STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

VICTOR SOWELL, 88-A-2649

Petitioner,

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

-against-

DECISION and ORDER
INDEX NO. 5804-11
RJI NO. 01-11-ST3040

BRIAN FISCHER, COMMISSIONER, DOCCS,

Respondent.

Supreme Court Albany County All Purpose Term, January 6, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:
Victor Sowell, 88-A-2649
Petitioner, Pro Se
Upstate Correctional Facility
PO Box 2001
Malone, New York 12953

Eric T. Schneiderman, Esq.
Attorney General of the State of New York
Attorney for the Respondent
Stephen Kerwin, Esq. AAG
The Capitol
Albany, New York 12224

TERESI, J.:

Petitioner commenced this CPLR Article 78 proceeding challenging two Tier III hearing determinations, rendered on April 20, 2011 and April 26, 2011 respectively, and their affirmance on administrative appeal. Respondent answered the petition and seeks its dismissal. Because

Petitioner established that both hearings violated his regulatory rights, he demonstrated his entitlement to two new hearings.

Considering first the April 26, 2011 Tier III hearing determination, the charges at issue stemmed from an incident occurring on April 8, 2011. Petitioner was charged with, and found guilty of, Violent Conduct, Demonstration, Creating a Disturbance, Assault on Staff and Refusing a Direct Order. Among other objections raised, Petitioner consistently objected to the assistance he was provided.

As is uncontested, Petitioner was entitled to an assistant. (7 NYCRR §251-4.1[a][4]). The assistant is required to "interview witnesses and to report the results of his efforts to [Petitioner]" (7 NYCCR 251-4.2), and "investigate any reasonable factual claim the inmate may make." (Velasco v Selsky, 211 AD2d 953, 954 [3d Dept. 1995], quoting Matter of Serrano v Coughlin, 152 AD2d 790 [3d Dept. 1995]). Importantly, "[w]hen the inmate is unable to provide names of potential witnesses, but provides sufficient information to allow the employee [assistant] to locate the witnesses without great difficulty, failure to make any effort to do so constitutes a violation of the meaningful assistance requirement." (Velasco v Selsky, supra at 954, quoting Matter of Mallard v Dalsheim, 97 A.D.2d 545 [2d Dept. 1983][internal quotation marks omitted]; People ex rel. Selcov v Coughlin, 98 AD2d 733 [2d Dept. 1983]). When an inmate is prejudiced by inadequate assistance, a new hearing must be held. (Matter of Bellamy v Fischer, 87 AD3d 1217 [3d Dept. 2011]).

Petitioner was assigned, and met with, assistant Tinkham prior to his hearing. Because Petitioner could not recall the names of the thirty inmates who witnessed his misbehavior incident, his first instruction to Tinkham was to identify the inmate witnesses. Specifically,

Petitioner requested Tinkham to go to the dorm where the alleged misbehavior occurred at 9:00 am and 2:00 pm; asking the available inmates if they would be willing to testify about their observations of Petitioner's misconduct incident. Despite such seemingly simple request, Tinkham refused. From the hearing testimony it appears that Tinkham was instructed to decline such request at the direction of a "higher authority." Although the "higher authority" directive was not explained, the Hearing Officer explicitly stated that "the assistant does not go around trying to drudge up witnesses for you." Such explanation and failure to "make any effort," in the face of a request to "locate... witnesses without great difficulty," violated Petitioner's right to meaningful assistance. (Velasco v Selsky, supra at 954). Tinkham similarly failed to "interview" the witnesses Petitioner specifically named. At the hearing, Petitioner's attempts to question Tinkham about his interviews was severely curtailed. Instead, the Hearing Officer explained that the assistant "does not interview the[witnesses]. He does not do your interviews. He asks them their willingness to testify in regards to your misbehavior report." On this record, Petitioner demonstrated that Tinkham failed to properly "interview witnesses and to report the results of his efforts" back to Petitioner, in derogation of his 7 NYCCR 251-4.2 responsibilities.

"Given the seriousness of the charges against petitioner and the marked contrast between the versions of the incident presented by petitioner and [the officers], the efforts of the employee assistant in this case were woefully inadequate." (People ex rel. Selcov v Coughlin, supra at 734-35). The result of which, Petitioner was provided with neither inmate witness testimony nor information from inmate interviews, establishes that Petitioner was prejudiced by the inadequate assistance. As such, "a new hearing is necessary" and the balance of Petitioner's claims are moot. (Matter of Bellamy v Fischer, supra at 1218).

Turning next to the April 20, 2011 Tier III hearing determination, Petitioner was charged with, and found guilty of, Refusing a Direct Order and Refuse Search or Frisk. The charges arose from Petitioner's conduct during an April 8, 2011 strip frisk, which Respondent admits was videotaped. Prior to and during the hearing, Petitioner demanded to view such video. His demand, however, was consistently refused.

Where a videotape of the misbehavior exists and "may have... a significant bearing on petitioner's defense, the Hearing Officer should... allow[] petitioner to examine it." (Lewis v Rivera, 32 AD3d 1120, 1121 [3d Dept 2006]; Taylor v Coughlin, 190 AD2d 900, 902 [3d Dept. 1993]; Garcia v Coughlin, 194 AD2d 896 [3d Dept 1993]). Failure to do so requires "the matter [to] be remitted for a new hearing ." (Lewis v Rivera, supra at 1121).

Here, the hearing transcript clearly establishes that neither the Hearing Officer nor Petitioner viewed the videotape at issue. (Id. [compare Matter of Marquez v. Mann, 192 AD2d 100 [1993]]). Nevertheless, the Hearing Officer denied Petitioner's request "because there is nothing on the video that's going to say anything different from here." Without viewing the videotape, however, such conclusion is unsupported and speculative. While the Hearing Officer characterized Petitioner's testimony as admitting the charged misbehavior, upon review of the hearing transcript there is no such admission. Petitioner's repeated claim that he did not remember the incident is simply not an admission of anything. Rather, Petitioner requested the video for the express purpose of helping him to remember the incident. As such, his viewing the videotape would necessarily have had "a significant bearing on petitioner's defense and... the hearing should have been adjourned to enable petitioner to view the evidence." (Taylor v Coughlin, supra 902). The Hearing Officer's failure to do so requires a new hearing.

Accordingly, both Tier III hearing determinations, rendered on April 20, 2011 and April 26, 2011 respectively, are hereby annulled and this matter is remitted to Respondent for further proceedings not inconsistent with this Court's decision.

Accordingly, the petition is dismissed.

This Decision and Order is being returned to the attorneys for the Respondent. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
January 29, 2012

Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Order to Show Cause, dated September 16, 2011; Petition, dated August 22, 2011, with attached Exhibits A-J.
2. Answer, dated January 3, 2012; Affirmation of Stephen Kerwin, dated January 3, 2012, with attached Exhibits A-W.