STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JAMEL CLARK,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER,

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-ST2081 Index No. 4541-10

Appearances: Jamel Clark
Inmate No. 99-A-0475
Petitioner, Pro Se
Wende Correctional Facility
P.O. Box 1187
3040 Wende Road
Alden, NY 14004-1187

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Attorney General
State of New York
Attorney For Respondent
The Capitol
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(Justin C. Levin,
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of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wende Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a Tier III disciplinary determination dated January 29, 2010 in which he was found guilty of violating prison rules. Specifically, the petitioner was

found guilty of violating Rule 100.13, fighting; Rule 104.11, engaging in violent conduct; Rule 106.10, refusing to obey a direct order; and Rule 113.10, possession of a weapon (see 7 NYCRR 270.2)[1]. The charges arose out of a fight involving ten inmates, which occurred on January 19, 2010 in the C-Block yard of Attica Correctional Facility. Among the arguments raised by the petitioner in his petition, he maintains that his employee assistance was inadequate in that his assistant failed to interview witnesses or obtain written statements from said witnesses. He argues that he was deprived of his right to call certain witnesses, among them inmate Skinner. He maintains that the Hearing Officer was biased. He also argues that his rights were violated by reason that, despite his protests, he was handcuffed with his hands behind his back during the hearing.

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) (see Matter of Taylor v Fischer, ___ AD3d ___, 914 NYS2d 691 [3d Dept., January 20, 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

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

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[1]The Hearing Officer imposed the following penalties: confinement in special housing, eighteen months; loss of package privileges, commissary, phone privileges and recommended withholding of good time, eighteen months. The determination was modified on administrative appeal on March 10, 2010. The weapons charge (Rule 113.10) was dismissed. Penalties were reduced from eighteen months to nine months, other than recommended loss of good time, which was reduced to twelve months.

> 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]).[2] Where, however, the refusing witness did not initially 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, as indicated in the Assistant Form signed by petitioner's employee-assistant, inmate Skinner initially agreed to testify. When the Hearing Officer called inmate Skinner to the hearing he refused to come. Correction Officers Hansen and Blenker testified

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[2]An exception to this rule exists where a genuine reason for the refusal appears in the record and the hearing officer made a sufficient inquiry through a correction employee to determine the authenticity of that reason (Matter of Hill v Selsky, supra, at 67)

at the hearing that inmate Skinner indicated, without giving a reason, that he did not want to be a witness. They testified that inmate Skinner refused to sign the witness refusal form (which was signed by the two officers). The petitioner objected, and requested the Hearing Officer to interview inmate Skinner, which the Hearing Officer declined to do. Very clearly, the Hearing Officer was required to conduct a personal interview of inmate Skinner.

Under the circumstances, the Court concludes that petition must be granted, that the determination be vacated and annulled, that all references thereto be expunged, and lost good time be restored (see Matter of Hill v Selsky, supra).

The Court need not address the remaining issues raised by the parties.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is granted; and it is

ORDERED and ADJUDGED, that the determination dated January 29, 2010 be vacated and annulled, that all references thereto in petitioner's inmate record be expunged, and that all good time credit with held as a result of the determination be restored.

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 22, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated July 26, 2010, Petition, Supporting Papers and Exhibits
2. Answer dated November 11, 2010, Supporting Papers and Exhibits
3. Petitioner's Reply dated November 17, 2010

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SEALING ORDER

The respondent having submitted respondent's Exhibit B, Unusual Incident Report, for *in camera review* in connection with the above matter, for good cause shown, it is hereby

ORDERED, that the foregoing designated document, including all duplicates and copies thereof, shall be filed as a sealed instrument and may not be made available to any person or public or private agency unless by further order of the Court.

ENTER

Dated: March 22, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice