officer as irrelevant. The Hearing Officer called the author of the misbehavior report, C.O. Willett, to testify.

The Petitioner also sought to have additional video secured of another period of time he asserts supported his defense of retaliation by C.O. Willett. The Petitioner requested video with respect to an alleged verbal exchange between himself and C.O. Willett during razor collection on March 29, 2014 between 7:45 a.m. and 8:30 a.m. The Petitioner alleges that C.O. Willett threatened to "get rid of" Petitioner from the Company. The Hearing Officer denied the March 29, 2014 video as irrelevant to the instant

proceeding.[4] A video of the alleged incident on April 22, 2014 was received and reviewed twice during the hearing. The Court has also reviewed the April 22, 2014 video.

At the hearing, the Petitioner denied that he was guilty of any of the charges in the misbehavior report written on April 22, 2014 and asserts that the report was fabricated in retaliation for Inmate Grievances he filed on or about April 20, 2014 against C.O. Willett. The Petitioner argued that the testimony of Sgt. Gokey, Sgt. Smith, Superintendent Uhler, Inspector General Fonda and Acting Commissioner Annucci may have provided testimony that was material to his defense, particularly as relates to retaliation by C.O. Willett.

The Petitioner was found guilty of all the charges and he received two months of SHU, two months of loss of packages and two months of loss of telephone as his penalty. The Petitioner filed a timely appeal and the Superintendent's Hearing was affirmed on July 31, 2014.

Petitioner asserts that the Hearing Officer impermissibly denied him the employee witnesses that he requested. Additionally, the Petitioner questions why the inmate witnesses decided not to testify on his behalf as they originally agreed to do when questioned by the Employee Assistant. Petitioner asserts that the Hearing Officer was required to conduct a personal interview with each of the inmate witnesses regarding the reason why they each did not want to testify and the Petitioner asserts that the Hearing Officer failed to do so. The Petitioner also asserts that the denial of the March 29, 2014 video/audio tape requested is a denial of the Petitioner's Constitutional right to call

[4] Concomitantly, the Petitioner submitted a FOIL request for the March 29, 2014 video and such request was denied by the FOIL Office on May 20, 2014.

witnesses. Finally, the Petitioner argues that the Hearing Officer failed to properly conduct the hearing in a timely manner and failed to request valid extensions to continue the hearing.

Preliminarily, "Petitioner's claim that the misbehavior reports were filed in retaliation for various grievances that he filed presented a credibility issue for the Hearing Officer to resolve." *Blackwell v. Fischer*, 106 AD3d 1346, 1346. Here, the Hearing Officer heard testimony from the author of the misbehavior report which was wholly supported by the video tape of April 22, 2014. On the video, C.O. Willett is clearly heard repeatedly directing the Petitioner to remove the towel(s) blocking the officer's view into the cell. Based upon the video in conjunction with the testimony of C.O. Willett, the Hearing Officer found that the Petitioner had refused a direct order and visibly obstructed the cell with the placement of his towels. Similarly, deference is awarded to the Hearing Officer to make a credibility determination regarding the alleged threat made and the source of the threat. The evidence presented to the Hearing Office supported the charges in the misbehavior report and, as such, negated the Petitioner's claims that the misbehavior report was falsely created in retaliation for his filing of grievances against C.O. Willett. *See Brown v. Goord*, 19 AD3d 833, 834.

As relates to the Petitioner's complaints pertaining to the denial of witnesses, the Hearing Officer limited the employee witnesses called to only those witnesses who were present at the time of the incident reflected in the misbehavior report. While the Petitioner requested the Acting Commissioner of DOCCS, the facility Superintendent and an employee of the Inspector General's Office, "he failed to articulate how the testimony of these individuals was relevant to his defense of retaliation." *Tafari v. Fischer*, 93

AD3d 1054, 1055; *see also Jones v. Fischer*, 2016 Slip Op. 03789, ___ AD3d ___ [“petitioner was not improperly denied witnesses as the correction officers requested were not present during the incident and their testimony was not show to be relevant.”]. As such, the Hearing Officer was within his discretion to deny the Petitioner’s requests for same.

Similarly, although the four inmate witnesses initially agreed to testify, all four refused to testify at the time of the hearing. The Hearing Officer personally contacted the witnesses to ascertain why they no longer wished to testify and all four indicated that they did not want to get involved. *See*, Return Ex.H, p. 65. Although Petitioner objected to the Inmate Witness Refusal form (2176A) for Inmate Sidney as he alleged it was not signed by an employee or the Hearing Officer indicating that the inmate was specifically asked why he did not want to testify, the Hearing Officer indicated on the record that he did, in fact, speak to Inmate Sidney on the telephone as the inmate had transferred to another facility. The Court finds that the Hearing Officer’s statement that he spoke with Inmate Sidney on the telephone to be akin to signing the 2176A form indicating the same. *See Tafari v. Selsky*, 78 A.D.3d 1334, 1334 [“Where the witnesses had previously agreed to testify, the Hearing Officer attempted to conduct a personal interview with each of them on the record to determine why they would not testify and, thus, we find that petitioner's right to call witnesses was adequately protected.”]

The Court rejects the Petitioner’s assertion that the video shown did not portray the incident at issue. Further, the Petitioner was not entitled to a video that would purportedly show an interaction between himself and C.O. Willett three weeks earlier. The video footage of April 22, 2014 portrays the incident in question inasmuch as it shows

C.O. Willett repeatedly giving instructions to the Petitioner to remove the hanging towels. The video of March 29, 2014 was properly determined to be irrelevant and therefore denied. *See Allen v. Venettozzi,* 139 AD3d 1208.

Finally, although the Petitioner has complained that the Hearing Officer failed to request and/or receive permission for extensions of the hearing, such assertions are belied by the record. *See* Return, Ex. F.

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

ORDERED, that the Petitioner's motion to enforce is denied as moot, and it is further

ADJUDGED, that the petition is dismissed.

Dated: June 27, 2016 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice