

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

Parkinson v. Selsky

49 A.D.3d 985 (N.Y. App. Div. 2008) · Decided March 13, 2008

SUMMARY

The New York Appellate Division reviewed a prison disciplinary determination finding that the petitioner assaulted correction officers and resisted their control. The court held that substantial evidence supported the determination and rejected challenges concerning witness testimony, hearing restrictions, the incomplete transcript, inadequate assistance, and Hearing Officer bias, confirming the determination and dismissing the petition.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Kane, J.; Cardona, P.J.; Carpinello, J.; Lahtinen, J.; Kavanagh, J.
JURISDICTION	New York
DECIDED	March 13, 2008
DISPOSITION	dismissed
PROCEDURAL POSTURE	Petitioner sought appellate review of an administrative prison disciplinary determination finding that he assaulted correction officers and engaged in related misconduct.
STANDARD OF REVIEW	The court reviewed whether substantial evidence supported the disciplinary determination and whether the Hearing Officer abused his discretion or otherwise deprived petitioner of a fair hearing.
PRECEDENTIAL VALUE	published appellate decision
PARTIES	Parkinson v. Selsky

TOPICS

- administrative law
- judicial review of agency action
- evidence
- appellate procedure
- standard of review

PRACTICE AREAS

- New York prison disciplinary proceedings
- administrative law
- appellate procedure
- evidence
- civil rights

QUESTIONS PRESENTED

1. Whether substantial evidence supported the finding that petitioner committed the charged assaults and related misconduct.
2. Whether the Hearing Officer improperly limited, denied, or conducted witness testimony.
3. Whether the missing portion of the hearing transcript deprived petitioner of meaningful appellate review.
4. Whether inadequate prehearing assistance required reversal despite later corrective measures.
5. Whether the Hearing Officer was biased or the determination was otherwise improperly motivated.

HOLDINGS

1. The disciplinary determination was supported by substantial evidence, including the misbehavior report, unusual incident reports, and correction-officer testimony.
2. The Hearing Officer did not abuse his discretion by refusing cumulative, irrelevant, or impeachment-only testimony, or by limiting further testimony after hearing or seeking testimony from nearly 30 witnesses.
3. The Hearing Officer properly took the inmate's testimony outside petitioner's presence to preserve institutional safety.
4. The missing portion of the transcript did not require reversal because the record remained sufficient for meaningful appellate review.
5. Any initial inadequacy in assistance did not warrant reversal because the Hearing Officer remedied it by providing the requested documents, excluding only nonexistent or irrelevant materials, and granting additional review time.
6. The record did not establish Hearing Officer bias or that the determination resulted from anything other than the evidence of petitioner's guilt.

FACTUAL BACKGROUND

The misbehavior report, unusual incident reports, and testimony from numerous correction officers indicated that Parkinson struck two correction officers, attempted to strike one officer again, and wrestled with officers while resisting control. Parkinson and two inmate witnesses gave a contrary account, creating a credibility issue for the Hearing Officer. The Hearing Officer limited or denied additional witness testimony, took one inmate's testimony outside Parkinson's presence for institutional safety, and later supplied documents and additional review time after an initial deficiency in assistance. Part of the hearing transcript was inadvertently recorded over, but the missing testimony was substantially repeated later in the hearing.

PROCEDURAL HISTORY

A prison Hearing Officer sustained the charged misconduct after a disciplinary hearing. Parkinson challenged the determination on evidentiary, witness, hearing-transcript, assistance, and bias grounds. The Appellate Division confirmed the determination and dismissed the petition.

DISPOSITION

dismissed

CASES CITED

- Matter of Williams v. Goord, 36 A.D.3d 1033, 1033 (N.Y. App. Div. 2007)
- Matter of Barnes v. Goord, 279 A.D.2d 685, 685 (N.Y. App. Div. 2001)
- Matter of Moore v. Senkowski, 13 A.D.3d 683, 684 (N.Y. App. Div. 2004)
- Matter of Pica v. Selsky, 274 A.D.2d 712, 713 (N.Y. App. Div. 2000)
- Matter of Thomas v. Goord, 293 A.D.2d 787, 788 (N.Y. App. Div. 2002)
- Matter of Gill v. Selsky, 240 A.D.2d 831, 831 (N.Y. App. Div. 1997)
- Matter of Fama v. Mann, 196 A.D.2d 919, 920 (N.Y. App. Div. 1993)
- Matter of Muhammad v. Selsky, 279 A.D.2d 742, 743 (N.Y. App. Div. 2001)
- Matter of Lebron v. McGinnis, 26 A.D.3d 658, 658-659 (N.Y. App. Div. 2006)
- Matter of Hynes v. Goord, 30 A.D.3d 652, 653 (N.Y. App. Div. 2006)
- Matter of Parker v. Laundree, 234 A.D.2d 727, 728 (N.Y. App. Div. 1996)
- Matter of Moss v. Goord, 36 A.D.3d 977, 978 (N.Y. App. Div. 2007)
- Matter of De La Cruz v. Selsky, 36 A.D.3d 907, 907 (N.Y. App. Div. 2007)
- Matter of Tumminia v. Goord, 294 A.D.2d 727, 728 (N.Y. App. Div. 2002)
- Matter of Rossi v. Portuondo, 277 A.D.2d 615, 616 (N.Y. App. Div. 2000)

OPINION

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KANE, J.

Kane, J. The misbehavior report, unusual incident reports and the testimony by numerous correction officers provide substantial evidence to support the determination that petitioner struck two correction officers, attempted to strike one a second time and wrestled with them while resisting their control (see Matter of Williams v Goord, 36 AD3d 1033, 1033 [2007]). The testimony from petitioner and two inmate witnesses, stating that the correction officers attacked petitioner and another inmate for no reason, created an issue of credibility for the Hearing Officer to resolve (see Matter of Barnes v Goord, 279 AD2d 685, 685 [2001]). The Hearing Officer reasonably refused to call or recall certain witnesses. Although only two inmates besides petitioner testified, 12 more were contacted and refused to testify, as evidenced by their signed witness refusal forms (see Matter of Moore v Senkowski, 13 AD3d 683, 684 [2004]). Petitioner failed to indicate any relevance or new information that could be provided when he requested the testimony of every correction officer assigned to the shift and each of the inmates in the holding pen. The information he sought by recalling two officers was irrelevant to the ultimate determination and only sought to impeach them on minor details (see Matter of Pica v Selsky, 274 AD2d 712, 713 [2000]). The Hearing Officer appropriately denied the testimony of medical

personnel who treated petitioner after the incident, as such testimony was irrelevant to the determination on the charged misconduct (see *Matter of Thomas v Goord*, 293 AD2d 787, 788 [2002], lv denied 98 NY2d 613 [2002]). Having heard or sought the testimony from nearly 30 witnesses, the Hearing Officer reasonably limited further testimony based on redundancy (see *Matter of Williams v Goord*, 36 AD3d at 1033; *Matter of Gill v Selsky*, 240 AD2d 831, 831 [1997]). It was not an abuse of his discretion to take the testimony of an inmate outside petitioner's presence to preserve institutional safety, considering that the two were charged with assaulting staff in the same incident and a correction officer saw the two engaged in a confrontational situation (see 7 NYCRR 254.5 [b]). The Hearing Officer obtained questions from petitioner before questioning the inmate and played the tape of that inmate's testimony for petitioner (see *id.*). Although a portion of the hearing transcript is missing because the Hearing Officer inadvertently recorded over some testimony, the record is sufficient for appellate review. The portion that is missing contained part of petitioner's explanation of his version of the incident, but he provided this information again later in the hearing. Under the circumstances, the transcript is adequate to permit meaningful review of the hearing (see *Matter of Fama v Mann*, 196 AD2d 919, 920 [1993], lv denied 82 NY2d 662 [1993]; compare *Matter of Muhammad v Selsky*, 279 AD2d 742, 743 [2001]). Despite the lack of adequate assistance prior to the hearing, the Hearing Officer remedied the situation by providing petitioner all of the documents he requested, save those that did not exist or were irrelevant to the charged misbehavior, and additional time was granted to permit petitioner to review those documents (see *Matter of Lebron v McGinnis*, 26 AD3d 658, 658-659 [2006], lv denied 7 NY3d 704 [2006]; see also *Matter of Hynes v Goord*, 30 AD3d 652, 653 [2006]; *Matter of Parker v Laundree*, 234 AD2d 727, 728 [1996]). Thus, he was not prejudiced by the original inadequacy (see *Matter of Moss v Goord*, 36 AD3d 977, 978 [2007]). The record does not disclose any bias by the Hearing Officer, nor that the determination *987 flowed from anything other than evidence of petitioner's guilt (see *Matter of De La Cruz v Selsky*, 36 AD3d 907, 907 [2007]; *Matter of Tumminia v Goord*, 294 AD2d 727, 728 [2002], lv denied 99 NY2d 502 [2002]; *Matter of Rossi v Portuondo*, 277 AD2d 615, 616 [2000], lv denied 96 NY2d 706 [2001]). Petitioner's remaining contentions have been reviewed and found lacking in merit. Cardona, P.J., Carpinello, Lahtinen and Kavanagh, JJ., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed.