PRESENT: HON. THOMAS J. McNAMARA
Acting Justice

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of
GENARO CAMPOS,

Petitioner,

DECISION & ORDER
Index No.: 928-13
RJI No.: 01-13-ST4368

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

BRIAN FISCHER, Commissioner, New York State Department of Corrections and Community Supervision,

Respondent.

(Supreme Court, Albany County, Motion Term)

APPEARANCES: Prisoners' Legal Services of New York
(By: Elizabeth Watkins Price, Esq. of Counsel)
Attorneys for Petitioner
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Ithaca, New York 14850

Eric T. Schneiderman
Attorney General of the State of New York
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McNamara, J.

Following the completion of a Tier III disciplinary hearing on August 16, 2012, petitioner was found guilty of "Harassment" and "Stalking". The hearing officer's determination was appealed and was modified such that the penalties imposed were reduced. Thereafter, this CPLR article 78 proceeding was

initiated to challenge the determination on the basis that petitioner was denied the right to attend the hearing.

A rehearing of the charges against petitioner was started on August 15, 2012 at Southport Correctional Facility. After petitioner noted his objections to the rehearing, he was asked if he wanted to call any witnesses. Petitioner put forth the names of eight inmates he wanted to call as witnesses and the hearing was adjourned so that the Hearing Officer could determine if the inmates were willing to testify. When the proceeding was resumed the following day the Hearing Officer was advised, on the record, by a correction officer that petitioner had told the correction officer that he did not want to attend the hearing. The correction officer also indicated that petitioner had signed a waiver form which contains a notation stating "I do not feel safe after being threatened by the Hearing Officer on 8/15/12." The Hearing Officer then made a statement on the record that he never threatened petitioner and concluded that the inmate had waived his right to attend the remainder of the hearing. The hearing resumed with a correction officer from Groveland Correctional Facility testifying telephonically that he had approached each of the seven inmates petitioner had requested as witnesses and each had signed a form indicating that they did not want to be involved. The Hearing Officer noted for the record that the only other witness requested by petitioner had been denied on the basis that his proposed testimony would not be material. The hearing was then adjourned for consideration of the evidence. When the hearing resumed approximately 40 minutes later, the Hearing Officer concluded, based on the statement in the Inmate Misbehavior Report, that petitioner was guilty of both charges.

"An inmate has a fundamental right to be present at his or her disciplinary hearing, unless he or she waives such right or refuses to attend" (*Matter of Brooks v R. James*, 105 AD3d 1233 [3d Dept 2013],

quoting *Matter of Alicea v Selsky*, 31 AD3d 1080, 1080 [3d Dept 2006]). Given his claim that he had been threatened, petitioner's absence from the hearing raises the question of whether his decision not to attend supports a finding that petitioner "willfully refused or knowingly, voluntarily or intelligently relinquished his right to attend the hearing" (*id.* at 1233 [internal quotation marks and citations omitted]). If words have any meaning, the Hearing Officer's self-serving conclusion that he had not threatened the inmate will not substantiate a determination that petitioner voluntarily waived his right to attend the hearing. Something more was required to protect this fundamental constitutional right. Either an independent determination that petitioner's fear was unfounded, or fashioning an environment in which the inmate's concern was reasonably allayed, was necessary before the hearing officer could proceed without the inmate. No such effort was made and inasmuch as petitioner's fundamental due process right was violated, expungement is required (*id.* at 1233).

Accordingly, it is

ADJUDGED, that the Tier III disciplinary hearing determination dated August 16, 2012 finding petitioner guilty of harassment and stalking be, and hereby is, vacated and it is further

ORDERED, that respondent, or whoever else shall have care and custody of the records, shall expunge all entries referencing the Tier III disciplinary proceeding including the disposition and any underlying investigation from all institutional records including disciplinary records, service unit files, temporary release committee files and all reports submitted to the New York State Parole Board.

This constitutes the judgment of the Court. The original judgment is returned to the attorney for petitioner. A copy of the judgment and the supporting papers have been delivered to the County Clerk for placement in the file. The signing of this judgment , and delivery of a copy of the decision and order shall