STATE OF NEW YORK
SUPREME COURT **COUNTY OF FRANKLIN**

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In the Matter of the Application of
NIGEL JOSEPH, #97-A-3826,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0384.89
INDEX # 2012-826
ORI #NY016015J

-against-

DARWIN LaCLAIR, Superintendent,
Franklin Correctional Facility,
Respondent.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Nigel Joseph, verified on August 3, 2012 and filed in the Franklin County Clerk's office on September 14, 2012. Petitioner, who is an inmate at the Franklin Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Franklin Correctional Facility on June 29, 2012. An Order to Show Cause was issued on September 19, 2012.[1] The Court has received and reviewed respondent's Answer, including confidential Exhibit B, verified on November 8, 2012 and supported by the Affirmation of Kevin P. Hickey, Esq,. Assistant Attorney General, dated November 8, 2012. The Court has also received and reviewed petitioner's Reply, verified on November 27, 2012 and filed in the Franklin County Clerk's office on November 30, 2012, as well as petitioner's additional, undated Reply filed in the Franklin County Clerk's office on December 4, 2012.

[1] In the caption of the Order to Show Cause petitioner's name was incorrectly stated as Joseph Nigel, rather than Nigel Joseph. That error has been corrected in this Decision and Judgment.

As a result of an incident that occurred at the Franklin Correctional Facility on June 26, 2012 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 100.13 (fighting), 104.11 (violent conduct) and 104.13 (disturbance). The inmate misbehavior report, authored by C.O. Donahue, alleged, in relevant part, as follows:

> " . . . I C.O. B. Donahue observed inmates Joseph . . . and . . . Clarke . . . exchanging closed fist punches beginning in the dorm bathroom. The incident continued from the dorm bathroom to the rec room in which the other inmates exited out off the t.v. room to watch what was going on. Inmates were given a direct order to stop fighting in which they did."

A Tier II Disciplinary Hearing was held at the Franklin Correctional Facility on June 29, 2012. At the conclusion of the hearing petitioner was found guilty of all three charges and a disposition was imposed confining him during non-program hours for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing of June 29, 2012 were affirmed. This proceeding ensued.

At the outset of the hearing petitioner denied exchanging punches with anyone. He testified that as he was talking to a friend inmate Clarke jumped on his back in a playful manner and he fell to the ground twisting an ankle. Thus, according to petitioner's testimony, there was no fight. Purportedly in support of this position petitioner first requested that inmate Clarke he called as a witness. The Hearing Officer, however, immediately responded as follows: "Yah, we aint gonna call Clarke when I have his hearing, I don't have ta, two fighters in the same room Mr. Joseph . . . Until I hear, figure all the facts, I'm not gonna be calling . . . the other fighter." Petitioner responded by requesting testimony from three inmate witnesses - Williams, Brown and Correa[2]. The

[2] The petitioner did not request the testimony of inmate Correa by name. Rather, petitioner requested the testimony of the occupant of 1 cube, who was later identified as inmate Correa.

Hearing Officer then adjourned the hearing to locate the requested witnesses. After going back on the record, approximately 25 minutes later, the Hearing Officer advised petitioner that none of the prospective witnesses wanted to testify on his behalf. Although petitioner stated that the witnesses had previously expressed their willingness to testify, no further steps to secure their testimony were taken at that time.

After the Hearing Officer placed his disposition on the record, petitioner first interposed an objection to the denial of his request for testimony from Inmate Clarke. The Hearing Officer addressed that objection by reiterating his security concerns. Petitioner then interposed an objection to the denial of his requests for testimony from inmates Brown, Williams and Correa. More specifically, petitioner objected to the fact that the Hearing Officer did not ask those witnesses why they changed their minds. The Hearing Officer responded that " . . . none of them want to be involved, we did ask 'em, all of them signed a refussals [sic]."

With respect to inmate Clarke, the hearing record included a Witness Interview Notice form, signed by the Hearing Officer, explaining the reason for the denial of the potential witness as follows: "Inmate Clarke was not allowed to testify in the presence of Inmate Joseph do [sic] to security concerns." The hearing record also included a Requested Inmate Witness Refusal to Testify in Tier II/Tier III Disciplinary Hearing form, apparently signed by Inmate Clarke as well as the Hearing Officer. In that form Inmate Clarke stated his refusal to testify on behalf of petition for the reason that "[h]e [petitioner] hit me."

With respect to inmates Brown, Williams and Correa, the hearing record included Requested Inmate Witness Refusal to Testify in Tier II/Tier III Disciplinary Hearing forms, signed by the respective inmates and C.O. Kemp. Inmate Brown stated that he refused to testify as follows: "I do not want to be involved . . . was not witness to this

incident." Inmate Williams stated his refusal to testify as follows: "I do not want to be involved . . . I do not care to get involved. [illegible]." Inmate Correa stated his refusal to testify as follows: "I do not want to be involved . . . I didn't see anything don't want to be involved."

7 NYCRR §253.5 provides, in relevant part, as follows:

> "(a) The inmate may call witnesses on his behalf provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals. If permission to call a witness is denied, the hearing officer shall give the inmate a written statement stating the reasons for the denial, including the specific threat to institutional safety or correctional goals presented.
>
> (b) Any witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that so doing will jeopardize institutional safety or correctional goals. Where an inmate is not permitted to have a witness present, such witness may be interviewed out of the presence of the inmate and such interview tape recorded. The recording of the witness' statement is to be made available to the inmate at he hearing unless the hearing officer determines that so doing would jeopardize institutional safety or correctional goals."

His arguments to the contrary notwithstanding, the Court finds that petitioner's right to call witnesses on his behalf at the Tier II Disciplinary Hearing of June 29, 2012 was not violated. With regard to the requested testimony Inmate Clarke, the Court first finds that the Hearing Officer's security-based decision not to allow the prospective witness in the same room with petitioner is a non-issue. Even if the Hearing Officer should have considered taking the testimony of Inmate Clarke outside the presence of petitioner, pursuant to 7 NYCRR §253.5(b), such consideration would have been rendered moot by Inmate Clarke's written refusal to testify. In this regard the Court notes that Inmate Clarke signed his refusal form in the presence of the Hearing Officer.

As far as the prospective testimony of inmates Brown, Williams and Correa is concerned, the Court rejects petitioner's assertion that the Hearing Officer was obligated,

pursuant to *Hill v. Selsky*, 19 AD3d 64, to conduct a personal inquiry with respect to the reason(s) underlying each of the three prospective inmate witnesses' unwillingness to testify. In this regard the Court finds nothing in the record, other than petitioner's bald assertion, to suggest that any of the prospective witnesses previously agreed to testify. Certainly there is nothing in the record indicating that any of the prospective witnesses previously expressed to DOCCS staff their willingness to testify on behalf of the petitioner. Under these circumstances the refusal forms executed by inmates Brown, Williams and Correa, in the presence of C.O. Kemp, were sufficient to support the denial of petitioner's request that those inmates be called to testify on his behalf. *See Boyd v. Selsky*, 232 AD2d 929.

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: February 7, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice