

APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK

Brown v. Fischer

91 A.D.3d 1336, 936 N.Y.S.2d 831 (N.Y. App. Div. 2012) · Decided January 31, 2012

SUMMARY

The court annulled a prison disciplinary determination finding the petitioner guilty of making threats and false statements. It held that the misbehavior report relied on unreliable hearsay and that the handwriting exemplars did not independently constitute substantial evidence; because the petitioner had already served the penalty, the court ordered expungement of the violations from his institutional record.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York
WRITING FOR THE COURT	Scudder, E.J.; Smith, J.; Sconiers, J.; Gorski, J.; Martoche, J.
JURISDICTION	New York
DECIDED	January 31, 2012
DISPOSITION	other
PROCEDURAL POSTURE	Petitioner commenced a CPLR article 78 proceeding seeking annulment of a prison disciplinary determination finding that he violated inmate rules concerning threats of violence and false statements. The Appellate Division reviewed the determination for substantial evidence.
STANDARD OF REVIEW	Whether the administrative determination was supported by substantial evidence.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Brown v. Fischer

TOPICS

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PRACTICE AREAS

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QUESTIONS PRESENTED

1. Whether the misbehavior report and related hearsay information constituted substantial evidence supporting the prison disciplinary determination.
2. Whether the hearing officer could rely on a comparison of handwriting samples without expert testimony and whether the samples provided substantial evidence of petitioner's authorship.
3. What remedy was appropriate because petitioner had apparently already served the administrative penalty.

HOLDINGS

1. A misbehavior report not written by an officer who witnessed the charged conduct cannot constitute substantial evidence unless the record contains facts establishing some indicia of reliability for the hearsay it contains. Because the record provided no information permitting assessment of the unnamed informants' reliability, the report did not constitute substantial evidence.
2. A hearing officer may independently compare handwriting samples without expert testimony, but the samples must contain sufficient similarities to constitute substantial evidence that they were written by the same person. The samples here did not meet that standard.
3. When the petitioner has already served the administrative penalty, the appropriate remedy is expungement of all references to the violations from the petitioner's institutional record.

KEY QUOTATIONS

“Where, however, “the misbehavior report was not written by a correction officer who witnessed the conduct in question, the record must contain facts establishing some indicia of reliability to the hearsay before the report may be considered sufficiently relevant and probative to constitute substantial evidence”” (at 1336)

“the trier of fact (here, the Hearing Officer) may make his or her own comparison of handwriting samples in the absence of expert testimony on the subject” (at 1337)

“the handwriting samples alone — the . . . letter[] and exemplars — can form the basis for a determination of guilt in a case such as this if there are sufficient similarities between the two to comprise substantial evidence that they were written by the same person” (at 1337)

FACTUAL BACKGROUND

Petitioner was charged with writing a threatening letter to a correctional-facility counselor. The inmate misbehavior report was based on information relayed through a correction officer and counselor from unnamed inmate informants, rather than firsthand observations. The correction officer also compared the allegedly threatening letter with handwriting exemplars obtained from petitioner, but the Appellate Division found insufficient similarities to establish that petitioner wrote the letter.

PROCEDURAL HISTORY

Following a Tier III disciplinary hearing, petitioner was found guilty of violating inmate rules 102.10 and 107.20 and apparently served the resulting administrative penalty. Petitioner commenced an article 78 proceeding. The

Appellate Division concluded that the determination was unsupported by substantial evidence, annulled it, and directed expungement of the violations from petitioner's institutional record.

DISPOSITION

other

REMAND INSTRUCTIONS

The disciplinary determination was annulled, and all references to the violations of inmate rules 102.10 and 107.20 were ordered expunged from petitioner's institutional record.

CASES CITED

- People ex rel. Vega v Smith, 66 N.Y.2d 130, 139 (1985)
- Matter of McIntosh v Coughlin, 155 A.D.2d 762, 763 (1989)
- Matter of Abdur-Raheem v Mann, 85 N.Y.2d 113, 121 (1995)
- Matter of Debose v Selsky, 12 A.D.3d 1003, 1004 (2004)
- Matter of Holmes v Senkowski, 238 A.D.2d 629 (1997)
- Matter of Daise v Giambruno, 279 A.D.2d 911, 911-912 (2001)
- Matter of Smith v Coughlin, 198 A.D.2d 726, 726 (1993)
- Matter of Cody v Fischer, 46 A.D.3d 1371 (2007)

OPINION

PER CURIAM.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a Tier III disciplinary hearing, that he violated inmate rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats of violence]) and 107.20 (7 NYCRR 270.2 [B] [8] [iii] [false statements]).

We agree with petitioner that the determination is not supported by substantial evidence. Petitioner was charged with violating the two rules at issue based upon allegations that he wrote a threatening letter to a counselor at a correctional facility. Respondent contends that the inmate misbehavior report, the testimony of the correction officer who wrote that report, and several handwriting exemplars submitted by or seized from petitioner constitute substantial evidence establishing that he violated the rules in question.

We reject that contention. The misbehavior report contains no firsthand information. Rather, the correction officer who wrote it interviewed a counselor who told him that unnamed inmate informants said that petitioner was going to write a letter after the counselor discharged petitioner from certain duties at the facility. Similarly, the correction officer who wrote the report testified

that he interviewed the counselor and compared the letter that petitioner purportedly wrote to handwriting exemplars that he obtained from petitioner, and the correction officer concluded therefrom that petitioner had written the letter.

It is well settled that misbehavior reports may constitute substantial evidence to support a determination (see generally *1337People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]). Where, however, “the misbehavior report was not written by a correction officer who witnessed the conduct in question, the record must contain facts establishing some indicia of reliability to the hearsay before the report may be considered sufficiently relevant and probative to constitute substantial evidence” (Matter of McIntosh v Coughlin, 155 AD2d 762, 763 [1989]).

We note that a hearing officer is not required to interview informants to determine the credibility of their hearsay statements in the misbehavior report but, rather, New York courts apply the federal standard that “any reasonable method for establishing the informant’s reliability will suffice” to establish the credibility of such inmates (Matter of Abdur-Raheem v Mann, 85 NY2d 113, 121 [1995]).

An informant’s credibility may be established where the information provided by the informant is “sufficiently detailed” to enable a hearing officer to assess the informant’s reliability (Matter of Debose v Selsky, 12 AD3d 1003, 1004 [2004]), or the information provided to the hearing officer establishes that the informant provided the information based on personal knowledge (cf.

Matter of Holmes v Senkowski, 238 AD2d 629 [1997]). Here, however, the Hearing Officer had no information to enable him to assess the credibility of the unnamed inmate informants who spoke to the counselor about the letter that petitioner allegedly wrote, and thus the misbehavior report does not constitute substantial evidence supporting the petition (see Matter of Daise v Giambruno, 279 AD2d 911, 911-912 [2001]).

Furthermore, respondent is correct that “the trier of fact (here, the Hearing Officer) may make his or her own comparison of handwriting samples in the absence of expert testimony on the subject... Thus, the handwriting samples alone — the... letter[] and exemplars — can form the basis for a determination of guilt in a case such as this if there are sufficient similarities between the two to comprise substantial evidence that they were written by the same person” (Matter of Smith v Coughlin, 198 AD2d 726, 726 [1993]).

Upon our independent review of those exemplars, we are unable to find that there are sufficient similarities between them “to comprise substantial evidence that they were written by the same person” (id.). Consequently, we conclude that the determination is not supported by substantial evidence and must be annulled.

Because it appears from the record that petitioner has already served his administrative penalty, the appropriate remedy is expungement of all references to the violations of those rules from his

institutional record (see *Matter of Cody v Fischer*, 46 AD3d 1371 [2007]). Present — Scudder, EJ., Smith, Sconiers, Gorski and Martoche, JJ.

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