**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 #16-1-2011-0361.76**
**INDEX # 2011-847**
**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 16, 2011 and filed in the Franklin County Clerk's office on August 19, 2011. 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 and concluded on July 29, 2011.

The Court issued an Order to Show Cause on August 26, 2011 and received and reviewed respondent's Answer, verified on October 14, 2011. The Court also received and reviewed petitioner's letter response, dated October 29, 2011 and filed in Franklin County Clerk's office on November 1, 2011, as well as his Reply, dated November 10, 2011 and received directly in chambers on November 16, 2011. By Decision and Order dated January 26, 2012 respondent's request for an order transferring this proceeding to the Appellate Division, Third Department was denied and he was directed to serve supplemental answering papers. The Court has since received and reviewed the Affirmation of Adam W. Silverman, Esq., Assistant Attorney General, dated February 24,

2012 and submitted on behalf of the respondent, as well as petitioner's Reply thereto, dated March 6, 2012 and filed in the Franklin County Clerk's office on March 13, 2012.

On July 16, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules of 100.13 (fighting), 104.11 (violent conduct), 107.20 (lying) and 118.23 (failing to promptly report injury). The inmate misbehavior report, authored by Correction Sergeant Beard, read, in relevant part, as follows:

> " . . . I [Correction Sergeant Beard] WAS CONTACTED BY E1 DORM OFFICER . . . AND ADVISED THAT HE HAD RECEIVED A RAT NOTE STATING THAT INMATE JOSEPH . . . WAS INVOLVED IN A FIGHT. I REPORTED TO E1E DORM AND ESCORTED JOSEPH, WHO HAD OBVIOUS INJURIES TO HIS FACE, OFF THE DORM AND INTERVIEWED. JOSEPH STATED THAT HE WAS HITTING THE HEAVY BAG ON THURSDAY IN THE BUBBLE AND THE HEAVY BAG SWUNG BACK AND HIT HIM IN THE FACE. JOSEPHS [sic] INJURIES ARE MORE CONSISTENT WITH BEING INVOLVED IN A FIGHT AND NOT BEING STRUCK WITH THE HEAVY BAG."

A Tier II Disciplinary Hearing was held at the Franklin Correctional Facility on July 29, 2011, at the conclusion of which petitioner was found guilty of all four charges and a disposition was imposed directing the loss of various privileges for a period of thirty days. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing of July 29, 2011 were affirmed. This proceeding ensued.

At the underlying hearing petitioner denied having been in a fight. Rather, he took the position that at the time of the incident he was not taking certain unspecified medications, was experiencing auditory hallucinations, was suicidal and sustained the injuries referenced in the inmate misbehavior report by repeatedly smashing his face into the heavy bag at the Franklin Correctional Facility "bubble" (gym?). Petitioner's hearing testimony suggests that soon after the underlying incident he was transferred from the Franklin Correctional Facility to an Office of Mental Health (OMH) satellite unit at the Clinton Correctional Facility where, according to petitioner, " . . . they . . .got me back on

my meds . . .” Petitioner was obviously returned to the Franklin Correctional Facility prior to the commencement of the hearing.

No witnesses testified at the Tier II Disciplinary Hearing of July 29, 2011 and the presiding hearing officer therefore relied exclusively on the allegations set forth in the inmate misbehavior report in reaching his determinations of guilt. During the course of the hearing, however, petitioner did request that an OMH representative be called to testify on his behalf “ . . .because they um see me and they um know what happened and they know [what?] goes on.” Although petitioner could have more clearly articulated the basis of his request for testimony from an OMH representative, the following colloquy occurred after the hearing officer observed that no OMH representative was present at the time of the underlying incident:

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| “JOSEPH: | No I think the psychiatrist will be able to explain to you as far as what happens when I go through my um basically verify what it is I’m saying. |
| HEARING OFFICER: | So um the psych is going to tell me that you weren’t in uh, uh able of violent conduct [sic]? |
| JOSEPH: | No, I’m not. |
| HEARING OFFICER: | The psych isn’t going to tell me you weren’t uh you didn’t uh report an illness? You didn’t report an injury? |
| JOSEPH: | No I’m saying, I don’t know what the psych is going to say. |
| HEARING OFFICER: | Is the psych going to tell me you weren’t lying? |
| JOSEPH: | I don’t know what the psych is going to say, I’m just saying that it would help. |
| HEARING OFFICER: | We’ll [sic] we’re not calling the psych today. . . The psych wasn’t there for your, when you were getting beat up by the punching bag, or beating |

yourself into the punching bag, or being involved in a fight, or not being involved in a fight. They weren't there so that uh thing from OMH (inaudible) [sic].

JOSEPH: Alright, I'll object to it though . . . I'll object to the entire proceeding also because um ya know as I said I try my best to explain what happened and as I said I'm not really (inaudible) stop taking the meds and when I stop taking the meds its like this happened to me and uh basically that's only thing that I could tell you."

The hearing officer then closed the hearing and rendered his disposition. After the disposition was rendered, before the hearing record was closed, petitioner further clarified his objection as follows: "I'm object [sic] to the fact that you didn't allow me to call the psych as a witness because I feel that you didn't believe me that what I said my information and I think the psych would have been able to tell you about the type of medication I take and what happens to me when I don't take my medication and they would have basically backed up what I was saying."

A hearing officer presiding over a prison disciplinary proceeding where an inmate's mental state is "at issue" must consider evidence regarding such inmate's mental condition. *See Huggins v. Coughlin*, 76 NY2d 904, *aff'g* 155 AD2d 844 and *Tafari v. Selsky*, 32 AD3d 1055, *lv den* 7 NY3d 717. In the case at bar the Court finds that petitioner's mental state was clearly "at issue." No only did petitioner testify that the injuries to his face were self-inflicted during the course of a possibly psychotic episode, DOCCS officials themselves opted to place petitioner in an OMH satellite unit following the incident giving rise to the issuance of the inmate misbehavior report. *See Rosado v. Kuhlmann*, 164 AD2d 199, *lv den* 77 NY2d 806. Under these circumstances the Court finds that the hearing officer erred in failing to call an OMH representative to testify based

solely upon the fact that no OMH representative was present at the time petitioner's injuries were incurred.

Having concluded that the petitioner was erroneously denied the opportunity to call a witness, the Court must next decide whether expungement or rehearing is the appropriate remedy. "Expungement will be ordered only where there has been a showing that '(1) the challenged disciplinary determination is not supported by substantial evidence . . .; (2) there has been a violation of one of the inmate's fundamental due process rights, as enunciated in *Wolff v. McDonnell* (418 U.S. 593 . . .); or (3) other equitable considerations dictate expungement of the record rather than remittal for a new hearing." *Monko v. Selsky*, 246 AD2d 699 at 700, quoting *Hillard v. Coughlin*, 187 AD2d 136, 140, *lv den* 82 NY2d 651 (citations omitted). In the case at bar there has been no finding that the determination question is not supported by substantial evidence. In view of the fact that an inmate at a Tier II Disciplinary Hearing is not subject to a loss of good time or punitive confinement in excess of 30 days (*see* 7 NYCRR §253.7(a)(1)), the Court finds that petitioner's fundamental due process rights were not implicated by the hearing officer's failure to call an OMH witness. *See Sandin v. Conner*, 515 U.S. 472 and *Cliff v. DeCelle*, 260 AD2d 812, *lv den* 93 NY2d 814. Accordingly, this Court's determination with respect to expungement or rehearing must be based on equitable principals. Upon consideration of such principals, the Court concludes that expungement is the appropriate remedy. In reaching this conclusion the Court notes that the charges against the petitioner were not considered particularly serious, as evidenced by the fact that such charges were heard at a Tier II Disciplinary Hearing rather than Tier III Superintendent's Hearing. It is also noted that the 30-day loss of privileges disposition imposed at the conclusion of the hearing has already run its course.

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

**ORDERED AND ADJUDGED,** that petition is granted, without costs or disbursements, but only to the extent that the results and disposition of the Tier II Disciplinary Hearing concluded on July 29, 2011 are vacated and the respondent is directed to expunge all reference to such hearing, as well as the incident underlying same, from petitioner's institutional record; and it is further

**ORDERED AND ADJUDGED,** that the respondent shall reimburse the petitioner's inmate account for any surcharge imposed.

**Dated:** May 11, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice