

**Matter of Skinner v Commissioner Brian Fischer**

2011 NY Slip Op 31920(U)

June 30, 2011

Supreme Court, Albany County

Docket Number: 4528-10

Judge: George B. Ceresia Jr

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STATE OF NEW YORK  
SUPREME COURT

## COUNTY OF ALBANY

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In The Matter of ROBERT SKINNER,

Petitioner,

-against-

COMMISSIONER BRIAN FISCHER, DOCS;  
SUPERINTENDENT JAMES CONWAY OF  
ATTICA C.F.,

Respondents,

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

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Supreme Court Albany County Article 78 Term  
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding  
RJI # 01-10-ST1848 Index No. 4528-10

Appearances: Robert Skinner  
Inmate No. 95-B-0984  
Petitioner, Pro Se  
Sullivan Correctional Facility  
325 Riverside Drive, Box 116  
Fallsburg, NY 12733-0116

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State of New York  
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of Counsel)

### DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Sullivan Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated February 4, 2010 in which he was found guilty of violating prison rules. Specifically, the petitioner was found

guilty of violating Rule 104.11 engaging in violent conduct; Rule 100.13, fighting; and Rule 106.10, refusing a direct order<sup>1</sup>. The charges arose out of a fight involving up to ten inmates which occurred on January 19, 2010 in C-Yard of Attica Correctional Facility at 7:20 p.m.

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, 80 AD3d 1037 [3d Dept., 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

The petitioner maintains that during the Superintendent's hearing he was deprived of the right to call three inmate witnesses, Noezile, Croswell and Gilbert, who, he claims, had assured his employee-assistant that they were willing to testify. He argues that the Hearing Officer erred in failing to personally interview the inmate witnesses with regard to their refusal to testify. He has submitted the affidavits of inmates Noezile and Croswell, who indicate that they each met with petitioner's employee-assistant on January 24, 2010 and assured the employee-assistant that they were willing to testify on petitioner's behalf. Each inmate indicates that on the date of the hearing, two correction officers came down to his respective cell location and inquired if he would be willing to testify on petitioner's behalf, to which each responded "yes". Each inmate indicates that notwithstanding the foregoing, a correction officer was not sent down to escort him to the hearing. Notably, as pointed out by the respondent, absolutely no mention was made that any inmates had agreed to testify on

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<sup>1</sup>Disciplinary Rules are found in Part 270 of the Rules of the Department of Correctional Services (see 7 NYCRR 270.2).

petitioner's behalf in the Assistant Form signed by the employee assistant and the petitioner on January 24, 2010 at 4:28 p.m of that day.<sup>2</sup>

It is well settled that an inmate has a conditional right to call witnesses at a disciplinary hearing when doing so would not jeopardize institutional safety or correctional goals (see Matter of Alvarez v Goord, 30 AD3d 118, 119 [2006]; Matter of Crosby v Selsky, 24 AD3d 990, 991 [2005]). A number of guidelines have developed for situations where an inmate initially agrees to testify, and then subsequently refuses to do so (see Matter of Hill v Selsky, 19 AD3d 64 [3<sup>rd</sup> Dept., 2005]). As relevant here, where a witness refuses to testify, after previously indicating that he or she would testify, then the hearing officer must personally interview the witness to determine the circumstances surrounding the refusal (see Matter of Hill v Selsky, 19 AD3d 64 [3<sup>rd</sup> Dept., 2005]).

In this instance however, the hearing officer was confronted with documentary evidence, the Assistant Form, which made no mention of any inmate who had agreed to testify. Under such circumstances he was under no obligation to personally interview the inmate-witnesses, and he could properly rely upon the testimony of correction officers who had spoken to inmates Noezile, Croswell and Gilbert (see Matter of Hill v Selsky, *supra*). The Court finds that the Hearing Officer did not err, and petitioner's rights were not violated.

Pursuant to § 254.6 (b) of the Rules of the Department of Correctional Services (see 7 NYCRR 254.6 [b]) the Hearing officer called the Chief of the Mental Health Unit as a witness, who gave confidential testimony out of the petitioner's presence, concerning

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<sup>2</sup>The Assistant Form contains a section where the inmate may identify inmates that he desires to be interviewed as potential witnesses, and contains a space indicating whether the potential witness agreed to testify.

petitioner's mental condition. During his testimony, the Chief of the Mental Health Unit noted that the petitioner had been seen by an institutional therapist shortly before the incident in question, specifically on January 5, 2010. He reviewed the therapist's findings, and described petitioner's mental/psychological condition at that time. During the hearing, the petitioner sought the testimony of his mental health therapist, a "Mr. Bishop", in order to establish petitioner's "state of mind" at the time of the incident in question. The Court, by order dated March 4, 2011, directed the respondent to submit an affidavit clarifying the role played by Mr. Bishop in his treatment of the petitioner. The respondent submitted an affidavit of Jeffrey Bishop, employed by the New York State Office of Mental Health as a Social Worker II. Mr. Bishop indicates in his affidavit that his responsibilities include scheduling patients monthly from his outpatient mental health caseload to monitor the patient's mental status, and to provide clinical support as needed and indicated by the treatment plan. He indicates that he reviewed the call-out log for the petitioner, and that the scheduling database reveals that he met with the petitioner on January 5, 2010.

It therefore appears that the Mental Health Unit Chief gave testimony with respect to notes taken by Mr. Bishop during petitioner's visit with Mr. Bishop on January 5, 2010. Under such circumstances, it is the Court's view, the testimony of Mr. Bishop would have been cumulative and redundant to the testimony given by the Mental Health Unit Chief. In addition, for much the same reason, the Court finds that any error in not calling Mr. Bishop as a witness was harmless. The Court finds that the petitioner was not improperly denied the right to call Mr. Bishop as a witness. Lastly, the Court finds that the Hearing Officer satisfactorily complied with the requirements of § 254.6 (b) of the rules of the Department of Correctional Services (see 7 NYCRR 254.6 [b]).

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

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.

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.

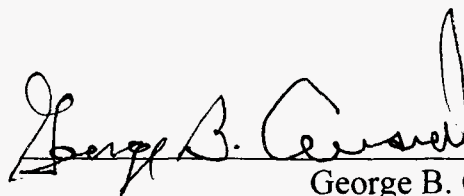
Accordingly it is

**ORDERED and ADJUDGED**, that the petition be and hereby is 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: June 30, 2011  
Troy, New York



George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated December 20, 2010, Supporting Papers and Exhibits
3. Affidavit of Jeffrey Bishop, sworn to March 23, 2011

STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

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-against-

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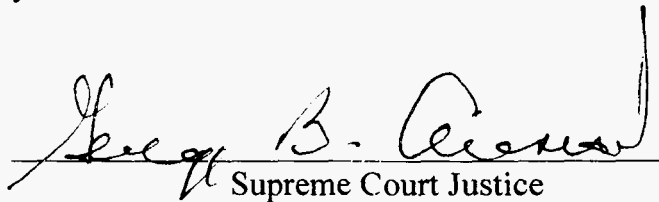
### SEALING ORDER

The following documents having been filed by the respondent with the Court for *in camera review* in connection with the above matter, namely, respondent's Exhibit B, Unusual Incident Report, and respondent's Exhibit F, Transcript of Confidential Testimony. For good cause shown, it is hereby

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

**ENTER**

Dated: June 30, 2011  
Troy, New York

  
Supreme Court Justice  
George B. Ceresia, Jr.