

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CLINTON

In the Matter of the Application of
George Texeira,

Petitioner,

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

-against-

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

Respondent.



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Clinton, NY
John H. Zurlo County Clerk

File **2012-00001126**

DECISION AND JUDGMENT

Index #: 2012-1126

RJI#: 09-1-2012-0465

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 February 22, 2012, was filed charging the Petitioner with violating seven institutional rules of conduct as set forth in 7 NYCRR §270.2. Specifically, Petitioner was charged with violating the following rules:

- Rule 100.10: An inmate shall not assault or inflict or attempt to inflict bodily harm upon any other inmate.
- Rule 114.10: An inmate shall not smuggle or attempt to smuggle or solicit others to smuggle any item in or out of the facility or from one area to another.
- Rule 102.10: An inmate shall not, under any circumstances make any threat, spoken, in writing, or by gesture.
- Rule 111.10: An inmate shall not impersonate any employee or any other person in any manner.
- Rule 121.12: An inmate shall comply with and follow the guidelines and instructions given by the staff regarding facility telephone programs pursuant to the requirements of departmental Directive No. 4423 (7 NYCRR Part 723).
- Rule 121.14: An inmate shall not exchange a personal identification number (PIN), or use the PIN of another inmate.

Rule 180.11: An inmate shall comply with and follow the guidelines and instructions given by staff regarding facility correspondence procedures pursuant to requirements of departmental Directive Nos. 4422 and 4421 (7 NYCRR Parts 720 and 721).

The misbehavior report read as follows:

Per an ongoing NYSDOCCS-I.G. Investigation involving Inmate George Texeira # 02A4942, AKA "Grandpa", "Baby Brother" while at the Attica C.F. on the above dated through 11-22-11 Resulted in the following. Inmate Texeira used the Inmate Correspondence - Inmate phone systems to threaten to harm - seriously assault - even kill another inmate(s) for failing to smuggle an item from one part of the facility to another while at Attica C.F. Inmate Texeira used the P.I.N. # of Inmate Andre Vega #95A2270 to call another individual at #313-769-5553 to relay messages back and forth on illegal activity involving Inmate Texeira and other inmates at the facility as well as planning to assault - *seriously harm Inmates Ivan Towndrow #95B1157 and Juan McNair #99B2286* as suspected "snitches - rats" per Inmate Texeira. The above investigation is also supported by confidential information to support the above I.6. Investigation. End of Report. *{emphasis provided}*

After the Tier III disciplinary hearing Petitioner was found guilty on each charge. The hearing officer imposed a penalty of twenty-four months special housing unit with corresponding loss of privileges and twenty-four months loss of good time.

Petitioner's sole argument is that he was denied a witness, specifically, inmate Ivan Towndrow.

Petitioner requested as witnesses, first through his tier assistant and then at the hearing, three inmates named in the misbehavior report. The requested inmates were inmate Towndrow and inmate McNair both of whom Petitioner allegedly threatened and inmate Andre Vega whose phone pin Petitioner was alleged to have improperly used.

Inmates Vega and McNair both agreed to and did testify.

Inmate Towndrow refused to testify and signed a refusal form.

On the refusal form, inmate Towndrow indicated his refusal was because he "... was never at Upstate ever. I came here from Attica!"

Petitioner argues that inmate Towndrow was confused and/or misinformed about the nature of his requested testimony. Specifically, Petitioner argues that the incident that gave rise to the misbehavior charges was for alleged misconduct at the Attica Correctional Facility and not at the Upstate Correctional Facility; yet, inmate Towndrow refused to testify because inmate Towndrow stated he “was never at Upstate”.

Petitioner requested at the hearing that the hearing officer contact inmate Towndrow again and provide clarification that Petitioner requested inmate Towndrow’s testimony regarding events at Attica not at Upstate. There is no indication in the record that the hearing officer investigated further inmate Towndrow’s refusal.

An inmate has a conditional constitutional right to call witness at a disciplinary hearing. *See, Matter of Move v Fischer*, 93 AD3d 1006, 940 NYS2d 356 [3 Dept 2012].

Respondent does not dispute that Petitioner had the right to call relevant witnesses. Rather, Respondent appears to argue that it is possible the hearing officer’s failure to further investigate was because the hearing officer could have reasonably concluded that inmate Towndrow’s testimony was irrelevant and abandoned efforts to further investigate.

There is absolutely no basis in the record to conclude that the hearing officer determined inmate Towndrow’s testimony was irrelevant. Respondent, in fact, concedes the following in his October 5, 2012 letter memorandum filed with Respondent’s Answer and Return:

In the instate proceeding, Hearing Officer Brown initially indicated that he would have Inmate Towndrow reinterviewed. However, there is not indication that he did so. As further discussed below, this could be a ground for remittal of the matter for a new disciplinary, at least on some issues.

The Court finds Petitioner’s right to call inmate Towndrow as a witness was clearly violated. The questions before the Court are now (1) whether the violation regarding

Petitioner's right to call inmate Towndrow results in the reversal of the guilty finding on each charge; and (2) whether the failure to further investigate inmate Towndrow's refusal should result in remittal or expungement.

The Court finds that while in the end inmate Towndrow's testimony (should he agree to testify) may prove relevant to only some of the charges lodged against Petitioner, the Court finds the alleged facts and alleged scheme so intertwined that the Court cannot say with certainty that inmate Towndrow's testimony is clearly not relevant to any of the particular charges. As such, the Court will reverse the entire matter.

The Court turns next to whether expungement or remittal is the appropriate relief.

There is no dispute the Petitioner requested that inmate Towndrow testify. There is no dispute that inmate Towndrow refused. There appears to be no dispute that inmate Towndrow's refusal gave rise to at least the possibility that inmate Towndrow was confused regarding what was being asked of him. It is certainly also possible that inmate Towndrow was not confused and for whatever reasons, not contained in the record, choose to respond to the request for his testimony as he did. Regardless, it is undisputed that the hearing officer indicated that he would have inmate Towndrow reinterviewed and the reinterview never occurred.

Petitioner argues expungement is the appropriate remedy as the instant violation was constitutional and not regulatory. Respondent argues remittal is appropriate.

An outright denial of a witness by a hearing officer without any good-faith reason provided or a lack of any effort to obtain a requested witness's testimony constitutes a constitutional violation requiring expungement, and in most other cases the improper denial of a witness

constitute regulatory violations warranting remittal. *See, Matter of Moulton v Fischer*, 100 AD3d 1131, 952 NYS2d 992 [3 Dept 2012].

Where no explanation or reason for the refusal been provided by the requested witness and a hearing officer fails to make any inquiry at all into the reason for the refusal (or the hearing officer himself or herself outright refuses the witness without explanation), expungement is appropriate. *See, Matter of Cahill v Prack*, --- N.Y.S.2d ----, 2013 WL 2090299, 2013 N.Y. Slip Op. 03534 [3 Dept 2013]; *Matter of Morris-Hill v Fischer*, 104 AD3d 978, 960 NYS2d 273 [3 Dept 2013]; and, *Matter of Samuels v Fischer*, 98 AD3d 776, 949 NYS2d 800 [3 Dept 2012].

However, where a good-faith reason for the denial appears on the record any violation amounts to a regulatory violation and remittal is the appropriate remedy. *See, Matter of Morris-Hill v Fischer*, 104 AD3d 978, 960NYS2d 273[3 Dept 2013].

In Petitioner's case, a reason for the refusal was provided. It cannot, therefore, be said that no reason for the requested witness's refusal was provided. *See, Matter of Pitts v Fischer*, 98 AD3d 762, 948 NYS2d 923 [3 Dept 2012] (where employee assistant form indicated witness was unwilling to testify with no further explanation and no further inquiry was done the Court remitted the matter for a new hearing). The Court concurs with Petitioner that the hearing officer's failure to conduct further investigation when it became apparent that reason provided by inmate Towndrow's for his refusal was illogical on its face does warrant reversal. The Court finds, however, that remittal and not expungement is the appropriate relief. *See, matter of Moulton v Fischer*, 100 AD3d 1131, 952 NYS2d 922 [3 Dept 2012].

Based upon all of the above, it is hereby

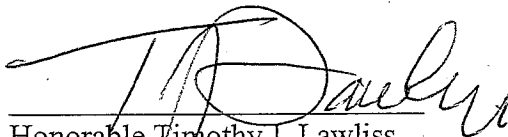
ORDERED, that George Texeira's Petition commencing the above-captioned Article 78 proceeding is hereby **GRANTED**; and it is further

ORDERED, that the judgment is reversed, on the law, without costs, determination annulled, and matter remitted to the Commissioner of Corrections and Community Supervision for further proceedings not inconsistent with this Court's decision; 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 24, 2013

E N T E R



Honorable Timothy J. Lawliss
Acting Supreme Court Justice