

Matter of Nova v Uhler
2018 NY Slip Op 32405(U)
September 27, 2018
Supreme Court, Franklin County
Docket Number: 2018-226
Judge: S. Peter Feldstein
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**STATE OF NEW YORK
SUPREME COURT**

COUNTY OF FRANKLIN

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 AND JUDGMENT
RJI #16-1-2018-0079.06
INDEX #2018-226**

-against-

**MR. DONALD UHLER, AS THE
SUPERINTENDENT OF UPSTATE
CORRECTIONAL FACILITY, MR.
DANE E. VENETTOZZI, AS DIRECTOR
OF SPECIAL HOUSING UNIT,**

Respondents.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Julio Nova, verified and supported by the Petitioner's Affidavit in Support of Order to Show Cause, both sworn to on March 7, 2018. Both of these documents were filed in the Franklin County Clerk's Office on March 22, 2018. Petitioner, who is an inmate at the Upstate Correctional Facility, appears to be challenging a determination following a Superintendent's Disciplinary Hearing.

The Court issued an Order to Show Cause on March 26, 2018. In response thereto, the Court has considered the Answer and Return, together with *in camera* materials, as well as a Letter-Memorandum dated July 3, 2018 by Christopher J. Fleury, Esq., Assistant Attorney General.¹ In further support of the petition, the Court has considered the Reply received July 23, 2018.

On September 12, 2017, the Petitioner was served with an Inmate Misbehavior Report charging rule violations 100.11 (assault on staff), 104.13 (create a disturbance),

¹ By letter dated June 20, 2018, Attorney Fleury requested an extension to submit responsive papers and same was granted by Letter Order on June 21, 2018.

107.10 (interference employee), 104.11 (violent conduct), and 102.10 (threats). The description of the incident reads as follows:

“On [September 11, 2017 at 12:16 p.m.] I (Sgt. R. McCauley) was supervising F Block when inmate Nova, J. 02A2345 (F-20) began screaming loudly out of his cell, disrupting the normal operations of the SHU. I reported to the scene and inmate Nova continued to scream at me and to the other inmates in the SHU that the lunch tray he was given had arrived cold. Other inmates in the area began to follow the lead of Nova, at which time Nova began making threats toward myself and my staff, stating, ‘you’ll see what I do. I aint (*sic*) fucking playing with y’all’. At this time, I alerted the Watch Commander and a cell shield was authorized by OD Capt. Mulcahy. As the cell shield was being applied, the inmate grabbed a styrofoam cup that was in his cell and propelled the contents directly at me. The contents which emanated (*sic*) from the cup were a white and yellow tinted liquid which smelled strongly of urine. The liquid struck me on the front of my shirt and in my face, mouth, nose, and eyes. As Staff continued to secure the cell shield, I observed inmate Nova utilize the same styrofoam cup to scoop liquid from his cell toilet and propel the contents at staff, striking C.O. N. Hurley on the left side of his chest and face. Once the cell shield was secured, all Staff exited the gallery and it was immediately secured as a crime scene until trained aggravated harassment collectors arrived in accordance with Directive 4931.” Resp. Ex. A.

On September 12, 2017, the Petitioner was served with an Inmate Misbehavior Report charging rule violations 102.10 (threats), 107.10 (interference employee), and 118.22 (unhygienic act). The description of the incident reads as follows:

"On [9/11/17 at 1405], I C.O. J. Weston while on rounds observed inmate Nova 02A2345 push water under his cell gate which appeared to have feces in it. While at Nova’s cell gate picking up the lunch meal, Nova made the statement that I would be next. I immediately notified my area supervisor.” Resp. Ex. A.

The Petitioner was transferred from Great Meadow Correctional Facility (where the incidents occurred) on September 12, 2017. Concomitantly, a hearing extension was granted in light of the transfer which required the hearing(s) to be completed within 14 days of the new placement. An Employee Assistant first met with the Petitioner on September 14, 2017. The Tier III Superintendent's Disciplinary Hearing commenced on September 21, 2017 on both of the reports at which time the Petitioner sought an adjournment to contact his attorney. (Resp. Ex. H. pp.7-8). The hearing continued on September 22, 2017 at which time the Petitioner withdrew his request for time to contact his attorney, however, the Petitioner requested a Spanish-speaking interpreter and a further adjournment was necessary. (Resp. Ex. H. pp.29-30). The hearing continued on September 26, 2017 at which time the Petitioner identified additional employee assistance he needed regarding a list of witnesses he wished to be interviewed and documents he wished to obtain. The hearing continued on October 3, 2017 at which time the Petitioner acknowledged receipt of additional documentation requested, but objected to the log book copy as it lacked a specific time. The Petitioner was also advised on October 3, 2017 that the video he requested of the incident was not preserved in a timely manner and was deleted. Testimony was received on October 3, 2017. In light of the hearing necessitating a further continuation to obtain additional witness testimony, a further extension was requested on October 3, 2017 at 3:30 p.m. and it was granted on October 4, 2017 at 8:21 a.m. with the hearing to be completed by October 6, 2017. The hearing again continued on October 5, 2017 with additional witness testimony. Insofar as the Petitioner requested that the Hearing Officer make copies of documents that he wanted to provide, an additional continuation of the hearing occurred until October 6, 2017.

The hearing concluded on October 6, 2017 and the charge of 107.10 (interference with an employee) was dismissed but the Petitioner was found guilty on the remaining charges. Petitioner was sanctioned to Special Housing Unit (hereinafter referred to as “SHU”) as well as loss of packages, commissary and phone privileges for a period of 365 days with 95 days suspended for a period of 180 days; a recommended loss of 9 months good time; and referrals to ART, to ORC and to the Grievance Department. Petitioner filed a timely appeal and the disposition was affirmed on December 5, 2017.

Petitioner argues that he was denied the opportunity to present exculpatory video evidence of the incident(s) despite having requested the video in a timely manner. Petitioner also argues that the hearing extension requests were untimely and in violation of 7 NYCRR §251-5.1(a). Petitioner seeks to reverse the hearing determination and expunge the report from his institutional records.

Respondents argue that the video requested was inadvertently destroyed but the attending witnesses to the event(s) were available for testimony. Respondents also assert that the hearing extensions were requested timely and even if the granting of same occurred after the deadline, the provisions of 7 NYCRR §251-5.1(a) are directory but not mandatory.

“[W]e reject petitioner's contention regarding his access to the videotape since the record establishes that the destruction of the videotape was due to inadvertence and was not destroyed in bad faith. In any event, the unavailability of the videotape was not detrimental since the correction officers who observed the incident first hand were available to testify and to be subject to cross-examination.” *Harris v. Selsky*, 236 AD2d 723, 724.

The Petitioner was housed in Great Meadow Correctional Facility at the time of the two incidents and subsequently transferred the next day to Upstate Correctional Facility.

While the Petitioner requested the video be preserved within the 14-day window following the incident, it appears that the request did not get conveyed in a timely manner from Upstate Correctional Facility to Great Meadow Correctional Facility resulting in the video being inadvertently deleted. The Hearing Officer questioned whether the video would provide the audio that the Petitioner seemed to be relying upon for his defense. The Hearing Officer questioned if the Petitioner had seen the video and the Petitioner repeatedly answered that he did not need to see the video because he was there. (Resp. Ex. H. p. 47). Similarly, the Hearing Officer relied upon the statements of the witnesses who were also there at the time of the incident in lieu of video footage.

The hearing was continued over several days for various reasons as outlined heretofore. The extension requests were made timely and but for the last extension request, granted prior to the expiration of the deadline. Even though the last extension approval was after the deadline, 7 NYCRR §251-5.1(a) does not require dismissal of the misbehavior report for untimeliness.

“[A]lthough there was a delay between the expiration of several valid extensions and subsequent requests for further extensions, the regulatory time limits for hearings are directory, not mandatory. In any event, petitioner has made no showing that he was prejudiced by these delays and, to the contrary, the delay on at least one occasion involved the Hearing Officer's attempts to interview witnesses that petitioner requested.” *Foster v. Bezio*, 62 AD3d 1222, 1223.

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

ADJUDGED, that the petition is dismissed.

Dated: September 27, 2018 at
Lake Pleasant, New York.

S. Peter Feldstein
Acting Supreme Court Justice