Matter of Tafari v Fischer
2011 NY Slip Op 33216(U)
September 29, 2011
Supreme Court, Franklin County
Docket Number: 2011-0005.02
Judge: S. Peter Feldstein
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STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

In the Matter of the Application of
INJAH TAFARI, #89-A-4807,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2011-0005.02
INDEX # 2011-0007
ORI #NY016015J

BRIAN S. FISCHER, Commissioner,
NYS Department of Correctional Services.
Respondent.

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Injah Tafari, verified on December 25, 2010 and filed in the Franklin County Clerk's office on January 4, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility and concluded on October 25, 2010, as modified on administrative appeal. The Court issued an Order to Show Cause on January 11, 2011 and has received and reviewed respondent's Answer, including confidential Exhibit K, verified on April 25, 2011 and supported by the Affirmation of Dean J. Higgins, Esq., Assistant Attorney General, dated April 25, 2011. The Court has also received and reviewed petitioner's Reply Memorandum of Law, filed in the Franklin County Clerk's office on May 2, 2011.

As the results of incidents that occurred at the Upstate Correctional Facility on September 21, 2010 at approximately 9:30 am and 10:10 am petitioner was issued two inmate misbehavior reports. The first report, authored by Lt. Salls, charged petitioner with violating inmate rules 114.10 (smuggling) and 180.17 (providing legal assistance to

inmate without superintendent's approval). The first report alleged, in relevant part, as follows:

> " . . . I Lt. Salls was made aware of 3 suspicious letters by mail room staff. The letters were being mailed out by inmate Wilson . . . but did not appear to be written by him. I received authorization from Supt. Rock to inspect the 3 letters. Upon inspection of the letters I was able to confirm that they were not written by inmate Wilson. They were in fact written by inmate Tafari . . . I have further determined that inmate Tafari was providing legal assistance to inmate Wilson without authorization as the letters were all legal in nature. It is also clear that these letters were smuggled back and forth between both inmates as the letters were written by inmate Tafari and signed by inmate Wilson . . ."

The second misbehavior report, authored by C.O. Healy, charged petitioner with violating inmate rules 105.13 (gang activity), 113.27 (possession of personal identifying information of other inmate), 113.23 (possession of contraband), 120.20 (gambling) and 180.17 (providing legal assistance to inmate without superintendent's approval). The second report alleged, in relevant part, as follows[1]:

> ". . . I, C.O. J. Healy, moved inmate Tafari . . .to another cell . . . Inmate Tafari's property was searched as he was given his permitted in-cell property. The following items were removed from Inmate Tafari's property:
>
> - 4 pages of apparently gang related information
>
> - 1 address book containing names, nicknames and personal information of other inmates
>
> - 5 pages of gambling information
>
> - 1 pair of dark tinted glasses
>
> - legal work belonging to other inmates . . ."

[1] Exhibits A and B, annexed to the respondent's Answer, are identified in the Answer as copies of the first and second inmate misbehavior reports, respectively. Exhibit B, however, only includes an obviously erroneously placed second copy of the first inmate misbehavior report. Petitioner, however, annexed copies of both inmate misbehavior reports to his administrative appeal, which is annexed to respondent's Answer as Exhibit I. That exhibit is the source of any quote from the second inmate misbehavior report set forth in this Decision and Judgment.

A Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on October 5, 2010 with respect to the charges set forth in both inmate misbehavior reports. At the conclusion of the hearing, on October 25, 2010, petitioner was found not guilty of violating inmate rule 105.13 (gang activity) but guilty of the six remaining charges. A disposition was imposed confining petitioner to the special housing unit for 12 months and directing the loss of various privileges for a like period of time. Upon administrative appeal the disposition of the Tier III Superintendent's Hearing was modified by reducing all penalties from 12 months to 6 months.

The Court initially notes that the record in this proceeding is problematic in a number of respects. The superintendent's hearing was conducted over an almost three-week period (October 5, 2010 to October 25, 2010) with numerous adjournments of varying lengths. It does not appear, however, that the separate segments of the transcript of the Tier III Superintendent's Hearing have been joined together in the overall transcript in strict chronological order. This factor renders, at times, a choppy quality to the overall transcript, making it difficult to follow the flow of the testimony of the various witnesses and the interaction between the hearing officer and petitioner. Still, there is no indication, or claim, that any portion of the transcript is missing or otherwise deficient.

The record is also problematic to the extent that the hearing officer and petitioner are sometimes not on the same wavelength as to whether the charges set forth in the first or second inmate misbehavior report are being discussed at any given time. Finally, as will be subsequently addressed in this Decision and Judgment, the record is problematic at times due to petitioner's apparently contradictory positions with respect to his involvement with the legal work of Inmate Wilson.

Petitioner's defense to the charges set forth in the two inmate misbehavior reports is multi-faceted. At the outset of the Tier III Superintendent's Hearing, when asked by the hearing officer if he had a defense to the charges against him, petitioner responded that no legal documents were ever smuggled between Inmate Wilson's cell and his own cell. According to petitioner's hearing testimony, he asked an unnamed correction officer for permission to review Inmate Wilson's legal work and the correction officer not only granted such permission but also physically transported the documents in question from Inmate Wilson's cell to petitioner's cell. On page eight of the transcript, however, when asked by the hearing officer why the papers were returned to Inmate Wilson, petitioner responded "I never gave it back to him ma'am." The following colloquy then occurred on page nine of the transcript:

"Stickney [hearing officer]:	So you prepared the paper work for inmate Wilson.
Tafari:	Yeah
Stickney:	Did inmate Wilson sign off on that paper work.
Tafari:	No I did everything, he didn't [sic] anything, I did everything and, and in the morning I put it in the mailbox."

On page 22 of the transcript, moreover, petitioner identified the documents/papers referred to in the first inmate misbehavior report as "[t]he letters that I sent out the next morning." The hearing officer then inquired "[f]or inmate Wilson" and petitioner responded "[y]es, ma'am."

Notwithstanding the foregoing, later in the hearing petitioner took the following three positions: (1) that he did not prepare any legal documents for Inmate Wilson but, rather, simply reviewed documents that Wilson had prepared; (2) that all of the legal documents belonging to Inmate Wilson that had been passed to petitioner, via the

unnamed correctional officer, were returned to inmate Wilson, again via the unnamed correction officer, prior to petitioner's transfer to a new cell on September 21, 2010; and (3) that petitioner did not mail any legal documents/papers for Inmate Wilson.

To the extent it was alleged in the second inmate misbehavior report that legal documents belonging to Inmate Wilson were discovered in petitioner's property at the time of the transfer to a new cell, petitioner maintained that some of Inmate Wilson's belongings fell off the moving cart and were accidently mixed with petitioner's belongings, which had likewise fallen off a moving cart. On page 61 of the transcript, however, when questioned why a certain legal document belonging to Inmate Wilson was found in petitioner's possession at the time of the transfer, petitioner responded "[b]ecause the officer gave it to me."

To the extent it was alleged that petitioner possessed legal material belonging to Inmate Mendez, petitioner asserted that he had been granted permission to provide such assistance in 2006 by Deputy Superintendent Butler at the Eastern Correctional Facility, where petitioner was then confined. Petitioner testified, however, that he was transferred out of Eastern prior to completing work for Inmate Mendez and that the legal documents pertaining to Inmate Mendez found in petitioner's property were simply forgotten documents left over from the previous assistance. Finally, petitioner took the position that at the hearing that he was, in fact, authorized to posses the dark tinted glasses which were found in his personal property by C.O. Healy.

The only arguments advanced by petitioner in this proceeding relate to the alleged denial of his due process rights to submit security videotapes (in DVD form) and to call witnesses on his behalf. In this regard petitioner asserts that his requests for the production of two security videos as well as his requests for the testimony of two inmate witnesses (Jones and Hampton) and four DOCCS staff witnesses (unnamed correction

officer working 11-B gallery on September 21, 2010, Deputy Superintendent for Programs Butler at Eastern Correctional Facility, DOCCS Deputy Commissioner and Counsel Boll and Nurse Practitioner Lashway) were all unlawfully denied. A DOCCS inmate involved in a Tier III Superintendent's Hearing, like petitioner, has a fundamental due process right to call relevant, non-redundant witnesses on his/her behalf provided the calling of such witness would not be unduly hazardous to institutional safety or correctional goals. *See Wolff v. McDonnell*, 418 U.S. 539 at 566 and *Hill v. Selsky*, 19 AD3d 64 at 65-66. *See also* 7 NYCRR §254.5(a).

Despite the fact that petitioner twice apparently admitted mailing the three letters referenced in the first inmate misbehavior report (but later denied mailing such letters) petitioner sought the introduction of a security video showing the 6:15 AM mail pick up on September 21, 2010 in order to demonstrate that he did not mail such letters. Petitioner's request was denied by the hearing officer as "[n]ot relevant to incident." The Court agrees. The significance of the three letters had nothing to do with who mailed them and, indeed, the first inmate misbehavior report alleged that the letters were "mailed out by inmate Wilson." The significance of the letters was that they were allegedly written by petitioner but signed by Inmate Wilson, thereby evidencing that petitioner provided legal assistance to Inmate Wilson and that the letters were smuggled between their cells.

It is asserted in paragraphs one and two of petitioner's Memorandum of Law that he requested his employee assistant to obtain, *inter alia*, the security video showing "11-B-12 gallery 8:15 AM tray pick up." Although the Memorandum of Law did not specify the date of the allegedly requested 8:15 AM tray pick up security video, the third page of petitioner's administrative appeal (Exhibit I annexed to respondent's Answer) specifies September 21, 2010. In any event petitioner's alleged request for this security video was not addressed by the hearing officer. Notwithstanding the foregoing, a review of the

Assistant Form (part of Exhibit C annexed to the respondent's Answer), signed by the petitioner on October 4, 2010, does not specify any request for a security video showing "11-B-12 gallery 8:15 AM tray pick up" for any date. The Assistant Form merely indicates requests for the September 21, 2010 security videos of "A 23 . . . property search at 10:10 AM" and "B 9 . . . mail pick up 6:15 AM."[2]

Petitioner's request for the production of an additional security video tape was discussed with the hearing officer (transcript pages 86-92) during the course of the superintendent's hearing. Petitioner acknowledged the two security video requests mentioned on the Assistant Form but also stated to the hearing officer that he had requested the correction officer who served the inmate misbehavior reports on September 21, 2010 to preserve a security video from the previous day (September 20, 2010). According to petitioner the September 20, 2010 security video would show the unnamed correction officer giving petitioner the materials from Inmate Wilson, the petitioner giving the materials back to the correction officer and, in turn, the correction officer returning the materials to Inmate Wilson. Although petitioner asserts that he received the materials from the unnamed correction officer between 7:30 AM and 8:00 AM on September 20, 2010 and returned the materials when the correction officer picked up after lunch on that date, he was unsure of the exact time of lunch and therefore requested the September 20, 2010 security video covering an entire eight-hour shift.

The Court finds nothing in the record, including the transcript of the Tier III Superintendent's Hearing concluded on October 25, 2010, to indicate that petitioner ever requested the production of a security video showing the 11-B-12 gallery at 8:15 AM on September 21, 2010, or any other date. Accordingly, the Court finds petitioner's failure

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[2] Petitioner's request for production of the 6:15 AM mail pick up security video has already been addressed in this Decision and Judgment.

to request production of the security videotape in question during the course of the underlying superintendent's hearing precludes judicial review of any alleged failure on the part of the hearing officer to produce such tape.

Petitioner's requests for the testimony of Inmate Jones and Hampton was effectively denied based up such inmates refusal to testify. Inmates Jones and Hampton were apparently contacted by petitioner's employee assistant, upon petitioner's request, and the Assistant Form indicates that both prospective inmate witnesses agreed to testify. When he actually sought to have these inmates witnesses produced at the superintendent's hearing, however, petitioner was advised by the hearing officer that both were refusing to testify. Inmate refusal forms were produce showing that both Inmate Jones and Inmate Hampton did not want to be involved. The correction officers who took the refusal forms both testified as to the circumstances of the refusals but neither officer was able to provide any explanation for the refusals other than that the requested inmates did not want to be involved. Petitioner asked the hearing officer find out why Inmate Jones and Hampton refused to testify and, after a brief adjournment, the hearing officer reported that he " . . . personally went down to the block . . . and spoke to both of those inmates and they both told me that they do not want to be involved . . . I specifically spoke to each one of them." After further inquiry by the petitioner, the hearing officer stated that she " . . . asked them why they did not want to testify and why they changed their mind and they told me that they don't want to be involved."

Citing *Hill v. Selsky*, 19 AD3d 64, petitioner asserts, in effect, that he was unlawfully denied the testimony of inmates Jones and Hampton since the hearing officer " . . .did not attempt to try to determine what caused them [Jones and Hampton] to change their minds." "When an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer

is required to personally ascertain the reason for the inmate's unwillingness to testify . . . A witness's statement that he '[did] not want to be involved' is not a sufficient reason to excuse a personal interview by the hearing officer . . . However, when the hearing officer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected . . ." *Id.* at 67 (citations omitted).

In the case at bar the Court finds that the hearing officer's post-refusal interview/questioning of Inmates Jones and Hampton adequately protected petitioner's right to call witnesses. In this regard the Court specifically notes the representation of the hearing officer, placed on the record at the superintendent's hearing, that she " . . . asked them [Jones and Hampton] why they did not want to testify and why they changed their mind and they told me that they don't want to be involved." *See Jackson v. Fischer*, 87 AD3d 775.

Petitioner next challenges the denial of his request that a certain unnamed correction officer working the 11-B gallery on September 21, 2010 provide testimony on his behalf at the Tier III Superintendent's Hearing. According to petitioner, the correction officer in question was the one who allegedly agreed to allow petitioner access to Inmate Wilson's legal work and allegedly facilitated such access by delivering Inmate Wilson's legal papers to petitioner's cell and, in at least one version of petitioner's defense, returning the papers to Inmate Wilson after petitioner completed his review. At the outset of the hearing, when petitioner was asked to name the correction officer in question, the following colloquy occurred:

"Tafari: . . . I don't know how to pronounce his name and the video will show.

Stickney: Take a stab at it; just take a stab at it.

Tafari:	Ranger.
Stickney:	Ranger.
Tafari:	Ran, Ranoff.
Stickney:	Okay, we will pay attention on the video when we watch that. Okay so Officer Granger had given you permission to assist inmate Wilson with his legal work.
Tafari:	Yes, ma'am . . ."

There was little further discussion of "Officer Granger" until late in the hearing when petitioner was asked to confirm that he had requested the testimony of "Officer Granger." At that time the following colloquy occurred:

"Tafari:	That is the name you said it was, I don't know.
Stickney:	No, no, no, no, you told me Officer Granger . . . you are the one that told me Officer Granger . . . and you wanted his testimony, correct?
Tafari:	Incorrect. I tried pronouncing the correct name of the staff. You said Granger that might be the name. And you said well we gonna put the video in and look real good and see if you see this officer, I said okay and that's where, and that's where it stood at.
Stickney:	No, Tafari that's not how it went down at all. You specifically told me Granger. Are you telling me now that it is not Officer Granger that you wanted to testify is it another staff witness?
Tafari:	No, ma'am.
Stickney:	Okay, what are you telling me?
Tafari:	I don't know the correct name of the officer . . .
Stickney:	So do we need Officer Granger's testimony? Yes or no?
Tafari:	If that's the officer, yes ma'am.

Stickney:	Okay we will go ahead and get Officer Granger on the phone right now."

Upon commencement of his speaker phone testimony, Officer Granger was asked by petitioner whether or not he was working on September 21, 2010 and it was established that Officer Granger was not at Upstate Correctional Facility on that date. Petitioner then stated "[t]hat's not the officer, thank you very much." Although the Court notes that petitioner never inquired whether or not Officer Granger was working on September 20, 2010, the date the unnamed correction officer allegedly facilitated petitioner's review of Inmate Wilson's legal work, the hearing officer asked Officer Granger if he recalled, at any time, allowing Inmate Tafari to view another inmate's legal work. The officer replied "[n]ow, that is against policy and I would not allow that." The testimony of Officer Granger was then quickly concluded.

Later in the hearing, after Inmates Jones and Hampton (who, it was hoped, could identify the unnamed correction officer) refused to testify, the hearing officer asked "[s]o were does that leave us? Do you [petitioner] have any idea who the officer in question is?" Petitioner replied, "No. No ma'am . . ." Still later in the hearing petitioner again stated that he wanted the testimony of the correction officer on duty on September 21, 2010 (but did not mention September 20, 2010) and the following colloquy occurred:

"Stickney:	Who?
Tafari:	I don't know his name.
Stickney:	I don't know his name either. You have had ample time to try to figure it out Tafari.
Tafari:	I'm in a cell; I'm in SHU how can I figure it out?
Stickney:	There's 500 employees that work here. You seem to be pretty good about knowing everybody else's first and last name around here. What I'm trying to tell you is I have no idea, I thought it was officer Granger

	that's what you had originally told me. We got Officer Granger's testimony; he wasn't working.
Tafari:	And I appreciate you helping me to find a name and you went out of your way to get Officer Granger it was the wrong individual.
Stickney:	I didn't help you though, you're the one that told me about Granger. That's how I got the name.
Tafari:	No.
Stickney:	So I can't have somebody testify when I don't know who it is that I need to testify. Any other witnesses. . .
Tafari:	No ma'am."

Still later in the hearing, when petitioner interposed an objection to the denial of his request for the testimony of the unnamed correction officer he asserted as follows: "The officer that was on the company on 9/21 [again, no mention made of September 20, 2010] it ain't hard to find him he's an employee any time you come in and out of the block in the jail you have to be noted."

No due process violation occurs where an inmate at a Tier III Superintendent's Hearing requests the testimony of an unnamed witness but such witness cannot be identified/located despite reasonable efforts. *See Jones v. Bellamy*, 80 AD3d 1029, *Tafari v. Selsky*, 76 AD3d 1144, *lv dis* 16 NY3d 783 and *Perez v. Fischer*, 62 AD3d 1104. The record in the case at bar is disturbing to the extent the Court finds nothing therein to suggest that the hearing officer made any effort to identify the unnamed correction officer through DOCCS records at the Upstate Correctional Facility nor is there anything in the record to suggest that to resort to such records would be unavailing under the facts and circumstances of the case. Nevertheless, for the reasons set forth below, the Court finds that the proposed testimony of the unnamed correction officer was irrelevant and,

therefore, there was no due process violation associated with the effective denial of petitioner's request for the testimony of such witness.

As noted previously, the first inmate misbehavior report charged petitioner with violations of inmate rules 114.10 and 180.17. Inmate rule 114.10 provides that "[a]n inmate shall not smuggle or attempt to smuggle or solicit others to smuggle any item in or out of the facility or from one area to another." Inmate rule 180.17 provides, in relevant part, that " [a]n inmate may not provide legal assistance to another inmate without prior approval of the superintendent or designee." Even if the correction officer in question was identified and testified in full support of petitioner's position, such testimony would not have afforded petitioner any defense against the charges set forth in the first inmate misbehavior report.

With respect to smuggling charge, petitioner testified that he asked the unnamed correction officer to allow him to review Inmate Wilson's legal documents and that the correction officer acceded to that request, delivering the documents from Inmate Wilson's cell to the petitioner's cell. To the extent petitioner received Inmate Wilson's legal documents in this manner, rather than without the involvement of a correction officer, an additional co-conspirator (the correction officer) is merely added to the smuggling scheme. The petitioner, however, is in no way absolved of his own guilt. Even under petitioner's version of the events underlying the issuance of the first inmate misbehavior report he solicited another individual (the correction officer) to smuggle Inmate Wilson's legal work from Inmate Wilson's cell to his own cell and accepted receipt of the smuggled documents.

With respect to the providing legal assistance charge set forth in the first inmate misbehavior report, petitioner acknowledged through his hearing testimony that, at the very least, he reviewed Inmate Wilson's legal documents. Even if the unnamed correction

officer was located and testified that he facilitated such review in the manner asserted by petitioner, petitioner's conduct would still have constituted a violation of inmate rule 180.17 since his review of Inmate Wilson's legal documents was not undertaken with the prior approval of the superintendent or his designee.

For the reasons set forth in the preceding two paragraphs, the Court finds that the proposed testimony of the unnamed correction officer could not have been relevant in defense against the charges set forth in the first inmate misbehavior report.

The Court next finds that the hearing officer did not err in denying petitioner's request that Deputy Superintendent for Programs Butler, of the Eastern Correctional Facility, be called as a witness at the Tier III Superintendent's Hearing concluded on October 25, 2010. As noted by the hearing officer, even if DSP Butler testified that petitioner had permission, back in 2006, to render legal assistance to Inmate Mendez at the Eastern Correctional Facility, such permission would have been irrelevant to petitioner's defense against that aspect of the charge set forth in the second inmate misbehavior report that petitioner violated inmate rule 180.17 as evidence by his possession of legal documents belonging to Inmate Mendez at the Upstate Correctional Facility in September 2010.

The Court also finds that petitioner's request for the testimony of DOCCS Deputy Commissioner and Counsel Boll was properly denied. Obviously the proposed witness had no knowledge of the incident underlying the issuance of either inmate misbehavior report. Petitioner, for his part, never suggested otherwise. Apparently, however, a portion of the legal materials removed from petitioner's personal property by C.O. Healy (second misbehavior report) consisted of "case law." Petitioner sought the testimony of Ms. Boll " . . . to clarify that I can have that case law, a whole stack of case law they took out of my cell . . ." The hearing officer, however, made it clear to petitioner that she

understood petitioner was permitted to possess the case law and that the testimony of Ms. Boll was therefore unnecessary. In this regard the hearing officer noted that the issue in dispute in connection with the second inmate misbehavior report was not the "case law" (or the affidavits of inmates prepared in connection with petitioner's own pending legal proceedings) but, rather, other legal documents directly associated with the legal proceedings of Inmates Wilson and Mendez.

Finally, for the reasons set forth below, the Court finds no error in the hearing officers denial of petitioner's request for the testimony of Nurse Practitioner Lashway. N.P. Lashway's testimony was requested by petitioner in connection with the pair of dark tinted glasses removed from petitioner's personal property by C.O. Healy and deemed contraband in the second inmate misbehavior report. Under the provision of 7 NYCRR §302.2(e)(1)(i) a DOCCS inmate confined in a Special Housing Unit, like petitioner, is ordinarily entitled to posses " 1 pair eyeglasses, prescription only." Since there is no doubt that petitioner was already in possession of a lighter tinted pair of glasses, the only issue to be resolved was whether or not petitioner was medically authorized to posses the second pair of darker tinted glasses. According to petitioner he has 20/20 vision but suffers from photophobia (an unusual sensitivity to light) and was therefore permitted to possess not only his ordinary lighter tinted glasses for indoor use, but also the darker tinted pair for outdoor use.

Although petitioner testified and produced documentation suggesting that he had been previously issued permits to possess two sets of eyeglasses (lighter tint and darker tint) at other DOCCS facilities, the determination of guilt with respect to petitioner's possession of the additional, darker tinted glasses was based upon the testimony of Nurse Baker who review petitioner's then current medical chart and testified that petitioner had been examined as recently as May of 2010 at the Upstate Correctional Facility and that

as a result of such examinations photophobia was deemed was "unlikely." According to the testimony of Nurse Baker, there was "[n]o documentation in his [petitioner's current Upstate medical] chart that states he would require any type of [glasses] tinted to that [darker] degree." Petitioner sought the testimony of N.P. Lashway to clarify that certain medical records generated at the Clinton Correctional Facility on January 11, 2008 (and allegedly referenced by Nurse Baker) did not document an actual eye examination but, rather, a request that physical damage to petitioner's darker tinted glasses be repaired. The hearing officer effectively denied petitioner's request that N.P. Lashway be called to testify, and provided a written explanation for the determination as follows: "Nurse Practitioner Lashway did not treat you at this facility [Upstate]. RN Baker testified regarding your current medical chart." Under the circumstances of this case, the Court finds no error in the hearing officer's determination to rely on current medical records, to the exclusion of records produced at a different DOCCS facility more than two and a half years prior to the incident underlying the issuance of the second inmate misbehavior report.

Based upon all of the above, it is, therefore, the Decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: September 29, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice