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

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In the Matter of the Application of
**JAVAUGHN HIGGINS, #06-A-6030**,
Petitioner,

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

**DECISION AND JUDGMENT**
**RJI #16-1-2011-0477.94**
**INDEX # 2011-1098**
**ORI #NY016015J**

-against-

**BRIAN FISCHER,** Commissioner,
NYS Department of Corrections and
Community Supervision,
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 Javaughn Higgins, filed in the Franklin County Clerk's office on November 3, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility and concluded on August 8, 2011. The Court issued an Order to Show Cause on November 9, 2011 and has received and reviewed respondent's Answer, verified on January 5, 2012 and supported by the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated January 5, 2012. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on January 24, 2012.

As the result of an incident that occurred at the Upstate Correctional Facility on June 26, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 114.12 (smuggling), 113.25 (contraband) and 180.10 (visitation procedure). A Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on July 7, 2011. At the conclusion of the hearing, on August 8, 2011,

petitioner was found guilty of all three charges and a disposition was imposed confining him to the special housing unit for 24 months, directing the loss of various privileges for a like period of time, recommending the loss of 24 months of good time and directing the loss of contact visitation for 12 months. Upon administrative appeal the special housing unit confinement portion of the dispositional penalties was modified from 24 to 12 months. The results and disposition of the Tier III Superintendent's Hearing concluded on August 8, 2011 were otherwise affirmed. This proceeding ensued.

Petitioner advances only one argument. Citing *Hill v. Selsky*, 19 AD3d 64, he asserts that the " . . . hearing officer's failure, to make a personal interview with the two inmate's [sic] who originally agreed to testify, but later said they did not want to be involved [Fletcher and McKnight], requires reversal and annulment on the matter of law."

It is clear that both of the proposed witnesses agreed to testify when first approached by petitioner's employee assistant. When the testimonies of inmates Fletcher and McKnight were actually sought, however, the following colloquy occurred between Hearing Officer Bullis and C.O. Thorbon, who was apparently responsible for escorting the inmates from their cells to the hearing room:

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| "Bullis: | Officer Thorbon did you go to the cell and ask inmate eh Fletcher to come to the hearing to testify for inmate Higgins? |
| Thorbon: | I did. |
| Bullis: | Can you tell me the way it happened. |
| Thorbon: | He told me he wasn't coming out and I told him that all he had to do was to come out just for a minute just to say that he didn't want to testify and he said he's not coming out of his cell at all, for any reason. |
| Bullis: | He said, er you ordered him to come out of his cell to testify on the record as to why he was changing his mind? |

Thorbon: Absolutely and he refused that also.

Bullis: Did he a, did he tell you why that he was changing his mind?

Thorbon: No. He said I'm done here I'm gonna go back to sleep now. Then he walked away from door.

Bullis: Did he appear to be in any obvious mental of [sic] physical disabilities that would then interfere with of him coming to the hearing [sic]?

Thorbon: Not at all.

Bullis: Did he eh indicate to you that he's being influenced by somebody to change his mind and not testify?

Thorbon: Not at all.

Bullis: You had also requested that you go the cell of inmate McKnight to obtain him and eh what happened with Mr. McKnight?

Thorbon: I asked him to come out to testify for the hearing and he said he wasn't coming out of his cell. I asked him to come out and testify that he didn't want to testify and he said he's not coming out of his cell and he walked away from him [sic] door.

Bullis: He refused to come to the hearing inter, to be interviewed by me as to why he changed his mind?

Thorbon: He didn't say he just said he wasn't coming out of his cell for any reason. Then he walked away from his door.

Bullis: Did you order him to come to the hearing to testify and [sic] to why his changed his mind?

Thorbon: Yes I did.

Bullis: Did he tell you why he was changing his mind?

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| Thorbon: | He just said he wasn't coming and he didn't give me a reason. He just walked away from his door. |
| Bullis: | Did he appear to you to have been in any obvious, obvious mental or physical disabilities which would have interfered with him coming to the hearing? |
| Thorbon: | Not at all. |
| Bullis: | Did he indicate to you that he was being influenced by somebody to eh not come to the hearing to testify? |
| Thorbon: | Not at all. |
| Bullis: | Okay that [sic] you very much for your testimony. What we are going to do Mr. Higgins is proceed with the other inmates since Fletcher and McKnight have now changed their mind as so indicated by the testimony of Officer Thorbon. They have refused to be interviewed by me on the record as to this issue." |

Before the close of the hearing the petitioner placed on the record his objection " . . . to you [the hearing officer] not obtaining a written statement or to see if somebody threatened my witnesses to see why they didn't come." When the hearing officer responded that the potential inmate witnesses had changed their minds about testifying, as noted by the testimony of C.O. Thorbon, the petitioner, referencing *Hill*, stated " . . . that a hearing officer is required to interview to request the inmate witnesses to see the reason for their refusals to . . . testify at prison disciplinary proceedings and failure to do so violated . . . prisoner's right to call witnesses where witnesses have . . . previously agreed to testify but later refused to do so without giving a reason." The hearing officer responded as follows: "Mr. Higgins, I'm quite aware of that case and have made reasonable efforts to interview the witnesses at this facility as a special housing unit . . . And I do not conduct a hearing off the record and I requested through the Officer [presumably, Thorbon] that the inmates come to this hearing not to testify if they did not want to testify, because obviously er whether or not they want to testify is strictly up to

them. Er however, I did request through the Officer that the inmates come to the hearing and tell me on the record, in your presence, as to why they changed their mind and they both refused to do that . . . Your objection is so noted the testimony was a, the evidence was submitted regarding that through the testimony of Officer Thorbon."

According to the Appellate Division, Third Department, "[w]hen an inmate witness previously agreed to testify, but later refuses to do so without giving a reason, we have consistently held that the hearing officer is required to personally ascertain the reason for the inmate's unwillingness to testify . . . A witness's statement that he '[did] not want to be involved' is not a sufficient reason to excuse a personal interview by the hearing officer . . . However, when the hearing officer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected." *Hill v. Selsky*, 19 AD3d 64, 67 (citations omitted) (emphasis added). In the case at bar the hearing officer's personal inquiries as to the reasons underlying Inmates Fletcher's and McKnight's refusals to testify were clearly required. The Court finds, moreover, that the hearing officer's obligation to personally inquire into the reasons underlying the two refusals was not satisfied since the inmates' purported unwillingness to discuss their refusals with the hearing officer was established solely through the testimony of C.O. Thorbon. As noted by the *Hill* court, the right of an inmate at a Tier III Superintendent's Hearing ". . . to call witnesses was not adequately protected by third-person interviews because the Hearing Officer lacked the opportunity to judge the authenticity of the witnesses' refusals." *Id.* at 67. This Court further finds that the petitioner interposed a clear objection to the hearing officer's failure to conduct personal inquires as to the reasons underlying the two requested inmate witnesses' refusals to testify.

The hearing officer's failure to personally interview inmates Fletcher and McKnight with the respect to the authenticity their refusals to testify, after both witnesses had previously indicated to petitioner's employee assistant that they were willing to testify, constituted a violation of petitioner's fundamental due process rights for which expungement is the proper remedy. *See Alvarez v. Goord*, 30 AD3d 118, *Hill v. Selsky*, 19 AD3d 64 and *Contras v. Coughlin*, 199 AD2d 601.

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

**ADJUDGED**, that the petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Hearing concluded on August 8, 2011 are vacated, the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional records, and the respondent is directed to reimburse petitioner's inmate account for any mandatory surcharge imposed upon disposition of such hearing.

**Dated:** February 3, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice