SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF CLINTON

In the Matter of the Application of
Allen Wiggins, 99-A-1334,

Petitioner,

for Judgement 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.

DECISION AND JUDGMENT

Index #: 2012-1435
RJI#: 09-1-2012-0578

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 underlying Misbehavior Report at issue, dated June 9, 2012, was filed charging the Petitioner with violating five 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 100.13: An inmate shall not engage in fighting.

Rule 104.11: An inmate shall not engage in any violent conduct or conduct involving the threat of violence either individually or in a group.

Rule 104.13: An inmate shall not engage in conduct which disturbs the order of any part of the facility. This includes, but in not limited to, loud talking in a mess hall, program area or corridor, talking after the designated facility quiet time, playing a radio, television or tape player without a headphone or through a headphone in a loud or improper manner, or playing a musical instrument in a loud and improper manner.

Rule 113.10: An inmate shall not make, possess, sell or exchange any item that may be classified as a weapon or dangerous instrument by description, use or appearance. A dangerous instrument is any instrument, article or substance

which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing bodily harm.

After the Tier III disciplinary hearing conducted on June 15, 2012, Petitioner was found guilty of violating rules # 104.11 (violent conduct); 100.10 (assault on inmate); and 113.10 (weapon); and not guilty of violating rules # 104.13 (creating a disturbance) and 100.13 (fighting). The Hearing Officer imposed a penalty of six months special housing unit with corresponding loss of privileges and six months loss of good time.

Petitioner requested as a witness, first through his tier assistant and then at the hearing, an inmate named "Anderson". Inmate Anderson was named in the subject misbehavior report as Petitioner's target. Respondent maintains that inmate Anderson refused to testify as indicated by Petitioner's employee assistant checking "no" under whether inmate Anderson "Agrees to Testify" on the relevant DOCCS Assistant Form.

Petitioner maintains that there was no indication at the hearing that the Hearing Officer ever checked into or followed up with inmate Anderson, nor Petitioner's employee assistant, as to the reasons for inmate Anderson's refusal.

The Court emphasizes that the employee assistant, who spoke with inmate Anderson, did not testify as to the reasons for the refusal.

Respondent does not dispute that an inmate in a Tier III disciplinary hearing has a right to call relevant witnesses, so long as their testimony is not redundant and does not jeopardize safety and security or correctional goals. Rather, Respondent argues the refusal as indicated on the employee assistant form was a sufficient refusal.

It is clear from the record that the only indication that inmate Anderson refused to testify was the indication "no" on the employee assistant form[1]. No explanation was provided on the

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[1] The following are the relevant excerpts from the hearing regarding Inmate Anderson's testimony:

Transcript at Page 11:

WIGGINS:	I did have witnesses. Um.
BROWN:	Okay, who do you want for witness? ...
WIGGINS:	C.O. Gordon. I would like to um, I would like to call um, Anderson.
BROWN:	Anderson's refused. He refused and you signed off. Your assistant went and Anderson, a he didn't, did not, will not testify.
WIGGINS:	Alright.
BROWN:	Okay? If he refused to your assistant, when your assistant talked to you they advised you of such. ...

Transcript at Page 19:

BROWN:	I wish Anderson would testify, but he does not want to. ...

Transcript at Page 42:

WIGGINS:	Ok. And um, also, is it possible that I could get ah copy of the ah, ah witness ah, refusal form?
BROWN:	You don't do a witness refusal form if they refuse for a um, if they don't want to testify for um, on your assistance.
WIGGINS:	Alright.
BROWN:	He refused to the assistant. The only time we get a refusal is if he says he would come or I'd have to talk to him. If he refuses to the assistant, they tell you that.
WIGGINS:	Yeah. I asked him, I, I asked him to be called already.
BROWN:	Yeah but he doesn't want, he doesn't want to come. I, if he doesn't want to testify, I can't mandate he testify. So, he already told your assistant, and this is like a witness refusal form.
WIGGINS:	Right. Do you know why he didn't want to testify?
BROWN:	Why?
WIGGINS:	No, I'm asking you.

employee assistant form. Further, the record is clear the hearing officer made no independent inquiry of the witness nor did the hearing officer instruct a DOCCS employee to investigate the reason for the refusal. Finally, Petitioner's employee assistant did not testify as to the reasons provided, if any, by inmate Anderson for his refusal to testify and no witness refusal form with details regarding the refusal was provided (or even existed). No argument can be made from the record that inmate Anderson's testimony would be immaterial or irrelevant; in fact, clearly the testimony might prove highly material and relevant. Even the hearing officer remarked that the hearing officer wished innate Anderson would testify. The relevant authority is clear, a refusal given to an employee assistant with no explanation provided by the employee assistant or further inquiry by the hearing officer or other DOCCS employee is insufficient. *See, Matter of*

BROWN:	I have no idea. He doesn't, I, I don't have to mandate that.
WIGGINS:	Alright. I.
BROWN:	He, you, he was your witness and he did not want to testify.
WIGGINS:	Alright. I object to that. I'm just, I object to that.
BROWN:	Why would you object to a guy not wanting to testify? That's why you had an assistant.
WIGGINS:	No, I know that because, I'm objecting because he supposed to test, he's supposed to at least give me a reason why he don't wanna testify.
BROWN:	He just said no. I don't know what your assistant told you.
WIGGINS:	Okay. I'm sorry. I don't want to upset you.
BROWN:	No, I'm just telling you. That's fine. I'm just saying he told you no, the assistant is wa, everything we've done, at least the assistant reported back to you he will not testify, correct?

McFadden v Bezio, 92 AD3d 988, 937 NYS2d 702 [3 Dept, 2012]. *See also, Pitts v Fischer*, 98 AD3d 762, 948 NYS2d 923 [3 Dept. 2012][2]. The remedy is remittal. *See, Id.*

Based upon all of the above, it is hereby

ORDERED that Allen Wiggins' 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 13, 2013

E N T E R

Honorable Timothy J. Lawliss
Acting Supreme Court Justice

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In Matter of *McFadden v Bezio*, the Court held:

> However, we do find merit in petitioner's argument that the Hearing Officer erred in failing to make an effort to ascertain the reasons that inmates Sonberg and Freeman refused to testify. When petitioner requested those inmates' testimony at the hearing, the Hearing Officer noted that the employee assistance form indicated that both were unwilling to testify. However, that notation alone was not a sufficient basis to summarily deny petitioner's right to call those witnesses and, thus, it was incumbent upon the Hearing Officer to attempt to validate the reasons for their refusals *{citations omitted}*. Inasmuch as this amounted to a regulatory violation of petitioner's right to call witnesses, the matter must be remitted for a new hearing *{citations omitted}*.