STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ALBERT TULLOCH,

Petitioner,

-against-

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

Respondents,

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

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-10-ST1904 Index No. 5961-10

Appearances: Albert Tulloch
Inmate No. 88-T-2143
Petitioner, Pro Se
Sullivan Correctional Facility
325 Riverside Drive
Box 116
Fallsburg, NY 12733-0116

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Sullivan Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated March 4, 2010 in

which he was found guilty violating prison rules. The hearing concerned two misbehavior reports, one involving an incident which took place on February 26, 2010 in the facility kitchen in which an inmate was stabbed with a knife; the other arising out of a cell search the same day.

In the first misbehavior report the petitioner was charged with assault on an inmate and possession of a weapon. The second misbehavior report was issued as the result of a cell search conducted shortly after the foregoing incident. The petitioner was charged with possession of an altered item, unauthorized exchange of personal property, possession of contraband, property damage or loss, possession of stolen property and gang activity. From a careful review of the petition, it appears the petitioner only seeks review of the disciplinary determination related to the first misbehavior report.

Because it does not appear that the petitioner raised an issue of whether or not the determination was supported by substantial evidence (see CPLR 7803 [4]), the Court finds that it should retain the proceeding for disposition, rather than transferring it to the Appellate Division pursuant to CPLR 7804 [g]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

Among the arguments advanced by the petitioner, he maintains that the Hearing Officer erred in failing to personally interview the stabbing victim to ascertain the reason why he refused to testify at the hearing; and that the Hearing Officer erred in thereafter permitting the victim to provide *in camera* testimony as a confidential informant. He contends that the foregoing violated § 254.5 of the Rules of the Department of Correctional Services ("DOCS", see 7 NYCRR 254.5). He asserts that the Hearing Officer improperly

permitted a Correction Officer (Lt. Katz) to give *in-camera* hearsay testimony with regard to non-confidential matters. He maintains that he did not receive adequate employee assistance in that his employee assistant failed to interview potential witnesses.

The Court of Appeals, in Laureano v Kuhlmann (75 NY2d 141 [1990]), delineated the parameters of an inmate's rights in the context of a disciplinary proceeding:

> "A prisoner charged with violating a prison regulation which could result in the loss of 'good time' credit is entitled to minimal due process protections (Wolff v McDonnell, 418 US 539). The inmate has a right to advance written notice of the claimed violation as well as a written statement by the fact finders as to the evidence relied on and the reasons for the disciplinary action (Wolff v McDonnell, supra, at 563-565; Superintendent v Hill, 472 US 445). He also has a conditional right to call witnesses when that will not be unduly hazardous to institutional safety or correctional goals (Wolff v McDonnell, supra, at 566). But he has no right to counsel and no right to confront or cross-examine witnesses (Wolff v McDonnell, supra, at 563-570; Baxter v Palmigiano, 425 US 308). The hearing serves the limited purpose of permitting the inmate to produce whatever evidence he may have relating to his innocence or mitigating his guilt and there is 'no requirement that the disciplinary authority call any adverse witnesses, including the charging party, to testify at the hearing' (People ex rel. Vega v Smith, 66 NY2d 130, 141)." (Laureano v Kuhlmann, supra, at 146)

Where a witness first agrees to testify, but later refuses to do so, then the hearing officer must personally interview the witness to ascertain the reason for the witness's unwillingness to testify (see Matter of Alvarez v Goord , 30 AD3d 118, 121 [3d Dept., 2006]; Matter of Hill v Selsky, 19 AD3d 64 [3d Dept., 2005]; Matter of Brodie v Selsky, 203 AD2d 671 [1994]). "When the refusing witness gives no reason for the refusal, but that witness did not previously agree to testify, an inquiry by the hearing officer through a correction officer

adequately protects the inmate's right to call witnesses" (Matter of Hill v Selsky, supra, at 66; Matter of Berry v Portuondo, 6 AD3d 848, 850 [3d Dept. 2004]). In this instance, the evidence in the record reveals that the two inmate witnesses who petitioner specifically called to testify signed a witness refusal form. One inmate provided a reason for the refusal; the other, the victim, merely indicated he did not wish to become involved. A corrections officer witnessed the signing of both written refusals. In connection with the victim's written refusal, the corrections officer signed a statement which recited: "I specifically asked inmate [] to provide a reason for his refusal to testify and he refused to provide further information. The Court finds that this inquiry, through the correction officer, was sufficient. Moreover, at the hearing, when the petitioner was informed by the Hearing Officer that the victim (and other inmate witnesses) refused to testify, the petitioner failed to request that the reasons why they refused to testify be placed on the record; or request that the Hearing Officer personally interview them (see Dotson v Coughlin, 191 AD2d 912 [3d Dept., 1993]; Matter of Tafari v Selsky, 32 AD3d 1117, [3d Dept., 2006]).

With regard to confidential testimony given during the hearing, "the fact that the testimony of the confidential informants was taken personally by the Hearing Officer provided a sufficient basis for him to assess their credibility" (Matter of Barton v New York State Department of Correctional Services, ___ AD3d ___, 2011 NY Slip Op 610 [3d Dept., February 3, 2011]). Notably, the petitioner had no right to cross-examine the confidential informants (see Matter of Tosca v Selsky, 298 AD2d 738 [3d Dept., 2002]; Matter of Alba v Goord, 6 AD3d 847, 847-848 [3d Dept., 2004]).

Turning to petitioner's objection to hearsay testimony given by Lt. Katz, it is well

settled that inmate disciplinary determinations may be supported by hearsay evidence (see Abdur-Raheem v Mann, 85 NY2d 113, 119 [1995]; Matter of Chujoi v Selsky, 272 AD2d 801, 802 [3d Dept., 2000])

Lastly, with regard to alleged deficiencies in the efforts of the employee assistant, the Court observes that the Assistant Form signed by the petitioner never specifically indicated which witnesses should be interviewed.[1] During the hearing, the petitioner identified two inmates by name who he desired to call as witnesses. As noted, both of those witnesses signed witness refusal forms. Notwithstanding petitioner's failure to specifically identify other witnesses, the Hearing Officer (through other correction officers) contacted seven additional potential inmate witnesses, who also signed witness refusal forms. In this respect, the deficiencies, if any, in the employee assistance with regard to interview of potential witnesses were cured by the Hearing Officer's actions taken at the hearing (see Matter of Sierra v Dubray, 58 AD3d 970, 970-971 [3rd Dept., 2009]). Moreover, and apart from the foregoing, the petitioner failed to preserve his complaint by voicing an objection with respect to production of such witnesses at the hearing (see Reese v Bezio, 75 AD3d 1029, 1030 [3rd Dept., 2010]; Matter of Brown v Venettozzi, 79 AD3d 1510, 1510 [3rd Dept., 2010]. Towards the end of the hearing the Hearing Officer asked him if he had any additional witnesses to call, or evidence to present, and he indicated "no".

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

---

[1]The Assistant Form recites under the heading "other requests": "all witnesses to incident interviewed by staff".

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment does 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.

ENTER

Dated: March 10, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated September 9, 2010, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated December 22, 2010, Supporting Papers and Exhibits
3. Petitioner's Reply Affidavit sworn to January 4, 2010