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

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In the Matter of the Application of
INJAH TAFARI, #89-A-4807,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0150.31
INDEX # 2011-329
ORI #NY016015J

-against-

DAVID A. ROCK, Superintendent,
Upstate 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 Injah Tafari, verified on March 30, 2011 and filed in the Franklin County Clerk's office on April 1, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Upstate Correctional Facility on March 25, 2011. The Court issued an Order to Show Cause on April 12, 2011 and has received and reviewed respondent's Answer, verified on July 6, 2011 and supported by the Affirmation of Brian J. O'Donnell, Esq., Assistant Attorney General, dated July 6, 2011. The Court has also received and reviewed petitioner's Reply Memorandum of Law, filed in the Franklin County Clerk's office on July 14, 2011.

As the result of an incident that occurred at the Upstate Correctional Facility on March 8, 2011 petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 101.20 (lewd conduct). The misbehavior report, authored by R.N. Heath Baker, alleged, in relevant part, as follows:

> " . . . [T]his nurse went to Inmate Tafari . . . cell for sick call. During this interaction Inmate Tafari was found to be inappropriately dressed with his genitals exposed. He was informed that this was inappropriate conduct. He denied having his pants off. I terminated his sick call and informed him that he needed to stop this behavior as he has done this to me in the past."

A Tier II Disciplinary Hearing was conducted at the Upstate Correctional Facility commencing on March 22, 2011. At the conclusion of the hearing, on March 25, 2011, petitioner was found guilty as charged and a disposition was imposed confining him to keeplock status for 30 days and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing concluded on March 25, 2011 were affirmed. This proceeding ensued.

At the disciplinary hearing petitioner denied exposing himself to Nurse Baker. In addition, petitioner took the position that the inmate misbehavior report was written in retaliation against him for filing medical deprivation complaints against Nurse Baker. According to petitioner's testimony, Nurse Baker had threatened to continue filing sexually-related inmate misbehavior reports against him until a conviction was obtained. Petitioner also testified that Nurse Baker had already filed four similar inmate misbehavior reports against him but that each of these previous reports was dismissed at the hearing level. Although petitioner provided the hearing officer with copies of some or all of the inmate misbehavior reports previously filed against him by Nurse Baker, petitioner did not seek to introduce copies of any of the inmate grievance complaints he allegedly filed against the nurse.

In this proceeding petitioner does not raise the substantial evidence question (CPLR §7803(4)) by asserting that the quantum or quality of evidence produced against him at the disciplinary hearing was insufficient in the face of the retaliation defense. *See Bonez v. Commissioner*, 65 AD3d 1411. Rather, the only argument advanced by petitioner

in this proceeding is that the hearing officer allegedly violated his due process (and, presumably, regulatory) rights by denying his requests that Vernon Fonda (DOCCS Inspector General), Michael Hogan (Commissioner, NYS Office of Mental Health), David Rock (Superintendent, Upstate Correctional Facility), Donald Uhler (Deputy Superintendent for Security, Upstate Correctional Facility), Lucien Leclaire, Jr. (DOCCS Deputy Commissioner, Correctional Facilities Operations) and Brian Fischer (DOCCS Commissioner) be called to testify at the disciplinary hearing in support of the retaliation defense. In requesting such testimony petitioner stated to the hearing officer that he had written to the requested witnesses, both before and after the incident of March 8, 2011, advising them of Nurse Baker's alleged retaliatory actions and requested that investigations be initiated. Petitioner also stated that in his letters he asked to be separated from Nurse Baker. Notwithstanding the foregoing, petitioner did not offer into evidence any copies of such correspondence. All six of the above-enumerated witness requests were denied by the hearing officer who noted that the proposed witnesses were not present during the incident of March 8, 2011 and would have no impact on the outcome of the hearing.

An inmate at a Tier II Disciplinary Hearing has a limited regulatory right to call witnesses on his/her behalf " . . . provided their testimony is material, is not redundant, and doing so does not jeopardize institutional safety or correctional goals." 7 NYCRR §253.5(a).[1] None of the proposed witnesses were present at the time and place of the March 8, 2011 incident and, therefore, none of the proposed witnesses could provide testimony directly relevant to the issue of whether Nurse Baker's or Petitioner's version

[1] Since an inmate at a Tier II Disciplinary Hearing faces no loss of good time, and since the maximum Special Housing Unit confinement that can be imposed upon disposition of a Tier II Disciplinary Hearing is 30 days (*see* 7 NYCRR §253.7(a)(1)(iii)), petitioner's due process rights were not implicated. *See Sandin v. Conner*, 515 US 472 and *Cliff v. DeCelle*, 260 AD2d 812, *lv den* 93 NY2d 814.

of the underlying incident was accurate. In addition, unlike the situation in *Diaz v. Fischer*, 70 AD3d 1082, which is relied upon by petitioner, there is nothing in the record to suggest that any of the proposed witnesses had gained, through the investigative process, information directly relevant to the issue of what transpired in petitioner's cell from non-testifying individuals who were present at the time of the incident.

Notwithstanding the foregoing, even a potential witness with no direct knowledge of an incident underlying the issuance of an inmate misbehavior report may be properly called to provide testimony relevant to an inmate's retaliation defense. *See Adams v. Coughlin*, 202 AD2d 1055, and *Wilson v. Coughlin*, 186 AD2d 1090. This Court nevertheless finds that a hearing officer presiding at a prison disciplinary proceeding may, in the exercise of his or her discretion, limit the magnitude of evidence submitted in connection with a retaliation defense in order to avoid an extended collateral hearing within the hearing being conducted. In the case at bar the hearing officer afforded petitioner sufficient latitude in developing a retaliation defense by permitting him to testify that Nurse Baker had initiated four previous inmate disciplinary proceedings against defendant (all allegedly dismissed at the hearing level) in retaliation against petitioner for filing grievance complaints and that the nurse had threatened to continue to file misbehavior reports until a conviction was obtained. The hearing officer, moreover, reviewed, at the behest of petitioner, copies of the previous inmate misbehavior reports and permitted petitioner to testify that he wrote to various DOCCS and OMH officials (the proposed witnesses) advising them of Nurse Baker's retaliatory actions. Petitioner, however, did not provide copies of his correspondence with the proposed witnesses nor, as indicated previously, did he provide copies of his grievance complaints against Nurse Baker. In addition, although Nurse Baker testified and was cross-examined by petitioner at the disciplinary hearing, petitioner did not attempt to question the nurse with regard

to the previously filed inmate grievance complaint(s) and inmate misbehavior reports. In view of the foregoing, the Court finds that the hearing officer did not err in denying petitioner's request to call the six witnesses in question. *See Shapard v. Combe*, 234 AD2d 744.

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

ADJUDGED, that the petition is dismissed.

Dated: October 12, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice