STATE OF NEW YORK
SUPREME COURT **ALBANY COUNTY**

In the Matter of the Application of
SHINDELL PICKERING
DIN: 10-A-2233

Petitioner,

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

Decision & Order
Index No.: 2243-2013

-against-

STATE OF NEW YORK DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND BRIAN FISCHER,

Respondent(s)

Supreme Court, Albany County
Motion Return Date: July 12, 2013
RJI No. 01-13-ST4573
Present: Stephen G. Schick, JSC

Appearances: SHINDELL PICKERING
Petitioner
DIN:10-A-2233
Clinton Correctional Facility
1156 Rt. 374
Dannemora, New York 12929-2000
By: Jack L. Young, Esq.
Prisoner's Legal Services of New York
12 Bridge St., Suite 202
Plattsburgh, NY 12901

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Attorney for Respondent
The Capitol
Albany, New York 12224-0341
By: Colleen D. Galligan, Esq.

Schick, J.:

This matter is a prisoner's Article 78 action to vacate and annul an adverse decision at a Tier III Superintendent's re-hearing.

The salient facts are that in preparation for his original hearing, held July 3, 2012, petitioner requested an inmate, the alleged victim, to testify. The hearing officer properly refused to place both parties in the same room for reasons of institutional safety [Ponte v Real, 471 US 491 (1985)]. Petitioner then requested the witness testify via telephone, but no telephone testimony of the witness was taken and the hearing officer found prisoner guilty of the infractions charged.

On September 11, 2012, Albert Prack, the Director of Special Housing/Inmate Discipline, reversed the hearing officer's decision on the ground of "inappropriate denial of witness (victim)." Significantly, Director Prack ordered a rehearing to commence "within 7 days and complete within 14 days of receipt of this notice." The re-hearing took place during September 18 and November 7, 2012 (Respondent's Affirmation, Exhibits I, J) where "confidential testimony" was taken; where petitioner requested the same witness be produced to testify, but the witness could not be located (Exhibit K); and where the hearing officer again found petitioner guilty of the charges. Thereafter, petitioner administratively appealed and on January 3, 2013 the Commissioner, Brian Fischer, affirmed the

Superintendent's disposition (Exhibit G). This Article 78 action was filed on April 18, 2013.

According to DOCCS documentation in the record (Petitioner's Exhibit F) the victim/witness in question was released from prison on August 9, 2012, his maximum expiration date, with no post release supervision. Therefore, at the time of petitioner's original hearing the witness was an inmate under the control of DOCCS, but by the time the Director reversed the hearing officer's decision the witness was free. At the re-hearing DOCCS was, not surprisingly, unable to locate the witness.

As the Director acknowledged in reversing the original decision, a prisoner has a "conditional constitutional right to call witnesses to testify at a superintendent's hearing [7 NYCRR 254.5; see, Matter of Contras v Coughlin, 199 AD2d 601 (1993)]. Further, where a witness is called to testify, but refuses to testify or does not testify, the hearing officer is obligated to provide petitioner a written explanation [7 NYCRR 254.5(a); Matter of Barnes v LeFevre, 69 NY 2d 649; Matter of Contras v Coughlin, 199 AD2d 601 (1993)]. This, apparently, was not done. "A deprivation of the inmate's right to present witnesses will be found when there has been no inquiry at all into the reason for the witness's refusal, without regard to whether the inmate previously agreed to testify (see Matter of

Barnes v LeFevre, supra; Matter of Dawes v Selsky, 286 AD2d 806 (2001)].

Petitioner argues that respondent must be charged with knowing that the victim/witness would be released prior to the rehearing and, therefore, the witness could not reasonably be interviewed to cure the shortcoming of the original hearing (Petition, Exhibit N, letter of December 12, 2012) since hearing officers do not have subpoena power to compel an appearance (Respondent's Affirmation, ¶ 32). Petitioner argues that the proper remedy is expungement of the conviction not affirmation of an improper procedure.

Respondent argues that the department's efforts to reach the released witness by telephone were reasonable under the circumstances, and the decision, should be upheld based upon the testimony taken.

The Third Department has expressed "no view on how an inmate's right to call witnesses may be protected when an intervening inmate transfer" interferes with his appearance at the hearing [In the Matter of Hill v Selsky, 19 AD3d 64 (3d Dept 2005)], see Footnote 1], but under circumstances reasonably related to the facts of this matter, the Third Department has repeatedly held a re-hearing is inappropriate where a significant amount of time has passed since the incident in question and a key witness has been released [Matter of Williams v Coughlin, 145 AD2d 771 (3d Dept 1998)] and equity warrants expungement [Matter of Maier v

Coughlin, 193 AD2d 1015 (3d Dept 1993)].

This Court agree with petitioner that he was denied a hearing, either the original or the re-hearing, which comported with his "conditional constitutional," statutory and regulatory rights and that ordering a rehearing knowing that the witness had been released would not cure that deficiency. Respondent therefore "failed to perform a duty enjoined upon it by law," [CPLR 7803 (1)] and its decision " was made in violation of lawful procedure" and was "arbitrary and capricious" [CPLR 7803 (3)] and must be vacated and the prisoner's record expunged.

Therefore, it is

ORDERED that Respondent's decision to affirm the disposition of guilt was in violation of CPLR 7803 (1), (3) and it is further;

ORDERED that Respondent is directed to expunge Petitioner's record and restore him to the position he enjoyed prior to the Superintendent's determination.

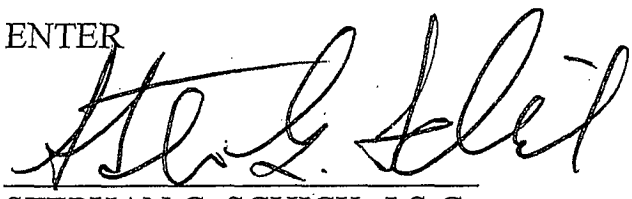
This shall constitute the Decision and Order of the Court. The original Decision and Order and all papers are being forwarded to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry

or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED

DATED: Monticello, New York
September 5, 2013

ENTER



STEPHAN G. SCHICK, J.S.C.

Papers Considered:
Notice of Petition, dated April 18, 2013;
Verified Petition, dated April 18, 2013, with exhibits A through N;
Petitioner's Memorandum of Law, dated April 18, 2013;
Answer, dated July 1, 2013, with exhibits A through L;
Affirmation of Respondent, dated July 2, 2012
Petitioner's Reply Affirmation, dated July 11, 2013.