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

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In the Matter of the Application of
MOSES SUNDHE, #97-A-3006,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0217.51
INDEX # 2012-455
ORI #NY016015J

-against-

BRUCE YELICH, Superintendent,
Bare Hill 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 Moses Sundhe, verified on May 14, 2012 and filed in the Franklin County Clerk's office on May 31, 2012. Petitioner, who is an inmate at the Bare Hill Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Bare Hill Correctional Facility on May 3, 2012. The Court issued and Order to Show Cause on June 5, 2012 and has received and reviewed respondent's Answer and Return, verified on July 27, 2012 and supported by the Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge, dated July 27, 2012. The Court has also received and reviewed petitioner's Reply thereto, dated August 6, 2012 and filed in the Franklin County Clerk's office on August 8, 2012.

As a result of an incident that occurred at the Bare Hill Correctional Facility on April 19, 2012 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (direct order) and 112.21 (count procedures). The inmate misbehavior report, authored by C.O. Stewart, alleged, in relevant part, as follows: " . . . while conducting my [6:00 AM] live count I observed offender Sundhe . . . laying in

bed with the appearance of sleeping. I gave him a direct order to get up. He continued to lay in his bed. I gave him another direct order to get up. He then complied without incident. Prior to this incident the count was announced over the facility P.A. system. I also announced the count on the dorm. He has been counseled on numerous occasions for this behavior." A Tier II Disciplinary Hearing was commenced at the Bare Hill Correctional Facility on May 3, 2012. At the conclusion of the hearing, on May 4, 2012, petitioner was found guilty as charged and a disposition was imposed directing the loss of various privileges for 30 days. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing concluded on May 4, 2012 were affirmed. This proceeding ensued.

At the hearing petitioner commenced his testimony by attempting to assert that the inmate misbehavior report was issued in retaliation for an unspecified written complaint about C.O. Stewart that petitioner had allegedly submitted to the facility superintendent on an unspecified date prior to the incident of April 19, 2012. In this regard the Court notes the following exchange between the hearing officer and the petitioner:

"HO:	. . . Do you have any defense or statements of explanation regarding this misbehavior report?
INM:	[Y]es. Um prior to this uh misbehavior report I had wrote a complaint
HO:	[O]k, do you have anything you want to present to me that has to do with this misbehavior report?
INM:	[U]m no I just have the ah witness and um this is a complaint that ah ah
HO:	[W]ell, the complaint, you're insinuating that . . . the officer is retaliating because of the grievance you filed against him?

INM: [Y]es, there wasn't a grievance, it was a complaint to the Superintendent.

HO: [O]k but what are . . . we gonna do about this misbehavior report is what I'm concerned about. I'm not concerned about what happened that's another a whole other situation (inaudible) and what we're dealing with today is this misbehavior report and the charges that (inaudible) [.]"

At the prompting of the hearing officer petitioner then testified that he was sitting up on his bed, not sleeping, at the time C.O. Stewart took the morning count. Petitioner further testified that C.O. Stewart woke up a "neighbor" (Inmate Pettijohn) who was sleeping on the count and took the sleeping inmate's ID, presumably as a prelude to the filing of an inmate misbehavior report. The petitioner then testified that " . . . no sooner than he [C.O. Stewart] left his [the sleeping neighbor's] cube all he said to me was you know let me get your ID too." Thus, the testimony of the petitioner was in stark contrast to the allegations set forth in the inmate misbehavior report. Petitioner also testified that C.O. Stewart followed an informal policy whereby an inmate found sleeping on the count would be given a warning, rather than issued an inmate misbehavior report, unless the inmate had received such a warning within the previous 30 days. According to petitioner, C.O. Stewart kept a logbook with respect to warnings issued to inmates found sleeping on the count. Although petitioner admitted that he had been warned about sleeping on the count prior to the April 19, 2012 incident, he denied having been warned "numerous times," as alleged in the inmate misbehavior report. According to his testimony, "[t]here was one time in the last maybe 90 days that he warned me for this. I never received a ticket and as far as me being in this facility I've been in this facility for 19 months, I got one ticket. None of them has been for sleeping and in the log book if you was to review it, you would see as he said it hasn't been two or three times . . ."

Inmate Carr was called to testify on behalf of the petitioner without prior explanation as to the purpose of his testimony. Although the witness was apparently in the general vicinity of petitioner's cube at the time of the April 19, 2012 incident, upon questioning by the hearing officer it quickly became apparent that Inmate Carr had no firsthand knowledge of the events leading up the issuance of the misbehavior report. The hearing officer then invited the petitioner to question the witness, cautioning, however, that " . . .what we're dealing with is this misbehavior report and this date of the misbehavior report." The following exchange then took place:

INM: [U]m well the issues that I . . . brought him [presumably the witness] down for is based on the officer's procedure when it comes to these type of things because I was trying to establish

HO: Well you did, you told me that the officer gives you verbal counsel warning before he issues a misbehavior report. That's more than fair by this officer because if it was me, the first time I catch you not up for the count, I'm writing you a misbehavior report. You just told me that this officer gives you a couple times play and then before he issues you a misbehavior report. I think that's quite fair. Is that what you're discussing here?"

After some discussion of C.O. Stewart's informal policy the following colloquy occurred:

INM: [W]hat I was saying was his [C.O. Stewart's] rule is within 30 days. That's what I was explaining to you . . . When I called this witness down he would recall he was issued a misbehavior report for the same thing. His ticket reads that

HO: . . . Ok, what does that have to do with your misbehavior report? I you know you're you're stretching this buddy. You're stretching this all right. Now let me just, let me just seeing I have time today. Let me run ah Mr. Carr's disciplinary history. Ok you're here for a

witness ok. He's stating that you were issued a misbehavior report also from this officer. Ok. I'd just like to look here and see if you have two two misbehavior reports ok. Ok, do you have any more questions for him?

INM: [U]m just the fact that he that

HO: I don't want statements ok I asked you if you had any more questions for this witness that he could testify against this misbehavior report. Ok, what's the question?

INM: [D]id he receive a misbehavior report (inaudible)

HO: [I]t has to relate to this misbehavior report. What you're making there is a statement. We've already determined that he's been issued two misbehavior reports. He's not he's not down here on a hearing, he's here for your witness, ok? Do you have any more questions for him as a witness regarding this inmate misbehavior report?

INM: [W]ell I I

HO: [N]ot statements, questions

INM: [W]ell you well you said that I can't ask him any questions.

HO: [N]o, you can ask him a question but it has to relate to this incident. That's what he's down here for a witness for. You called him as a witness for this incident and this misbehavior report . . . [Y]ou've already told me that this misbehavior report was issued to you[.] [Y]ou made that allegation that because it was ah something you wrote to the superintendent is why you got the inmate misbehavior report. It has nothing to do with this gentleman here. This gentleman here was called down by you to be a witness for you on this incident in this misbehavior report. That's why I accepted him

as a witness because he was supposed to come in here and testify on this incident and all [he] testified to me is that the officer asked you for your ID card. That's the only thing I got out of this witness so far.

INM: [M]y . . .point in bringing him as a witness was to establish the biasness in him [C.O. Stewart] issuing him [the witness] a misbehavior report and me a misbehavior report because

HO: . . . [H]e's not here for that ok."

No further testimony was received from Inmate Carr.

C.O. Stewart acknowledged in his testimony that although he did not have to warn inmates before issuing an inmate misbehavior report for sleeping on the count, he chose to do so. He further acknowledged, moreover, the existence of the logbook (B2 counseling book) wherein he recorded entries with respect to inmates warned about sleeping on the count. In response to questions posed by the Hearing Officer, C.O. Stewart stated that petitioner had been so warned "approximately two to three" times. Notwithstanding the foregoing, the Hearing Officer did not ask C.O. Stewart when the petitioner had been warned prior to the April 19, 2012 incident nor did the Hearing Officer question C.O. Stewart with respect to the 30-day warning limitation alleged by petitioner. Upon questioning by the Hearing Officer, C.O. Stewart denied that the inmate misbehavior report in the case at bar had been issued in retaliation for the complaint submitted by petitioner to the facility superintendent.

After the Hearing Officer completed his questioning of C.O. Stewart, the petitioner posed the following question: "Before officer Stewart issues a misbehavior report . . . for sleeping on the count does he issue a warning and how frequent because the reason why I'm asking that question is because his policy would usually be you know within a 30 day span if you were sleeping on the count." Notwithstanding the fact that the witness had

not been previously questioned with regard to the alleged 30-day limitation, the Hearing Officer cut off any response to the petitioner's question as follows: " . . . I've already I asked him that question myself. If he gave you guys any warning prior to issuing a misbehavior report. So that's as far as I'm gonna go, now he already answered that question that you asked. Which he doesn't have to so. [N]ext question please."

In this proceeding petitioner contends that the hearing officer unlawfully restricted his testimony, as well as the testimony of Inmate Carr, with respect to the alleged retaliatory nature of the inmate misbehavior report. Petitioner also contends that the hearing officer erred in failing to review certain documentary evidence, specifically the complaint petitioner allegedly mailed to the superintendent, C.O. Stewart's logbook and the inmate misbehavior report(s) issued to Inmate Carr.

An inmate at a Tier II Disciplinary Hearing " . . . may reply orally to the charge and/or evidence and shall be allowed to submit relevant documentary evidence . . . " 7 NYCRR §253.6(c). In addition, "[t]he 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." 7 NYCRR §253.5(a). While testimony/documentary evidence relating past grievance filed by an inmate against the correction officer who authored an inmate misbehavior report is plainly relevant to such inmate's retaliation defense (*see Washington v. Napoli*, 61 AD3d 1243, *lv denied* 13 NY3d 704 and *Perkins v. Goord*, 257 AD2d 821), a hearing officer presiding at a prison disciplinary proceeding may, in the exercise of his or her discretion, limit the magnitude of evidence submitted in connection with a retaliation defense in order to avoid an extended collateral hearing within the disciplinary hearing. *See Shapard v. Coombe*, 234 AD2d 744.

In the case at bar the hearing officer afforded petitioner virtually no leeway to develop a retaliation defense. Petitioner's testimony with regard to the complaint he filed with the facility superintendent was cut off by the hearing officer, leaving the hearing record devoid of any indication as to the general nature of the complaint and/or how much time elapsed between the filing of the complaint and the April 19, 2012 incident. The hearing officer also cut off testimony from Inmate Carr that might have confirmed or refuted petitioner's assertion that the informal policy of C.O. Stewart was to not issue a misbehavior report for sleeping on the count unless the inmate in question had been warned about sleeping on the count within the prior 30 days. In addition, the hearing officer did not allow petitioner to question C.O. Stewart with regard to the existence of the alleged 30-day limitation.[1]

While it would not be practical for the Court to attempt to articulate any broadly applicable rule with respect to just how much leeway a hearing officer must afford a petitioner attempting to assert a retaliation defense, in the case at bar the Court finds that it was not sufficient for the hearing officer to simply acknowledge that a retaliation defense had been raised and then reject such defense, based upon a generic denial of retaliatory intent on part of the author of the inmate misbehavior report, while foreclosing any testimony/evidence whatsoever with respect to the circumstances underlying the inmate's claim of retaliation. In view of this finding the Court declines to reach the other arguments advanced by petitioner.

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

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[1] If petitioner had admitted sleeping on the count and was seeking to introduce evidence of C.O. Stewart's informal policy as a defense to the charges, the Court might well find such evidence to be irrelevant since DOCCS regulations do not mandate any warning prior to the issuance of a misbehavior report. In the case at bar, however, the petitioner denied sleeping on the count and sought to bolster his retaliation defense by attempting to demonstrate that C.O. Stewart ordinarily applied the informal 30-day warning policy but failed to apply such policy with respect to the April 19, 2012 incident.

ADJUDGED, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier II Disciplinary Hearing of May 3, 2012 are vacated and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's inmate records.

Dated: March 20, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice