STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JEFFREY A. NELSON,

Petitioner,

-against-

BRIAN FISCHER, COMMISSIONER 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 # 01-11-ST2812 Index No. 2301 -11

Appearances: Jeffrey A. Nelson
Inmate No. 98-A-4066
Petitioner, Pro Se
Southport Correctional Facility
P.O. Box 2000
Pine City, NY 14871

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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 Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a Tier 3 disciplinary determination dated October 5, 2010 in which he was found guilty of violating the following rules: Rule 104.11,

engaging in violent conduct; Rule 104.13, creating a disturbance; Rule 100.10, assault on an inmate; Rule 113.10, possession of a weapon; Rule 106.10, refusing a direct order; Rule 109.12, movement regulation violation. The petitioner maintains that he was denied the right to call witnesses; that he received ineffective assistance from his employee assistant, who failed to interview witnesses and obtain documentary evidence; and that he did not receive a fair hearing.

The underlying incident occurred on September 16, 2010 at approximately 8:40 a.m. at Auburn Correctional Facility. The misbehavior report recited as follows:

> "On the above date and approximate time, while conducting the let-in for protective custody inmates returning from outside recreation, I CO E. Wing heard a disturbance on E-Block 4 & 7 company stairwell. I CO E. Wing observed inmate Nelson, Jeffrey, #98A4066, E-7-27, making slashing motions with his right hand toward the head and face area of inmate Felix Matthew, #02A0050, E-7-23. I CO Wing gave both inmates several direct orders to stop fighting and separate. Inmate Nelson then turned and ran down the stairs to the 3 & 8 company landings, ignoring my orders to stop. I then observed inmate Nelson drop an object out of his right hand, then continue to run toward the next stairs down. Inmate Nelson still refused all direct orders to stop and get down on the floor. I CO Wing then used force on inmate Nelson to gain control of the situation, taking him to the floor. As additional staff responded, I CO Wing applied mechanical restraints to his wrists, behind his back. CO J. Graney recovered the object that I CO Wing observed inmate Nelson drop to the floor. CO J. Graney then secured the object, which was a partial can lid with tape handle, into the evidence drop box per directive 4910A. Area supervisor responded and inmate Nelson was escorted to SHU-D by CO's Reilly and Heffernan without any further incident."

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).

With respect to petitioner's claim that he was denied the right to call three correction officers as witnesses, those witnesses were not present and did not have direct knowledge of the September 16 2010 incident. As such their testimony was properly found not to be relevant (see Matter of Davis v State of New York, 75 AD2d 1022, 1023 [3d Dept., 2010]; Matter of Hernandez v Bezio, 73 AD3d 1406, 1407 [3d Dept., 2010]; Matter of Smith v Martuscello, 85 AD3d 1516 [3d Dept., 2011]; Matter of Knight v Bezio, 82 AD3d 1381, 1382 [3d Dept., 2011]; Matter of Smalls v Fischer, 89 AD3d 1294 [3d Dept., 2011]).

Petitioner claims that two of the three inmates who were contacted on his behalf to testify were not the ones he requested. A review of the transcript of the hearing reveals that the petitioner requested inmate Felix (the alleged victim), an inmate who locked in E7-22[1] (later determined to be inmate Bryson), and an inmate that locked in E7-26[2] (later determined to be inmate Reyes). When the Hearing Officer subsequently indicated that these witnesses refused to testify, the petitioner initially confirmed that these were the witnesses he had requested. Later in the same hearing he claimed that the Hearing Officer had contacted the wrong inmates, but never provided information as to the identity of the correct inmate(s). The Court finds that petitioner's argument has no merit (see Matter of Callender, 41 AD3d 1065

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[1]Also referred to in the hearing transcript as "Ez-722".

[2]Also referred to in the hearing transcript as "Ez-726".

[3rd Dept., 2007]; Matter of Perez v Fischer, 62 AD3d 1104 [3rd Dept., 2009]).

With regard to the refusal of the three inmates to testify, because there is nothing in the record which indicates that they had previously agreed to testify, the reasons provided were sufficient (see Matter of Hill v Selsky, 19 AD3d 64 [3rd Dept., 2005]). Further, "any claimed deficiencies in the adequacy of petitioner's employee assistant were remedied by the Hearing Officer, and petitioner has not demonstrated that he was prejudiced in his defense by such deficiencies" (Matter of Haynes v Bezio, 73 AD3d 1295 [3rd Dept., 2010], citing Matter of Rivera v Goord, 38 AD3d 964, 964 [2007]; Matter of Martino v Goord, 38 AD3d 958, 959 [2007]).

In addition, "any purported inadequacy on the part of the employee assistant was cured by the Hearing Officer at the disciplinary hearing and petitioner has demonstrated no prejudice resulting from the alleged inadequate assistance" (Matter of Reid v Fischer 80 AD3d 1035, 1035, [3d Dept., 2011]).

Lastly, there is nothing in the record to support petitioner' contention that the Hearing Officer was biased, or that the determination of guilt flowed from any alleged bias (see Matter of Lamage v Bezio, 74 AD3d 1676 [3rd Dept., 2010]; Matter of Cruz v Bezio, 79AD3d 1509, 1510 [3rd Dept., 2010]).

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.

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: December 29, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated June 24, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated October 12, 2011, Supporting Papers and Exhibits