

Matter of Nova v Kirkpatrick
2016 NY Slip Op 32601(U)
December 15, 2016
Supreme Court, Clinton County
Docket Number: 16-0770
Judge: S. Peter Feldstein
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**STATE OF NEW YORK
SUPREME COURT****COUNTY OF CLINTON****X**

In the Matter of the Application of
JULIO NOVA, #02-A-2345,

Petitioner,

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

DECISION, ORDER & JUDGMENT
RJI #09-1-2016-0277.24
INDEX #16-0770

-against-

MICHAEL KIRKPATRICK, Superintendent,
Clinton Correctional Facility,

Respondent.

X

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Julio Nova, verified on June 14, 2016 and filed in the Clinton County Clerk's office on June 23, 2016. Petitioner, who is an inmate at the Five Points Correctional Facility, is challenging the results of a Tier II Superintendent's Disciplinary Hearing held, presumably at the Clinton Correctional Facility, on April 5, 2016. This Court issued an Order to Show Cause on June 29, 2016 and thereafter, upon written request by the petitioner, an Amended Order to Show Cause on July 18, 2016.

The Court has received and reviewed the Answer and Return together with the Letter-Memorandum dated September 19, 2016 by Christopher J. Fleury, Esq., Assistant Attorney General. In response thereto, on September 28, 2016, the Court received and reviewed a letter dated September 21, 2016 from the petitioner indicating he was making a good faith attempt to obtain disclosure pursuant to CPLR §3126 of a grievance he referenced in his petition. Thereafter, the Court received a Motion to Compel Disclosure by the petitioner relating to the grievance at issue in his petition. In response thereto, the respondent submitted a Supplemental Return together with a Supplemental Letter-

Memorandum dated October 7, 2016 by Attorney Fleury. On October 21, 2016, the Court received and reviewed the petitioner's Reply dated October 14, 2016.

On March 30, 2016, the petitioner was served a misbehavior report charging him with violating rules 104.13 (creating a disturbance), 107.10 (interference with an employee), 107.11 (harassment), 106.10 (refusing to follow a direct order), 102.10 (making threats), and 109.12 (movement regulation violation). The description of the incident by C.O. K. Stoughton was as follows:

“On [3-30-16 at approx. 11:00 a.m.] inmate Nova 02A2345 WH-8-20 was coming back from a call out with other inmates. Inmate Nova asked to talk to me. I told him that now was not a good time & to lock in. Inmate Nova became angry & began harassing me & making threats towards me stating that I was ‘fucking w/ the wrong guy’. B/C I had issued him a misbehavior report for talking in a no talking posted area at approx. 9:00 a.m. earlier in the day. I gave inmate Nova a second direct order to lock in. He refused & continued threatening me stating ‘if you got a problem we can deal with it now. I’ll kick your fucking ass you faggot.’ At this time me, other officers in the block & the block Sgt. all gave inmate Nova 02A2345 several more direct orders to lock in. Inmate Nova continued to verbally harass me, but he did finally lock in.” Resp. Ex. A.

The Tier II Hearing commenced on April 5, 2016 at approximately 8:40 a.m. The hearing concluded at 9:40 a.m. at which time Hearing Officer Miller found the petitioner not guilty of the charges of 102.10 (threats) or 107.10 (interference) but guilty of the remaining charges. The petitioner received a sanction of 30 days keeplock, as well as 30 days of loss of phone, packages and commissary privileges. The petitioner filed an administrative appeal and the determination was affirmed on April 15, 2016.

The petitioner alleges that the hearing officer failed to allow him to introduce exculpatory evidence, to wit: an inmate grievance allegedly filed five (5) days prior to the

misbehavior report. The petitioner asserts that the requested grievance would have been relevant to show that the misbehavior report was evidence of retaliation by the correction officers. The petitioner also alleges that the hearing officer denied evidence that the petitioner was in fear of retaliation by the correction officers.

Respondent argues that the petitioner filed a grievance on March 25, 2016 (CL-69152-16) wherein the petitioner alleged that he was assaulted by correction officers. In the grievance (CL-69152-16), the petitioner alleged:

“On or about March 25, 2016, approximately 11:00 Am, upon grievant (*sic*) return from law library, Officer Robert Lawrence and others, assaulted (*sic*) me on the second floor of the UH-8, gallery house and unit.

Upon entering to the above mentioned house and unit, Grievant was instructed by Office (*sic*) Lawrence to drop all legal work on the floor and to place both hands upon the wall. Grievant then complied with this Officer’s instructions. While Grievant maintained both hands upon the wall, C.O. Lawrence started searching through Grievant’s Legal folder. In the mean time an Officer whom name I do not know kept Grievant on the wall by placing his hand on the back of Grievant’s neck. This Officer (who was the one who took the chowl list) started then making serious threats and physically assaulting (*sic*) Grievant by smaking (*sic*) him on its right side of head and neck area. Afterwards, the same Officer kicked Grievant on its (*sic*) groin area repeatedly (*sic*). Officer Lawrence then stated ‘so, that’s the reason why you be at the law library every day, ah!’ At this time Grievant was on the floor barely unconcise (*sic*) from the pain caused by the kick. Grievant was then let in his cell even though due to the pain, Grievant could barely walk to his cell. Subsequently Grievant was rushed to the hospital on a stretcher.

After all injuries were notified by doctor, Grievant was placed back in same house and unit where the insiden (*sic*) took place. Furthermore, approximately at 2:00 pm, while Officer Lawrence made his hourly rounds, he stoped (*sic*) at Grievant’s cell and then begun threatening me by stating ‘tomorrow when I come-back to work, I will show you what we do to animals like you!’ He then turned my electricity off including everyone else around me.” Resp. Ex. H.

Respondent admits that it is unclear from the hearing transcript whether the issue of the grievance was raised and, as such, the respondent is precluded from raising any objections relative to a waiver of this claim.¹ Nonetheless, the respondent argues that the grievance referenced Officer Lawrence and not Officer Stoughton who authored the misbehavior report at issue. While Officer Stoughton transported the petitioner to the hospital after the incident, the grievance did not allege any wrongdoing by him as would be necessary to allow the grievance as evidence of retaliation. *See, Perkins v Goord*, 257 AD2d 821.

Petitioner moved for disclosure of the grievance indicated in the petition, to wit: (CL-69271-16) as opposed to the grievance attached as respondent's Exhibit H (CL-69152-16). In response thereto, the respondent provided a Supplemental Return including the referenced grievance (CL-69271-16). Respondent noted that the grievance provided in the original Answer and Return was the grievance filed by the petitioner approximately five days prior to the incident, on March 25, 2016, as was described in the petition and at the time of the Tier II hearing. Respondent further notes that the grievance (CL-69271-16) petitioner referenced in the petition was dated April 4, 2016 and received April 14, 2016 therefore it could not be the grievance the petitioner sought to be entered as evidence in the hearing held on April 5, 2016.

In his Reply, the petitioner argues that a "new matter" has arisen that must be addressed in conjunction with the petition. Petitioner refers to the "new matter" as the

¹ The administrative appeal clearly indicated that the petitioner alleged the Hearing Officer denied the petitioner the opportunity to establish his claim of retaliation.

transcript provided as Exhibit D of the Answer and Return is largely unintelligible and fails to provide an adequate record for review. The Court agrees.

The hearing transcript is replete with numerous “inaudible” comments that precludes reasonable review. This Court is unable to discern any thread of the testimony from which it could be determined what happened at the time of the incident including the testimony of Sergeant Baker who was present during the incident. Similarly, the transcript testimony of inmate witness, Alvarez, is mostly inaudible, for example:

“MILLER: Alright. Mr. Nova (inaudible) misbehavior report written by Officer Stoughton charging you with, um, harassment, threats, creating a disturbance, interference. Um, did you witness any interaction between inmate Nova and Correction Officer Stoughton on that day?

ALVAREZ: Um, yes, um, (inaudible) and slammed (inaudible) and that was (inaudible) slammed (inaudible) old man (inaudible) on inmate Nova (inaudible) officer (inaudible) said yeah (inaudible) and then, um, um, (inaudible) when I came (inaudible).

MILLER: Do you remember Nova using any harassing or threatening statements direct at the officers?

ALVAREZ: (inaudible) what I told you (inaudible).

MILLER: Any other questions, Mr. Nova (inaudible).

NOVA: (inaudible).

MILLER: (inaudible) direction was given (inaudible) locked in, um, did he become loud and argumentative?

ALVAREZ: No, he (inaudible) I had to (inaudible) on both sides (inaudible).

MILLER: Any other questions?

NOVA: (inaudible).” Resp. Ex. D, p.6.

While the respondent argues that there was no nexus between the grievance filed prior to the incident on March 30, 2016 and the misbehavior report, such argument is mere supposition. Insofar as the hearing transcript is so deficient that meaningful review is impossible, the determination of the Tier II hearing held on April 5, 2016 must be annulled and remitted for a new *de novo* hearing. See, *Matter of Green v. Prack*, 101 AD3d 1203; *Matter of Torres v. Prack*, 95 AD3d 1518; *Matter of LaVan v. New York State Dept. of Correctional Servs.*, 47 AD3d 1153.

As relates to the petitioner’s motion to compel disclosure, insofar as the respondent did provide the inmate grievance that was requested, the relief sought has been achieved and the motion is denied as moot.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby **ORDERED**, that petitioner’s motion to compel disclosure is denied; and it is further **ADJUDGED**, that the petition is granted as to annulling the determination of April 5, 2016 and the matter is remitted for a *de novo* hearing.

DATED: December 15, 2016 at
Indian Lake, New York

S. Peter Feldstein
Acting Supreme Court Judge