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**SUPREME COURT OF NEW YORK
BRONX COUNTY**

People ex rel. Furde v. New York City Dep't of Correction ¹
(decided June 3, 2005)

Mark Furde, a pretrial detainee at Rikers Island Correctional Facility, was placed in “23 hour lock-in” pursuant to a Department of Correction (DOC) hearing determination after the murder of a fellow inmate.² Furde remained in “23-hour lock-in” for six months at which time he filed an Article 78 petition seeking reversal of the department’s ruling.³ Furde argued that DOC violated his due process rights under both the federal and state constitutions⁴ by failing to follow self-imposed regulations regarding restrictive custody hearings.⁵ On review of his claim, the court annulled DOC’s determination as unconstitutional under article I, section 6 of the New York State Constitution and ordered Furde to return to the general prison population.⁶

On October 3, 2004, Tyree Abney, an inmate at the Rikers Island Correctional Facility was killed during an attack by his fellow

¹ 796 N.Y.S.2d 892 (Sup. Ct. 2005).

² *Id.* at 892.

³ *Id.* Article 78 enables challenges to agency determinations made in violation of lawful procedure or that are otherwise arbitrary and capricious.

⁴ *Id.* U.S. CONST. amend. XIV states: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .”; N.Y. CONST. art. I, §6 provides: “No person shall be deprived of life, liberty or property without due process of law.”

⁵ *Furde*, 796 N.Y.S.2d at 892.

⁶ *Id.*

inmates.⁷ Seven inmates were identified as participants in the attack, but Furde was not among them.⁸ However, his name was included in a DOC investigator's incident report based on information obtained from an unidentified informant.⁹ All eight inmates were removed from the general prison population and Furde was placed in "23-hour lock-in."¹⁰

The New York City Board of Correction rules provide that an inmate may be confined to a cell for a maximum of eight hours overnight and two hours during the day absent a Board-granted variance.¹¹ Including Furde, each of the eight inmates allegedly involved in the attack were placed in "23-hour lock-in."¹² However, while the DOC granted a variance for seven of the inmates, none was granted for Furde.¹³

In addition to the requirement of a variance, DOC has enumerated certain rights afforded to inmates who are involuntarily placed in restrictive custody.¹⁴ Specifically, Directive 6005 states that each inmate is entitled to a pre-detention hearing and written notice of his status "either before or as soon as [he] is involuntarily placed in a restrictive security assignment."¹⁵ The hearing must be held within 48 hours of written notice and effort must be made to

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Furde*, 796 N.Y.S.2d at 893.

¹¹ *Id.* at n.2.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 897.

¹⁵ *Furde*, 796 N.Y.S.2d at 897 as provided under 39 RCNY § 1-02 [a] [1] (Directive 6005).

ensure that the inmate understands the contents of the notice.¹⁶ Furde remained in restrictive lock-in for eleven weeks before he was given a hearing.¹⁷ Further, he was notified orally, and no effort was made to determine whether he understood the reason for the hearing.¹⁸

Under Directive 6005, proper notice includes a statement of the reasons for the restrictive designation, the evidence relied upon, and notice to the inmate that he is entitled to a hearing.¹⁹ The inmate must also be informed that he is entitled to call witnesses at the hearing; and if the hearing results in a determination that the inmate is to remain in isolation, a detailed, written report of the hearing officer's decision must be produced within twenty-four hours.²⁰

At Furde's hearing, the officer did not present any specific evidence as to why Furde should be placed in or remain in restrictive isolation.²¹ The hearing instead consisted of generalized statements regarding fear of gang related activity and facts surrounding Abney's homicide, but none specifically related to Furde.²² Without stating a reason, the hearing officer did not afford Furde the ability to call witnesses to testify on his behalf during the hearing and did not inform Furde of his right to do so.²³

Furde filed a writ of habeas corpus seeking relief on February 9, 2005 that was converted to an Article 78 proceeding since Furde

¹⁶ *Id.* at 898.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Furde*, 796 N.Y.S.2d at 898-99.

²¹ *Id.* at 894.

²² *Id.*

²³ *Id.* at 895.

was not seeking relief from prison, but relief from isolative confinement.²⁴ In defense of its actions, DOC claimed that it afforded Furde all of the rights entitled to him under federal due process standards and that the court had no jurisdiction over the implementation of DOC protocol.²⁵

Six months after his initial lock-in, the court invalidated the DOC determination and ordered Furde to be released from isolation.²⁶ The court found that Furde's right to due process under both the federal and state constitution was infringed when DOC failed to follow its self-imposed procedures for restricting pretrial detainees.²⁷ The court acknowledged that federal due process is minimally defined as affording the prisoner notice and an opportunity to be heard.²⁸ However, in this case, Furde's eleven month isolation was invalid because, contrary to DOC Directive 6005, Furde was neither notified of the evidence compiled against him, nor was he advised of his rights during the hearing.²⁹ Thus, absent knowledge of evidence against him, Furde had no opportunity to adequately respond or call witnesses in his defense.³⁰ DOC's departure from its stated procedure, coupled with the extended duration of isolation imposed, evidenced a "grievous deviation" from the prison norm as established by the Supreme Court in *Sandin v. Dermont*.³¹

²⁴ *Id.* at 895 n.7.

²⁵ *Furde*, 796 N.Y.S.2d at 896.

²⁶ *Id.* at 895.

²⁷ *Id.*

²⁸ *Id.* at 896 (citing *Hewitt v. Helms*, 459 U.S. 460 (1982)).

²⁹ *Id.*

³⁰ *Furde*, 796 N.Y.S.2d at 897.

³¹ 515 U.S. 472, 486 (1995) (holding that subsequent confinement not exceeding current

Regarding violation of the state constitution, the *Furde* court did note that the nature of prison safety and security is such that broad discretion should be granted to those charged with effectuating policy.³² However, in cases where an agency like DOC promulgates specific rules of procedure, that procedure becomes determinative of what process is due.³³ In cases such as *Furde*'s, where a state agency codifies particular rules of disciplinary procedure, the agency thereby enlarges an individual's due process rights, and deviation from procedure constitutes a violation of the New York State Constitution.³⁴ Indeed, the court made it clear that in this case, "DOC disregarded virtually all of its rules concerning petitioner's involuntary restrictive housing placement."³⁵

In *Hewitt v. Helms*, the United States Supreme Court took an expansive view in deciding what constitutes due process.³⁶ It held that the Due Process Clause of the Fourteenth Amendment requires prison officials to provide inmates facing isolation with simple notice of the charges against them and an opportunity to be heard.³⁷ In that case, a pretrial inmate was allegedly involved in a prison riot which resulted in injury to a guard.³⁸ The State Bureau of Corrections rules stated that "[a]dministrative segregation may be imposed when an

prison sentence does not amount to significant deprivation of liberty interest).

³² *Furde*, 796 N.Y.S.2d at 896.

³³ *Id.* at 896-97.

³⁴ *Id.* at 896 (citing *Bryant v. Coughlin*, 572 N.E.2d 23 (N.Y. 1991)); *see also* *Powlowski v. Wullich*, 102 A.D. 575 (4th Dep't 1984) (holding that inmate has a valid claim of injury when denied rights guaranteed by prison rules).

³⁵ *Id.* at 897.

³⁶ *Hewitt*, 459 U.S. at 472.

³⁷ *Id.* at 476.

³⁸ *Id.* at 463.

inmate poses a threat to security” or “when disciplinary charges are pending against an inmate.”³⁹

A disciplinary hearing was convened and without any evidence, the review board determined that Hewitt should be isolated.⁴⁰ In addition to an absence of proof upon which to base its determination, the committee confined Hewitt for six months until all incident-related charges were dropped.⁴¹ He then filed suit against prison officials claiming a violation of his liberty interest to remain among the general prison population.⁴²

The Supreme Court ruled that the prison system had created a liberty interest by promulgating a specific protocol to be followed before an inmate can be placed in isolation.⁴³ The Court noted that hearing requirements which included the words “shall,” “will,” and “must,” went beyond mere procedural guidelines and alluded to the conclusion that segregation would be proper only when such procedure is followed.⁴⁴ Nevertheless, the Court determined that the review board’s actions satisfied due process because the inmate was told of the charges against him and was able to present a statement to the board.⁴⁵ The Court reasoned that the safety of prison guards and other inmates is fundamental to the administration of correctional facilities and warrants a relaxed interpretation of due process.⁴⁶

³⁹ *Id.* at 464 n.4.

⁴⁰ *Id.* at 464.

⁴¹ *Hewitt*, 459 U.S. at 465.

⁴² *Id.* at 462.

⁴³ *Id.* at 466, 470-71.

⁴⁴ *Id.* at 471-72.

⁴⁵ *Id.* at 477.

⁴⁶ *Hewitt*, 459 U.S. at 472.

The Supreme Court refined the *Hewitt* decision in *Sandin v. Halawa Correctional Facility*⁴⁷ without overruling it.⁴⁸ There, the Court recognized that prison regulations may create liberty interests for inmates.⁴⁹ Yet, those interests are only infringed when an inmate's detention arises in a way that is atypical and significant.⁵⁰

In *Sandin*, a convicted inmate who was serving a sentence of 30 years to life in a Hawaii state prison was charged with "high misconduct" for a physical confrontation with a prison officer during a body search.⁵¹ Eleven days later, he received notice of the charge and was granted a disciplinary hearing.⁵² The committee denied his request to present witnesses and sentenced him to 30 days in solitary confinement.⁵³ Relying upon a denial of opportunity to call witnesses pursuant to hearing guidelines, he sought relief from the Supreme Court, which found no due process violation.⁵⁴

Referring to *Hewitt*, the Court ruled that while state enacted prisoner hearing regulations do give rise to due process rights, the requirement of verbatim adherence to them would enable inmates to succeed on due process violations for slight deviations in procedure.⁵⁵ Therefore, in determining whether a hearing has violated due process, the court must look to the nature of the resulting

⁴⁷ 515 U.S. 472 (1995).

⁴⁸ *Id.* at 484 n.5.

⁴⁹ *Id.* at 483-84.

⁵⁰ *Id.* at 486.

⁵¹ *Id.* at 474-75.

⁵² *Sandin*, 515 U.S. at 475.

⁵³ *Id.* at 475.

⁵⁴ *Id.* at 476.

⁵⁵ *Id.* at 480-81 (stating that inmates need not rely on a showing of "grievous loss" of liberty).

confinement and whether it imposes a hardship beyond those typical of prison life.⁵⁶ Thus, the Court determined that while the inmate was placed in solitary confinement for 30 days, the confinement did not trigger due process because he was already serving a 30 year to life sentence and his segregation substantially mirrored that of the general prison population.⁵⁷

Under the New York State Constitution, if a prison disciplinary determination is not supported by substantial evidence that indicates a need for restrictive confinement of an inmate and departs from codified procedure, the decision to isolate that inmate constitutes a violation of due process.⁵⁸ Additionally, a violation of the Due Process Clause of the Fourteenth Amendment will be based on whether a restriction is arbitrary and amounts to punishment of the inmate.⁵⁹

In *Bryant*, a prison riot took place during which numerous inmates attacked guards in the dining hall.⁶⁰ Following the disturbance, an inmate hearing was held based on eyewitness testimony of a prison employee and a civilian cook who made a blanket statement that “every inmate in the mess hall. . . was participating in the riot.”⁶¹ Disciplinary hearings were held for both inmates during which they denied any involvement in the

⁵⁶ *Id.* at 484.

⁵⁷ *Sandin*, 515 U.S. at 485-86.

⁵⁸ *Bryant v. Coughlin*, 572 N.E.2d 23, 25 (N.Y. 1991).

⁵⁹ *Powlowski v. Wullich*, 479 N.Y.S.2d. 89, 96 (App. Div. 4th Dep’t 1984).

⁶⁰ *Bryant*, 572 N.E.2d. at 23-24.

⁶¹ *Id.* at 24.

disturbance.⁶² However, the hearing officer concluded that the inmates posed a threat to security under Disciplinary Rule 104.10 and confined both to 365 days of solitary confinement.⁶³ Both inmates sought relief for violation of due process rights.⁶⁴ They claimed that the isolation was based on insubstantial evidence.⁶⁵

On review, the *Bryant* court acknowledged that a “misbehavior report” filed by a hearing officer may “constitute substantial evidence of guilt” sufficient to form the basis of confinement.⁶⁶ Yet, written regulations required an officer who suspected that an inmate had misbehaved, but who was not completely sure, to so indicate in the report.⁶⁷ Another regulation required the written report to include the specific acts committed by the inmate.⁶⁸

Because the hearing officer’s written report made no mention that the evidence against the defendants was circumstantial, nor the specific acts allegedly committed by them during the riot, the determination of the hearing board and the officer’s failure to follow written procedure violated the inmates’ due process rights.⁶⁹ The court made it clear that “the failure of the Commissioner to follow his own regulations in the report. . . . must be considered a material

⁶² *Id.* at 25.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Bryant*, 572 N.E.2d at 25.

⁶⁶ *Id.* at 25-26.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 26.

defect. . . [and] the determination must be annulled.”⁷⁰

The *Powlowski* court noted that when reviewing the rights of pretrial detainees, the court must be mindful that “[lawful] incarceration brings about the necessary withdrawal or limitation of many privileges and rights.”⁷¹ However, because a state does not have the power to punish prisoners until a final adjudication of guilt, a due process inquiry looks to whether the prison has imposed a condition upon the pretrial detainee that amounts to punishment.⁷² Punishment in this context would be an arbitrary deprivation of prison rights.⁷³

In *Powlowski*, those claiming a violation of due process rights were pretrial detainees at a state prison, which did not provide exercise or recreational facilities.⁷⁴ As a result, the prisoners were forced to remain in their cell blocks for 24 hours each day in violation of state correctional facility standards.⁷⁵ The prison stated that constant confinement was necessary because the prison lacked space to create the facilities and it was, therefore, confining the prisoners out of necessity.⁷⁶

In its decision, the court held that the lack of exercise and recreation facilities were so deficient under self-promulgated prison standards that the deprivation constituted a violation of federal and

⁷⁰ *Bryant*, 572 N.E.2d at 26-27.

⁷¹ *Powlowski*, 479 N.Y.S.2d at 96 (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

⁷² *Id.* at 95-96.

⁷³ *Id.* at 96.

⁷⁴ *Id.* at 91.

⁷⁵ *Id.* at 97.

⁷⁶ *Powlowski*, 479 N.Y.S.2d at 94.

state due process.⁷⁷ The court acknowledged that the confinement was not intended to be punitive, but nevertheless, did constitute punishment of the detainees since it was imposed arbitrarily in absence of a legitimate governmental objective.⁷⁸ Thus, the court held that 24 hour confinement to a prison cell when the detainee is not suspected of additional criminal activity is unlawful.⁷⁹

In deciding *Santiago v. Warden*,⁸⁰ the court went beyond the concept of requiring substantial evidence to appear in a hearing examiner's report. In that case, which arose from the same incident that involved Furde, the court stated that an inmate's right to due process pursuant to Board of Correction regulations regarding a disciplinary hearing is violated when the substantial evidence included in the report is not based on the independent assessment of the hearing officer.⁸¹

Santiago was one of the eight inmates involuntarily confined after the murder of Abney at the Rikers Island Correctional Facility.⁸² While a board-granted variance was obtained for Santiago's extended confinement, he remained in isolation for two months before he was given a hearing.⁸³ In addition, the hearing officer did not present any evidence at the hearing; he chose instead to rely on the documentation used to support Santiago's criminal indictment for

⁷⁷ *Id.* at 92.

⁷⁸ *Id.* at 97.

⁷⁹ *Id.*

⁸⁰ 793 N.Y.S.2d 722 (Sup. Ct. 2005).

⁸¹ *Id.* at 731.

⁸² *Id.* at 724.

⁸³ *Id.*

allegedly attacking Tyree.⁸⁴

In concluding that the board's determination to isolate Santiago was a violation of his due process rights under the state constitution, the court also pointed to the fact that the hearing officer failed to follow protocol by depriving Santiago of the right to present evidence at the hearing.⁸⁵ Accordingly, when pretrial detainee hearings are conducted and the hearing officer deviates from written procedure by failing to provide a complete assessment of the inmate's conduct, any determination that the inmate be isolated is not proven by substantial evidence and violates the prisoner's rights to due process.⁸⁶

While both federal and state courts acknowledge that due process rights of pretrial detainees may be violated when prisoners are placed in solitary confinement after detention hearings, they differ in their views of what constitutes due process. At the federal level, due process merely consists of notifying the prisoner that he is suspected of a particular crime. Additionally, the prisoner must then be given an opportunity to defend himself during the hearing before a final determination as to solitary confinement is made. After that point, extended isolation within the limits of standard prison confinement is constitutional.

At the state level, the definition of due process is significantly broader. In New York, the due process rights of a pretrial detainee also include notice and opportunity to be heard. However, the state

⁸⁴ *Id.* at 731.

⁸⁵ *Santiago*, 793 N.Y.S.2d at 730.

⁸⁶ *Id.* at 734.

2006]

DUE PROCESS

81

additionally requires that detention hearing procedures enumerated by the Department of Correction must be followed.

The Court's decision in *Furde* reflects the broad interpretation of due process adopted by New York. The decision also acknowledges the federal view that prison officials should be granted wide discretion when implementing policy, yet ensures that inmates are not completely stripped of their constitutional guarantees while incarcerated.

Adam D'Antonio

