

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
DAVID YAW,

Petitioner,

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

-against-

ANTHONY ANNUCCI, Acting Commissioner,
New York State Department of Corrections And
Community Supervision,

Respondent.

Supreme Court Albany County Article 78 Term
Hon. Roger D. McDonough, Acting Supreme Court Justice Presiding
RJI # 01-14-ST6144 Index # 5236-14

Appearances:

Prisoners' Legal Services of New York
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(Michael E. Cassidy, Esq., of Counsel)

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State of New York
Attorney for Respondent
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(Justin Engel, Esq., Assistant
Attorney General of Counsel)

DECISION/ORDER/JUDGMENT

Roger D. McDonough, Justice

Petitioner challenges the determination of a Tier II Superintendent's Hearing. He seeks a judgment awarding, *inter alia*, the following relief: (1) reversing and vacating the determination; (2) directing respondent to expunge all entries of the hearing and determination from petitioner's records; and (3) restoring petitioner to his status prior to the determination and immediately

restoring his privileges and recommended loss of good time. Respondent opposes the requested relief.

Background

Petitioner was charged, via an Inmate Misbehavior Report, with violating Rule 100.10(Assault); 114.10 (Smuggling); and 102.10 (Threats). The rule violations were based on a purported incident involving petitioner, another inmate named Guerra and a third inmate ("victim"). Guerra and petitioner allegedly assaulted the victim based upon the victim's purported refusal to assist in the smuggling of prison contraband. Both Guerra and the victim appeared in the Inmate Misbehavior Report.

At the hearing, petitioner requested Guerra and the victim as witnesses. The Hearing Officer denied the requests. Petitioner was ultimately found guilty of all rule violations. The following penalties were imposed: (1) eighteen month confinement in the Special Housing Unit; (2) a corresponding loss of recreation, packages, commissary, and phone; (3) a recommended loss of twelve months good time credits; and (4) eighteen months loss of visitation with six of those months being suspended and deferred for one hundred and eighty days. At the administrative appeal level, the penalties were modified to seven months in the Special Housing Unit and loss of privileges along with nine months loss of good time. Three months of the Special Housing Unit/loss of privileges penalties were suspended. The instant proceeding ensued.

Petitioner's sole argument is that he was improperly denied the right to call Guerra and the victim as witnesses. He asserts that their testimony clearly was relevant and would not have been redundant to any other witnesses. Petitioner further argues that the Hearing Officer failed to specify and explain how the requested testimony would jeopardize institutional safety or correctional goals. In opposition, respondent primarily argues that petitioner was not entitled to access to confidential testimony. In reply, petitioner's counsel makes it abundantly clear that this proceeding has nothing to do with seeking access to confidential testimony. Rather, counsel stresses that petitioner's requests for the two witnesses was improperly denied and that the Hearing Officer provided nothing more than a conclusory basis for the denials.

Discussion

The Court finds that the Hearing Officer improperly denied petitioner his right to call the victim and Guerra as witnesses. Regarding the victim's testimony, the Hearing Officer basically indicated that his testimony could not be had because: (1) he was the reported victim in the report; (2) it would be considered confidential; and (3) it would be a threat to security to allow petitioner to question him directly. When petitioner asked the Hearing Officer to interview the victim outside petitioner's presence, the Hearing Officer indicated that "security took care of that". Later in the hearing, the Hearing Officer indicated that testimony from the victim and Guerra would be a threat to the safety and security of the facility if it were taken in petitioner's presence. When petitioner asked the Hearing Officer to take their testimony outside petitioner's presence, the Hearing Officer basically indicated that petitioner was only allowed to review those witnesses that were not directly involved in the incident and the misbehavior reports. Still later, the Hearing Officer indicated that it would not be appropriate or safe for their to be testimony and/or communication going back and forth between the petitioner, the victim and Guerra at this time. Finally, the Hearing Officer specified that the victim's testimony was denied because it would be a threat to the safety and security of the facility as well as the safety and security of the individuals. He also specified that Guerra's testimony was denied because it would be a threat to the safety and security of the facility and to individuals to allow petitioner to question, take testimony or review testimony from Guerra.

The record before the Court does not provide adequate support for the Hearing Officer's assertions regarding specific threats to institutional or individual safety (*see, Matter of Roberson v. Bezio*, 70 AD3d 1226, 1227 [3rd Dept. 2010]). The Hearing Officer appears to have adopted a blanket rule banning witness testimony from any assault victim as well as any alleged co-conspirator. The Court does not find any basis for this type of ban in the relevant case law or the regulations. Additionally, 7 NYCRR 254.5 required that the Hearing Officer give petitioner a written statement stating the reasons for a witness denial. Said regulation also requires that the specific threat to institutional safety or correctional goals be presented. The Hearing Officer did

not provide any such written statement as to the victim or Guerra.¹ Additionally, the Hearing Officer did not adequately explain why institutional safety or correctional goals prevented him from conducting interviews of the victim and Guerra outside the petitioner's presence.

Given that the Hearing Officer did specify in some detail that institutional and individual safety considerations required that petitioner, Guerra and the victim not be allowed to communicate back and forth via testimony, he did offer a "good faith reason" for the witness denials (*see, Matter of Alvarez v Goord*, 30 AD3d 118, 119 [3rd Dept. 2006]). Therefore, the Court finds no "clear constitutional violation" requiring the remedy of expungement (*Id* at 121). Under these circumstances, the Court finds that the proper remedy is to remit the matter for a new hearing (*see, Matter of Roberson v Bezio, supra* at 1227).

Based on all of the foregoing, the petition is granted solely to the extent that the determination is annulled and the matter is remitted to the Department of Corrections and Community Supervision for a new hearing.

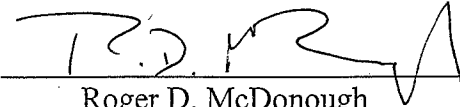
SO ORDERED AND ADJUDGED.

This shall constitute the Decision, Order and Judgment of the Court. The original Decision, Order and Judgment is being returned to the counsel for the petitioner who is directed to enter this Decision, Order and Judgment without notice and to serve respondent's counsel with a copy of this Decision, Order and Judgment with notice of entry. The Court will transmit a copy of the Decision, Order and Judgment and the papers considered to the County Clerk. The signing of the Decision, Order and Judgment and delivery of a copy of the Decision, Order and Judgment shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

¹ The Hearing Officer did provide the form as to a witness marked "Confidential". Said writing did not identify the specific threat.

ENTER

Dated: Albany, New York
February 20, 2015



Roger D. McDonough
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition, dated October 8, 2014;
2. Verified Petition, dated October 8, 2014, with annexed exhibits;
3. Respondent's Answer, dated December 11, 2014, with annexed record/exhibits;
4. Affirmation of Justin Engel, Esq., A.A.G., dated December 11, 2014;
5. Affirmation of Michael E. Cassidy, Esq., dated January 6, 2015.