

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CLINTON


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Clinton, NY
John H. Zurlo County Clerk
File **2012-00001718**

In the Matter of the Application of
Brian Franqui, #11-A-1864,

Petitioner,

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

DECISION AND JUDGMENT

-against-

Index #: 2012-1718

RJI#: 09-1-2012-0691

**Brian Fischer, Commissioner, New York State
Department of Corrections and Community Supervision**

Respondent.

Petitioner, an offender incarcerated with the New York State Department of Corrections and Community Supervision [DOCCS], filed a Petition commencing the above-captioned Article 78 proceeding contesting the results of a Tier III disciplinary hearing.

The Misbehavior Report at issue, dated May 22, 2012, was filed charging the Petitioner with violating one institutional rule of conduct as set forth in 7 NYCRR §270.2. Specifically, Petitioner was charged with violating Rule 105.13 which provide:

An inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten gang or gang related material.

The misbehavior report read as follows:

On the above date and time I C.O. B. Kelly frisked Inmate Franqui's 11A1864 cell located in UH 8-11. I found a letter in the inmates locker and confiscated it which was annotated on a Contraband Receipt. A sentence in the letter states "We are suppose to reach 120 degrees at 3 different levels to be complete." Another sentence in the state "getting in contact with the Mesa and/or its secure team that creating that heart of steel was the worst thing Caso did." Both sentence were verified by Facility CIU to be terms used by the Latin Kings. Evidence placed in Contraband Locker #3 shelf B-L.

After the Tier III disciplinary hearing conducted on June 1, 2012, Petitioner was found guilty. The Hearing Officer imposed a penalty of nine months special housing unit with corresponding loss of privileges and three months loss of good time.

Petitioner's sole argument is that he was denied his right to observe the search of his cell in violation of DOCCS Directive #4910.

DOCCS Directive #4910(v)(C)(1) provides:

General Confinement: The search of a general confinement housing unit may be conducted with or without the inmate being present. If the inmate is removed from quarters prior to the search, he or she shall be placed outside the immediate area to be searched, but allowed to observe the search. However, if, in the opinion of a **supervisory security staff member**, the inmate presents a danger to the safety and security of the facility, the inmate shall be removed from the area and not allowed to observe the search *{emphasis provided}*.

Respondent argues that the DOCCS Officer (Kelly) who conducted the search of Petitioner's cell did comply with the requirements of DOCCS Directive #4910; specifically, Respondent maintains "**upon information and belief**, C.O. B. Kelly, **under the direction of Captain Facteau**, commenced the search ... C.O. B. Kelly determined the petitioner presented a danger ..." *{emphasis provided}*.

Assuming for purposes of this determination that Captain Facteau was at the relevant time "a supervisory security staff member", the Court finds the record void of any evidence that Captain Facteau, and not Officer Kelly, determined that Petitioner presented a danger. The record is further void of any proof, or even assertion, that Officer Kelly was at the relevant time "a supervisory security staff member."

Officer Kelly did testify that Captain Facteau authorized the search as follows:

Transcript Starting at Page 11:

CAMPBELL: Ok. Um the directive states that you ha, you can be present unless they feel you may be a threat or it might be a security issue if you do watch. If you've read the directive. I know, I just checked on it myself. Ok. Captain Facticeau was the uh one who authorized the frisk that day. The only, uh I can get Officer Kelley down here if that's what you want me to do. Uh, he will not be here until tomorrow. He's off today. But, it will be on how he felt the situation arose to do the frisk. Whether he felt you should be present or out, away from the cell. That's in the directive. You, you are required, you can, you can be there, but you don't, they don't have to have you there.

FRANQUI: It's in the opinion of the supervisors.

CAMPBELL: That's correct.

FRANQUI: Staff member If the inmate presents a danger to the safety and security of the facility the inmate shall be removed from the area and not allowed to be present.

CAMPBELL: Right, and that's

FRANQUI: Observe.

...

CAMPBELL: Franqui Ok. Ok. First of all I need to know who authorized the, the, the search.

KELLEY: Captain Facticeau.

...

CAMPBELL: Ok. Um, I read over the directive and you are not required to be there, but if the Officer feels that its not necessary. Ok. That's the way I read the directive. So, you, was he present when you frisked his cell?

KELLEY: No he wasn't.

CAMPBELL: Ok.

KELLEY: He locked in the slop

CAMPBELL: And the reason for that was?

KELLEY: Because his name was reported some of the porters who saw him at Company B porters and looking for weapons and possible gang material (not audible).

CAMPBELL: Ok. So that was your reason for not letting him.

KELLEY: It was going to be a long search, cause he has a porter cell. It take a while to search it.

While the testimony of Officer Kelly may demonstrate that Captain Facticeau authorized the search, there is no testimony that Captain Facticeau opined that Petitioner posed a danger and should be removed and not allowed to observe the search.

Absent any indication in the record that a supervisory staff member determined that Petitioner posed a danger, the Court cannot find that Respondent complied with DOCCS Directive #4910. *See, Matter of Mingo v Chappius*, — NYS2d —, 2013 WL 1830809 [3 Dept], 2013 NY Slip Op. 03143. As such, Petitioner's application must be granted and the contested determination annulled. *See, Id.*

Based upon all of the above, it is hereby

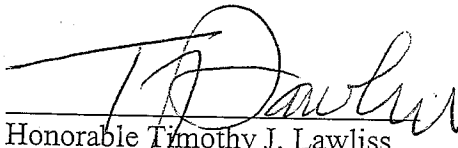
ORDERED, that Brian Franqui's Petition commencing the above-captioned Article 78 proceeding is hereby **GRANTED**; and it is further

ORDERED, that the judgment is reversed, on the law, petition granted, determination annulled and the Commissioner of Corrections and Community Supervision is directed to expunge all references thereto from Petitioner's institutional record and to reimburse the mandatory surcharge, if any, to Petitioner; and it is further

ADJUDGED, that the Court will take no action on Petitioner's application for costs, including attorney's fees, until and unless Petitioner complies with CPLR 8601.

Signed and Dated: May 13, 2013

E N T E R



Honorable Timothy J. Lawliss
Acting Supreme Court Justice