STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
RANDOLPH JAMISON,

Petitioner,

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

-against-

BRIAN FISCHER, COMMISSIONER OF THE
NEW YORK STATE DEPARTMENT OF
CORRECTIONAL SERVICES,

Respondent.

DECISION and ORDER
INDEX NO. 10584-09
RJI NO. 01-09-ST1013

Supreme Court Albany County All Purpose Term, February 19, 2010
Assigned to Justice Joseph C. Teresi

APPEARANCES:
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TERESI, J.:

Petitioner commenced this CPLR Article 78 proceeding challenging the Tier III disciplinary hearing determination, dated July 1, 2009, which found him guilty of "Violent

Conduct", "Creating a Disturbance", "Assault on Staff" and "Refuse Search or Frisk". Respondent answered, asserted specific and general denials, and seeks the petition's dismissal claiming that the hearing was conducted in a procedurally valid manner. Because Petitioner demonstrated that Respondent violated his right to call witnesses, the petition is granted.

"An inmate generally has the right to call witnesses at a disciplinary hearing when doing so would not jeopardize institutional safety or correctional goals." (Buari v. Fischer, __AD3d__, [3d Dept. 2010]). At a Tier III hearing "[a]n inmate may request a witness by either: (1) informing his assistant of the hearing officer before the hearing; or (2) informing the hearing officer during the hearing." (7 NYCRR 254.5[c]). "It is well settled that the hearsay report of a correction officer that a witness refuses to testify unaccompanied by any reason from the witness proffered to the hearing officer for such refusal is not a sufficient basis upon which an inmate's conditional right to call witnesses can be summarily denied." (Martinez v. Goord, 15 AD3d 737 [3d Dept. 2005] quoting Barnes v. LeFevre, 69 NY2d 649 [1986][internal quotations omitted]; Alvarez v. Goord, 30 AD3d 118, 121 [3d Dept. 2006]; Hill v. Selsky, 19 AD3d 64 [3d Dept. 2005]). "[C]onstitutional violations of an inmate's right to call witnesses will result in expungement." (Alvarez, supra at 120)

On this record, Petitioner demonstrated that his conditional right to call witness was denied. At the hearing, Petitioner requested numerous inmate witnesses. The proposed witnesses were not named, but rather described as those inmates housed in the cells surrounding the location of the incident for which he was charged. The proposed witnesses' testimony was potentially highly relevant, for eye witness accounts of the incident. Upon Petitioner's request for these witnesses, the hearing officer properly adjourned the hearing to determine whether such

individuals would testify. The record demonstrates that a corrections officer, at the direction of the hearing officer, solicited the testimony of nine inmates. Only one of these inmates testified, and the record contains an insufficient basis for the remaining eight witnesses' refusals. One refusal form was signed by an inmate explaining "I'm not in my cell." The seven remaining refusal forms, however, were unsigned. Six of the unsigned refusal forms indicated that the proposed witness "refused to provide further information" when asked to provide a reason for their refusal. And one refusal form contained no information whatsoever, except an inmate's name inscribed at the top of the form. The corrections officers who obtained these forms did not testify during the hearing, and gave no details about the refusals. Nor did the hearing officer himself inquire further, for details about the refusals. The corrections officer's hearsay refusal reports provide an insufficient basis for the hearing officer's denial of Petitioner's right to call witnesses. Because this record contains an insufficient explanation of the witnesses' reasons for refusal, Petitioner's right to call witnesses was denied.

In opposition, Respondent fails to sufficiently controvert Petitioner's showing. Although Respondent claims that Petitioner waived his right to call witnesses, he failed to demonstrate a specific waiver. Contrary to Respondent's waiver claim, Petitioner specifically stated at the hearing that he "need[ed] witnesses... [because he wanted to set forth] some type of grounds to have [for] appeal." An inmate may waive "a right of constitutional dimension [only]... upon a showing that the inmate was informed of its existence and made a knowing and intelligent waiver." (Krall v. Inmate Disciplinary Programs, 309 AD2d 1027 [3d Dept. 2003]). On this record, Respondent failed to demonstrate a knowing and intelligent waiver. Moreover, Respondent makes no allegation that the witnesses posed a threat to institutional safety or

correctional goals.

Because "the record does not reflect any reason for the witness[es]' refusal to testify, or that any inquiry was made of [them] as to why [they] refused or that the hearing officer communicated with the witness to verify [their] refusal to testify, there has been a denial of the inmate's right to call witnesses as provided in the regulations." (Barnes, supra at 650). As the Court of Appeals held in Barnes, this violation requires the "determination of respondents [to be] annulled and respondents directed to expunge all references to the proceeding from the petitioner's file and restore the good behavior allowance lost." (Id.)

The parties' remaining contentions have been examined and found to be lacking in merit or, considering the above, moot.

Accordingly, the petition is granted and the Respondent's determination is annulled. Respondent is hereby directed to expunge all references to this matter from Petitioner's institutional record and to restore the good behavior allowance lost.

This Decision and Order is being returned to the attorneys for the Petitioner. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered 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 provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
March 16, 2010

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Petition, dated December 22, 2009, Verified Petition, dated December 21, 2009, with attached Exhibits A-S;
2. Answer, dated January 25, 2010, Affirmation of Brian J. O'Donnell, dated January 25, 2010 with accompanying Exhibits A-F.