Matter of Paige v Annucci
2016 NY Slip Op 32167(U)
September 29, 2016
Supreme Court, Franklin County
Docket Number: 2016-243
Judge: S. Peter Feldstein

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

---X

In the Matter of the Application of
SAMUEL PAIGE, #08-B-0255,
Petitioner,

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

DECISION, ORDER AND JUDGMENT
RJI #16-1-2016-0147.34
INDEX # 2016-243

-against-

ANTHONY J. ANNUCCI, Acting 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 Samuel Paige, verified on April 20, 2016 and filed in the Franklin County Clerk's Office on April 26, 2016. Petitioner, who is an inmate at the Auburn Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing (re-hearing) apparently held at the Upstate Correctional Facility and concluded on February 16, 2016.

The Court issued an Order to Show Cause on May 4, 2016. By Notice of Motion, respondent moves to dismiss the petition inasmuch as the petitioner's request for administrative reconsideration was granted and a rehearing was granted rendering the petition moot. In support of the motion, the Court has received and reviewed the affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated May 26, 2016 together with exhibits annexed thereto. In opposition to the motion and in further support

of the petition, the Court has received and reviewed the petitioner's affidavit dated June 7, 2016.[1]

On December 3, 2015, petitioner was served with a misbehavior report authored by C. O. E. Hoit. The misbehavior report reads as follows:

> "During an ongoing investigation, interviews of 10 reliable confidential informants whom, I CO E Hoit have used in the past, revealed information to teacher J. Lewis and myself, that was detrimental to the safety and security of the facility. On the above date and approximate time, in the E1 bathroom area, inmate Hunter, Emmitt 15A2952 was severely cut to left side of his face by an unknown assailant. During the course of this investigation, it was revealed to me by several different confidential informants that inmate Paige, Samuel 08B0255 was the person who assaulted inmate Hunter. Inmate Paige was placed in SHU." Petition, Ex. 1.

Petitioner was charged with rule violations 100.10 (assault on inmate) and 104.11 (violent conduct). At the conclusion of the hearing, the petitioner was found guilty of both charges. Petitioner filed an administrative appeal on December 13, 2015. By notice dated January 22, 2016, the Tier III determination was reversed and a new hearing was directed. On February 3, 2016, the re-hearing commenced and concluded on February 16, 2016, at which time the petitioner was again found guilty of both charges. Again, the petitioner appealed and the Tier III determination was affirmed on March 16, 2016.

---

[1] The Court also received a series of letters from the petitioner. The first undated letter was received on May 9, 2016 wherein the petitioner advised the Court that he had received notice on April 28, 2016, two days after the filing of the instant proceeding, that the respondent had administratively reversed the determination at issue. The letter also contained a statement of objection petitioner purportedly read into the record when he was produced for the rehearing. The subsequent letter dated May 22, 2016 and received on May 25, 2016 indicated that the rehearing had commenced on May 5, 2016 and was adjourned but not yet recommenced. The last letter was dated May 24, 2016 and received on May 26, 2016 which indicated that the petitioner filed a grievance on May 23, 2016 and was promptly advised that following the conclusion of the rehearing, the disposition was reduced to 200 days SHU, however, the petitioner had not yet received a written copy of the disposition.

Thereafter, by letter dated April 1, 2016, Michael Cassidy, Managing Attorney of Prisoner Legal Services, wrote Donald Venettozzi, Director of Special Housing/Inmate Disciplinary Programs, asking for reconsideration and reversal of the disposition of the re-hearing in light of the failure to adequately record the proceedings. Unbeknownst to Attorney Cassidy, the petitioner also prepared and filed the instant proceeding challenging the determination on the merits. The petition and related papers were notarized on April 20, 2016, and presumably mailed forthwith as they were received by the Franklin County Clerk on April 26, 2016 and then forwarded to Chambers.

Respondent moves to dismiss the petition based upon the administrative determination to reverse the Tier III determination held on the re-hearing date of February 16, 2016. Respondent argues that the relief sought in the petition has been granted and the petition has been rendered moot. Respondent argues that at the time of the administrative reversal, to wit: April 28, 2016, the respondent was unaware of the filing of the instant Article 78 petition. Respondent also states that the reconsideration and reversal came at the behest of petitioner's counsel and said counsel was also unaware of the filing of the *pro se* petition. Respondent asserts the second re-hearing has already been held and any challenge thereto must be made by proper administrative appeal.

Petitioner objects to the motion to dismiss inasmuch as while the respondent administratively reversed the re-hearing on April 28, 2016, the respondent did not have jurisdiction to conduct a further re-hearing because the petitioner had commenced the instant action. The petitioner alleges that he objected by letter and formal statement at the second re-hearing that the respondent no longer had jurisdiction and the petitioner refused to participate in the second re-hearing. Attorney Cassidy also notified the respondent of the

lack of jurisdiction to proceed to a second re-hearing by letter dated May 11, 2016. Attorney Cassidy requested that in light of the pending Article 78 petition, either the respondent withdraw the reversal and allow the Article 78 to be considered or, in the alternative, that the respondent withdraw only such portion of the reversal that directed a second re-hearing.

Procedurally, the administrative decisions to reverse the December 2015 and February 2016 Tier III hearings renders the challenges thereto as moot. *See Ifill v Fischer*, 79 AD3d 1322. However, inasmuch as the administrative decision on April 28, 2016 was rendered after the instant petition was filed, the respondent was without jurisdiction to reconvene the Superintendent's Disciplinary Hearing anew absent Court leave to do so. *See Rahman v. Coughlin*, 112 AD2d 591; *see also Gonzalez v Jones*, 115 AD2d 849.

Inasmuch as the respondent concluded that the February 2016 re-hearing was deemed to be insufficient due to the failure to electronically record the hearing, the respondent concedes that reversal was necessary. As such, that portion of the petition is granted and the February 2016 re-hearing is reversed.

Notwithstanding same, respondent argues that the petitioner has since received a *de novo* hearing, which is the relief sought in the petition. Therefore, respondent argues that the petitioner must administratively challenge the second re-hearing. The Court disagrees.

The petition sought reversal, expungement and annulment of the February 2016 proceeding, as well as dismissal and expungement of the December 3, 2015 misbehavior report. While the respondent's argument is that reversal of the February 2016 hearing should warrant a *de novo* hearing, which the petitioner has already been afforded, the Court

notes that the petitioner did not participate in such hearing and upon the petitioner's refusal to attend due to the lack of jurisdiction by the respondent, the respondent was on notice that the instant Article 78 had been filed.

Notwithstanding the foregoing, the Court must look at the history of these proceedings to fashion an appropriate remedy. Preliminarily, petitioner argues that he was originally denied the Unusual Incident Report at the first hearing held on December 9, 2015. Following the reversal, the petitioner was provided with the Unusual Incident Report and he then discovered that C.O. J. Quinion was in visual proximity of the area of the incident. At the re-hearing, the petitioner sought to call C.O. Quinion, however, such request was denied as C.O. Quinion no longer worked for DOCCS and was allegedly unavailable. Petitioner argues that at the time of the first hearing, C.O. Quinion was still an employee of DOCCS and had the Unusual Incident Report been timely provided, the testimony of C.O. Quinion would have been available and may have assisted the petitioner's defense. Further, the petitioner alleges that while the Hearing Officer stated that there were attempts to contact C.O. Quinion by telephone, there is no audio recording of such attempts. "Inasmuch as petitioner was deprived of his constitutional right to call a witness with regard to that incident, expungement of the related charges is required." *Cahill v. Prack*, 106 AD3d 1310, 1311.

Additionally, petitioner objects to the Hearing Officer's failure to obtain the reason for an inmate Kayron Wilson's refusal to testify or to inquire into the genuineness of the refusal. Petitioner asserts that he was never informed of the reason either orally or in writing. 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).

Similarly, the petitioner sought to call DOCCS staff psychologist J. Marinelli at the rehearing but such witness was allegedly denied insofar as Dr. Marinelli was not present at the time of the incident. Petitioner argues that there were other witnesses who testified that were not present at the time of the incident. As such, the denial of Dr. Marinelli was an abuse of discretion. "Inasmuch as th[is] witness[] may have provided testimony that was material, their absence substantially prejudiced petitioner's ability to present his defense and the Hearing Officer denied their testimony for reasons other than institutional safety, we find such denial to be error." *Diaz v. Fischer*, 70 AD3d 1082, 1083.

Although the simple remedy would be to vacate the May 8, 2016 determination and remit the matter for a third *de novo* rehearing, same would create a further impediment to the petitioner's defense inasmuch as the underlying incident would be even more remote in time and favorable witness testimony possibly unattainable. The petitioner has raised more than mere procedural errors which could be corrected by a third re-hearing; indeed, the petitioner has raised issues tantamount to a deprivation of constitutional rights. Expungement is the only proper remedy in light of the numerous violations. *See Delgado v. Fischer*, 100 AD3d 1171, 1172.

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

ORDERED, that the respondent's motion to dismiss is denied; and it is further

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 (second rehearing) concluded on May 8, 2016 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: September 29, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge