STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of DAVID BROWN,

Petitioner,

-against-

SUPERINTENDENT GRAHAM,
COMMISSIONER FISCHER,

Respondents,

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 # 01-12-ST3537 Index No. 854-12

Appearances: David Brown
Inmate No. 10-A-1263
Petitioner, Pro Se
Southport Correctional Facility
P.O. Box 2000, Institutional Road
Pine City, NY 14871-2000

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of Counsel)

DECISION/ORDER

George B. Ceresia, Jr., Justice

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

creating a disturbance, fighting, and drug possession. The disciplinary determination arose out of two separate misbehavior reports issued on the evening of January 16, 2012. The first misbehavior report involved an incident in which he was observed fighting with another inmate, identified as J. Thomas. The second was issued after a subsequent search of petitioner's cell revealed a cellophane packet containing a substance which later tested positive for marijuana. The petitioner alleges that the Hearing Officer improperly denied his request to call two witnesses on his behalf.

The first proposed witness was inmate J. Thomas. The petitioner maintained that inmate Thomas would testify that the petitioner was not involved in the subject altercation. When the petitioner attempted to call inmate Thomas as a witness at the hearing, the Hearing Officer informed him (the petitioner) that the petitioner's employee assistant had previously contacted inmate Thomas, and Thomas had indicated he did not wish to testify. The refusal of inmate Thomas to testify was documented in the Assistant Form prepared by petitioner's employee assistant. The petitioner alleges that because the Hearing Officer declined to personally interview inmate Thomas with regard to the reason for his refusal to testify, and failed to document the refusal in writing, that his constitutional right to call a witness was violated.

The petitioner also sought to call as a witness an employee of the NIK Testing Company, which manufactures the testing device which was used to test the substance discovered in petitioner's cell. The purpose of the proffered testimony was to establish that multiple tests for a controlled substance were necessary in order to confirm a positive test result, as allegedly indicated in NIK Testing Company literature. In this instance, Correction

Officer Gilmore, the officer who performed the test which confirmed that the substance found in the petitioner's cell was marijuana, testified that only one test was performed, and only one test was necessary.

Prior to service of an answer, the respondent made a motion to dismiss the petition, alleging that it did not state a cause of action, and that the petitioner had not exhausted his administrative remedies. The petitioner conceded that he did not take an administrative appeal of the disciplinary determination; and contended that this was unnecessary since the petition alleges a constitutional violation of his right to present witnesses on his behalf. The Court observed that the alleged failure of the Hearing Officer to investigate the reason why inmate Thomas refused to testify, and the alleged failure to call the NIK employee as a witness might, depending upon the facts, be a violation of petitioner's constitutional right to due process (see respectively Matter of Moye v Fischer, 93 AD3d 1006, 1007 [3d Dept., 2012] and Matter of Alvarez v Goord, 30 AD3d 118 [2006]). The Court, accordingly, found that the petition adequately stated a cause of action with respect to a violation of his constitutional right to call witnesses; and that this cause of action did not require the petitioner to first exhaust his administrative remedies. The Court further found, however, that all claims related to a violation of petitioner's regulatory rights (see 7 NYCRR 254.5) must be dismissed by reason of his failure to exhaust his administrative remedies. The respondent has now served an answer, and the matter is now ready for disposition with regard to the constitutional issues.

"A prisoner charged with violating a prison regulation which could result in the loss of 'good time' credit is entitled to minimal due process protections" (Laureano v Kuhlmann

(75 NY2d 141 [1990] at 146, citing Wolff v McDonnell, 418 US 539). This includes a conditional right to call witnesses (see id.). It is well settled that where a hearing officer denies a request to call a witness, but supports the denial with a good faith reason, there is no violation of a constitutional right (see Matter of Santiago v Fischer, 76 AD3d 1127, 1128 [3rd Dept., 2010]). Ordinarily, where a hearing officer is found to have violated an inmate's regulatory right, the remedy is annulment of the determination and remittal for a rehearing (see Matter of Alvarez v Goord, 30 AD3d 118, supra, at 120; Matter of Buari v Fischer, 70 AD3d 1147, 1148 [3rd Dept., 2010]; Matter of Moulton v Fischer, ___ AD3d ___ [3d Dept., November 8, 2012]). On the other hand, a violation of an inmate's constitutional right will require expungement of the entire matter (see Matter of Alvarez v Goord, supra; Matter of Buari v Fischer, supra; Matter of Moulton v Fischer, supra). The Appellate Division, in Matter of Alvarez v Goord (30 AD3d 118, supra), explained the difference between infringement of an inmate's constitutional right to call witnesses and a regulatory violation of the same right (pertaining to 7 NYCRR 254.5). As the Court stated:

> "New York adopted a regulation to implement this constitutional right, but that regulation provides more protection to inmates than the constitution requires (see 7 NYCRR 254.5; Matter of Laureano v Kuhlmann, supra at 147 [noting that some of the regulatory rights provided in 7 NYCRR 254.5 were 'suggested by the Supreme Court but not required as a matter of due process']). The constitution addresses denials of witnesses by hearing officers, as representatives of the government. The regulation has been extended to cover situations where a hearing officer has not denied a witness, but the requested inmate witness refuses to testify (see Matter of Hill v Selsky, 19 AD3d 64, 66, [2005]; see also Matter of Barnes v LeFevre, 69 NY2d 649, 650 [1986])." (Matter of Alvarez v Goord, supra, at 119-120)

The Alvarez Court went on to provide an overview of an inmate's constitutional rights to call witnesses:

> "We now attempt to clarify the parameters of constitutional violations requiring expungement. A hearing officer's actual outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain a requested witness's testimony, constitutes a clear constitutional violation (see Matter of Reyes v Goord, [20 AD3d 830] at 831; Matter of Escoto v Goord, 9 AD3d 518, 519-520 [2004]; Matter of Johnson v Coombe, [244 AD2d 664] at 665). In addition, this Court has consistently held that where an inmate witness agreed to testify but later refuses to do so without giving a reason, the hearing officer must personally attempt to ascertain the reason for the inmate's unwillingness to testify; failure to make a personal inquiry constitutes a regulatory violation tantamount to a constitutional violation, thus requiring expungement (see Matter of Hill v Selsky, [19AD3d 64]; Matter of Brodie v Selsky, 203 AD2d 671 [1994]; Matter of Contras v Coughlin, [199 AD2d 601]). Most other situations constitute regulatory violations, requiring annulment of the determination but not mandating expungement." (Alvarez v Goord, supra, at 121, emphasis supplied)

Turning to the first misbehavior report, involving the alleged altercation between the petitioner and inmate Thomas, as stated by the Appellate Division in Matter of Moye v Fischer (93 AD3d 1006 [3d Dept., 2012]), "this Court has held that '[a] deprivation of the inmate's right to present witnesses will be found when there has been no inquiry at all into the reason for the witness's refusal, without regard to whether the inmate previously agreed to testify'" (Matter of Moye v Fischer, supra, at 1007, quoting Matter of Hill v Selsky, 19 AD3d 64, at 66 [3d Dept., 2005]). In Moye there was no explanation in the record with regard to the reasons why certain inmates refused to testify at the hearing. No witness refusal forms were produced; and the employee assistant was never called as a witness to give

testimony with regard to the reasons why the requested witnesses refused to testify. The Court concluded that the Hearing Officer's failure to ascertain the reason for the inmate's refusal to testify violated the petitioner's constitutional right to call witnesses and required expungement of the disciplinary proceeding (Moye v Fischer, supra, at 1007, citing Jamison v Fischer, 78 AD3d 1466, 1467 [3rd Dept., 2010; see also Matter of Samuels v Fischer, 98 AD3d 776 [3d Dept., 2012]).

As noted, the Employee Assistant Form here indicates that inmate Thomas refused to testify. There is no witness refusal form of inmate Thomas in the record. Nor was the employee assistant called to testify concerning the reasons why inmate Thomas declined to testify. In addition, as in Moye (supra), the Hearing Officer refused to do anything further to attempt to ascertain inmate Thomas's reasons for refusing to testify. Under all of the circumstances, the Court finds that the Hearing Officer erred, and the error requires expungement with respect to the misbehavior report in question, rather than annulment and remittal (Matter of Moye v Fischer, supra).

Turning now to petitioner's request to have employee of the NIK Testing Company testify, it is 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]). In this instance, Officer Gilmore, the Correction Officer who performed the test, gave testimony with regard to the test procedure. As noted, he indicated that there was no need to perform more than one test on the substance found in petitioner's cell. The

Hearing Officer denied the request to call a NIK Testing Company employee as a witness on grounds that it would be duplicative of the testimony of Officer Gilmore. Because the Hearing Officer provided a good faith reason for denial of the requested witness, the Court finds that there was no violation of petitioner's constitutional rights.[1]

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

In summary, the Court finds that the determination, as it relates to the first misbehavior report (involving the alleged altercation with inmate Thomas) must be vacated, and all references thereto in petitioner's inmate record expunged. With regard to the second misbehavior report (involving the charge of possession of a controlled substance), the Court finds that the petition to vacate the determination of guilt should be denied and dismissed.

In view of the foregoing, because the penalty imposed here encompassed both misbehavior reports, and because the penalty included a recommended loss of good time, the Court finds that the matter must be remitted to the respondent for a re-determination of the proper penalty.

Accordingly it is

ORDERED and ADJUDGED, that the petition is granted with respect to the misbehavior report dated January 16, 2012, containing the charges of Violent Conduct (Rule 104.11), Creating a Disturbance (Rule 104.13), Assault on Inmate (Rule 100.10), Fighting

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[1]The Court is also mindful that it is well settled that there is no need for multiple tests when testing a substance suspected of being marijuana (see Matter of McKoy v Bezio, 67 AD3d 1232 [2009]; Grochulski v Selsky, 305 AD2d 823 [3d Dept., 2003]; Cliff v. Kingsley, 293 AD2d 954 [3d Dept., 2002]).

(Rule 100.13), Possession of a Weapon (Rule 113.10), the determination is annulled, and all references to the misbehavior report or the administrative determination of guilt be and hereby are expunged from petitioner's inmate record; and it is further

ORDERED and ADJUDGED, that the petition be and hereby is dismissed, as it relates to the misbehavior report dated January 16, 2012, involving a charge of possession of contraband and/or drugs (Rule 113.25); and it is further

ORDERED, that the matter is remitted to the respondent for a redetermination of the penalty for the violation Rule 113.25.

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 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: December 10, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated October 5, 2012, Supporting Papers and Exhibits

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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 C, Unusual Incident Report and Related Papers, 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: December 10, 2012
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice