

<b>Matter of Rios v Fischer</b>
2013 NY Slip Op 32636(U)
October 2, 2013
Supreme Court, Albany County
Docket Number: 2462-13
Judge: Jr., George B. Ceresia
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

In The Matter of ELI RIOS,

Petitioner,

-against-

COMMISSIONER OF NYS DOCCS  
BRIAN FISCHER,

Respondent,

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 # 01-13-ST 4721 Index No. 2462-13

Appearances: Eli Rios  
Inmate No. 06-A-5077  
Petitioner, Pro Se  
Wende Correctional Facility  
3040 Wende Road  
Alden, NY 14004

Eric T. Schneiderman  
Attorney General  
State of New York  
Attorney For Respondent  
The Capitol  
Albany, New York 12224  
(Laura A. Sprague,  
Assistant Attorney General  
of Counsel)

### DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Wende Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination in which he was found guilty of violating prison rules. The misbehavior report dated October 24, 2012, which

charged the petitioner with a violation Rule 113.10, possession of a weapon, recites as follows:

“On the above date and approximate time, while conducting a cell search of 8-C1-7B as part of the 8 Block facility search I recovered a 1" long by 1/4 " wide piece of flattened copper electric tape wrapped around one end and sharpened at the other end. The sharpened end was inside a sheath made of electric tape. I found the weapon under the top of a goya adob spice container. The container was on the bottom shelf of the right locker. I then confiscated the weapon and notified the area supervisor of the contraband found. Inmate Rios was then placed into mechanical restraints, then escorted to 8 Block 1<sup>st</sup> Floor holding pen without further incident. All photographs were taken and the weapon was secured per directive 4910 A. The inmate admitted to ownership of all property of the right locker.”

The petitioner alleges that the hearing officer improperly denied his request to call correction officers as witnesses on his behalf; and improperly denied his request to produce a video tape of the incident. He also maintains that the officers who searched his cell failed to follow the procedures set for in DOCCS Directive 4910.

“It is well settled that an inmate has a conditional right to call witnesses at a disciplinary hearing provided their testimony would not jeopardize institutional safety or correctional goals” (Matter of Morris-Hill v Fischer, 104 AD3d 978, 978 [3d Dept., 2013], citing 7 NYCRR 254.5 [a]; Matter of Lopez v Fischer, 100 AD3d 1069, 1070, 952 N.Y.S.2d 694, 695 [2012]; Matter of Santiago v Fischer, 76 AD3d 1127, 1127, 908 N.Y.S.2d 139 [2010]). It is also well settled that a hearing officer may properly deny witnesses who would provide testimony which is merely cumulative and redundant to that given by prior witnesses (see Matter of Gomez v Fischer, 74 AD3d 1399, 1400 [3d Dept., 2010]; Matter of McLean

v Fischer, 63 AD3d 1468, 1469 [3d Dept., 2009]; Matter of Igartua v Selsky, 41 AD3d 717 [3d Dept, 2007]); or those who have no direct knowledge of the subject incident (see Matter of Hines v Prack, \_\_\_ AD3d \_\_\_, 2013 NY Slip Op 5939, [3d Dept., September 19, 2013]; Matter of Tafari v Fischer, 94 AD3d 1324, 1325 [3d Dept., 2012]; Matter of Smalls v Fischer, 89 AD3d 1294 [3d Dept., 2011]).

The petitioner maintains that the weapon was planted in his cell locker by one of the correction officers. According to the petitioner, the weapon was discovered in his locker by Officer Wyckoff, after Officer Lytle and Officer Strucyk searched the locker and failed to find a weapon. For this reason he requested that Officers Wyckoff, Lytle and Strucyk<sup>1</sup> be called to testify. The Hearing Officer called Officer Wyckoff, and Sergeant O'Connor ( who was Supervisor of the cell search that day), as witnesses. The Hearing Officer denied the request for Officer Lytle and Officer Strucyk stating the following:

“OK, Uhr. And as far as I’ll state for the record, the other two witnesses you had requested, Officer uh Strucyk and Ly are .. (unintel) here, just bare with me a second please. Officer Lidel and Officer Strizick Officer Strucyk, I’m going to deny those two Officers. Because there’s no where are they listed anywhere in the uh misbehavior report or any of the documentation. [ ]”

In this instance, the Hearing Officer did not make any finding that the testimony of Officer Lytle and Officer Strucyk would jeopardize institutional safety or correctional goals. Nor did he find that the testimony of these officers would be cumulative or redundant, or that they possessed no direct knowledge of the incident. Under the circumstances, the Court finds

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<sup>1</sup>The Court notes that there is more than one spelling for each of these names in the record..

that the Hearing Officer erred in not contacting the witnesses to ascertain whether either officer possessed direct knowledge of the incident, as alleged by the petitioner. The Court finds however, that because the Hearing Officer provided a good faith reason for not producing these witnesses, the proper remedy is to remit the matter for a new hearing (see Matter of Roberson v Bezio, 70 AD3d 1226, 1227 [2010], lv denied 14 NY3d 714 [2010]; see also Matter of Buari v Fischer, 70 AD3d 1147, 1148 [2010]).

The Court need not address the remaining issues raised by the parties.

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.

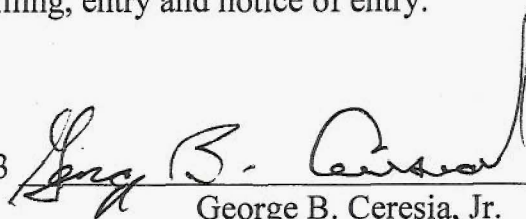
Accordingly it is

**ORDERED and ADJUDGED**, that the petition be and hereby is granted, the determination annulled, and the matter remitted to the respondent for a new hearing.

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 and delivery 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: October 2, 2013  
Troy, New York

  
\_\_\_\_\_  
George B. Ceresia, Jr.  
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated May 20. 2013, Petition, Supporting Papers and Exhibits
2. Answer Dated July 18, 2013, Supporting Papers and Exhibits

STATE OF NEW YORK  
SUPREME COURT COUNTY OF ALBANY

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-against- Petitioner,

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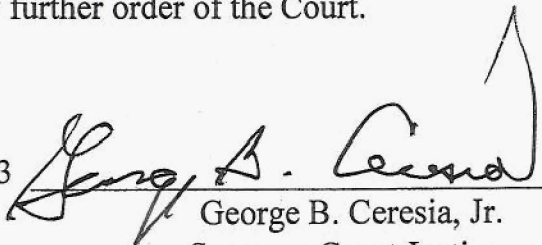
**SEALING ORDER**

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 G, Unusual Incident Report & Confidential Memos, 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: October 2, 2013  
Troy, New York

  
\_\_\_\_\_  
George B. Ceresia, Jr.  
Supreme Court Justice