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

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In the Matter of the Application of
VICTOR K. THOMAS, #92-B-1669,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0255.51
INDEX # 2011-565
ORI #NY016015J

-against-

ALBERT PRACK, Director,
Special Housing/Inmate Disciplinary
Program,

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 Victor K. Thomas, verified on June 2, 2011 and filed in the Franklin County Clerk's office on June 8, 2011. Petitioner, who is now an inmate at the Coxsackie Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Franklin Correctional Facility and concluded on March 27, 2011. The Court issued an Order to Show Cause on June 14, 2011 and an Amended Order to Show Cause on June 28, 2011. The Court has received and reviewed respondent's Answer, including Confidential Exhibits B and C, verified on August 19, 2011 and supported by the Affirmation Justin C. Levin, Esq., Assistant Attorney General, dated August 19, 2011. The Court has also received and reviewed petitioner's Reply in opposition, filed in the Franklin County Clerk's office on September 15, 2011.

As the result of an incident that occurred at the Franklin Correctional Facility on March 14, 2011 petitioner was issued an inmate misbehavior report charging him with

violations of inmate rules 100.13 (fighting) and 104.11 (disturbance[1]). The inmate misbehavior report, authored by Correction Sergeant Beard, alleged, in relevant part, as follows:

> "I [Sergeant Beard] interviewed you [petitioner] on above date [March 14, 2011] and you admitted that you your [sic] in a fight with an inmate over the TV on C-1 dorm. You stated that 'I was in a fight over the fucking T.V.' You also was [sic] unwilling to identify the other inmate that you fought with. The medical report indicates the injuries you obtained are consisted [sic] with being in a fight (see fight investigation attached)."

A Tier III Superintendent Hearing was commenced at the Franklin Correctional Facility on March 17, 2011. At the conclusion of the hearing, on March 27, 2011, petitioner was found guilty of violating inmate rules 104.11 (violent conduct) and 100.13 (fighting). A disposition was imposed confining him to the special housing unit for four months (with two months suspended), directing the loss of various privileges for six months (with three months suspended) and recommending the loss of two months of good time. Upon administrative appeal the results and disposition of the Superintendent's Hearing concluded on March 27, 2011 were affirmed. This proceeding ensued.

The petitioner advances a variety of arguments in support of his ultimate contention that the results and disposition of the Tier III Superintendent's Hearing concluded on March 27, 2011 must be overturned. One of petitioner's arguments resonates, at least in part, with the Court.

An inmate at a Tier III Superintendent's Hearing has a limited constitutional and regulatory right to call witnesses on his/her behalf provided institutional safety and correctional goals are not jeopardized and the proposed testimony and material/relevant and not redundant. *See Wolff v. McDonnell*, 418 US 539 at 556 and 7 NYCRR §254.5(a).

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[1] Inmate Rule 104.11 actually proscribes " . . . violent conduct or conduct involving the threat of violence either individually or in a group." It is Inmate Rule 104.13 that proscribes " . . . conduct which disturbs the order of any part of the facility."

The testimony of a fellow inmate may be requested either before the commencement of a Superintendent's Hearing, through an employee assistant, or by direct request to the hearing officer at the hearing. *See* 7 NYCRR §254.5(c). A potential inmate witness, however, may refuse such request and cannot be compelled by the hearing officer to testify. Nevertheless, depending upon the circumstances attendant to a refusal to testify, some level of further inquiry maybe required to assess the authenticity of the refusal. The state of the law with respect to this issue has been summarized by the Appellate Division, Third Department, as follows:

> "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. When the refusing witness gives no reason for the refusal, but that witness did not previously agree to testify, an inquiry by the hearing officer through a correction officer adequately protects the inmate's right to call witnesses. Similarly, no violation of the right to call witnesses will be found when there was no prior assent to testify, but the reason for the refusal appears in the record. In a case in which an inmate witness agreed to testify and then refused to do so, a personal inquiry by the hearing officer was not required because a genuine reason for the refusal appeared in the record and the hearing officer made a sufficient inquiry through a correction sergeant to determine the authenticity of that reason. When 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, 66-67 (citations omitted) (emphasis in original).

In the case at bar petitioner asserts, in effect, that his requests for testimony from inmates Medaro and Dillard were unlawfully denied. The testimony of these two potential inmate witnesses was originally requested by the petitioner, through his assistant, on March 16, 2011. Such requests were referenced on the "Franklin Correctional Facility

Assistant Form," annexed to the respondent's Answer as Exhibit D, and that form indicates that inmates Medaro and Dillard did not agree to testify.[2] Written "Requested Inmate Witness Refusal to Testify" forms were first prepared with respect to inmates Medaro and Dillard on March 16, 2011 - prior to the commencement of the Tier III Superintendent's Hearing on March 17, 2011. Although each form indicated that the requested inmate witness refused to testify on behalf of the petitioner, and although each form was signed by the respective requested inmate witness and an employee witness, no reasons for the refusals to testify were specified on either form. In addition, on each form, directly above the signature of the employee witness, the following was stated "I [presumably, the employee witness] specifically asked [Dillard/Medaro] to provide a reason for his/her refusal to testify and he/she refused to provide further information."

When petitioner's requests for testimony from inmates Medaro and Dillard was addressed during the course of the Tier III Superintendent's Hearing the pre-hearing refusal forms were referenced but the hearing officer ultimately concluded that the witnesses should be re-contacted in an effort to ascertain the reason(s) underlying the refusals. On March 18, 2011, apparently during the adjournment of the underlying hearing, a second set of "Requested Inmate Witness Refusal to Testify" forms was completed with respect to inmates Medaro and Dillard. The second form prepared in

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[2] Notwithstanding the indication on the assistant form, at one point during the hearing the petitioner took the position that inmate Dillard had originally agreed to testify. According to petitioner, his written request to his employee assistant that a statement be taken from inmate Dillard, as set forth in paragraph five of the attachment to the assistant form, was marked with the notation "no statement but interviewers say they will testify." The hearing officer responded as follows: "Okay, you know, then people can change their mind, alright, but um to satisfy any concerns in this matter the hearing officer will ah um re-contact the inmate and ask him again if he is willing to testify and have him sign the appropriate form again if he's not willing to testify." See transcript of the Tier III Superintendent's Hearing, annexed to respondent's Answer as Exhibit G, at pages 17 and 18. The Court, however, reads the notation next to paragraph five on the attachment to the assistant form as follows: "no statement but interview see if they will testify." The Court simply finds nothing in the record to suggest that inmate Dillard (or inmate Medaro for that matter) ever agreed to testify on behalf of petitioner.

connection with inmate Medaro was essentially identical to the pre-hearing form in that the second form was signed by inmate Medaro but stated no reason for his refusal. The second refusal form prepared in connection with inmate Medaro also contained the statement, signed by the employee witness, that inmate Medaro was "asked . . . to provide a reason for his/her refusal to testify and he/she refused to provide further information." The second inmate refusal form prepared in connection with inmate Dillard, however, was substantially different than the pre-hearing form in that the latter form, which was signed by inmate Dillard, contained a statement that "I do not want to be involved (explain) I don't no [sic] about the incident." The second set of inmate refusal forms was referenced when the Tier III Superintendent's Hearing was re-convened on March 20, 2011.

This Court first rejects petitioner's assertion that his request for the testimony of Inmate Dillard was unlawfully denied. Inmate Dillard never agreed to testify and the March 18, 2011 inmate refusal form stated, in effect, that inmate Dillard had no knowledge of the underlying incident. *See Barca v. Fischer*, 80 AD3d 1038, *lv den* 16 NY3d 711. With respect to inmate Medaro, however, this Court finds that in the absence of any indication that the hearing officer communicated with the correction officer(s) who witnessed the execution of the refusal forms, or inmate Medaro himself [3], the hearing officer had no opportunity to assess the authenticity of inmate Medaro's refusal to testify. Therefore, the results and disposition of the Tier III Superintendent's Hearing concluded on March 27, 2011 must be vacated with expungement, rather than remittal for a new

[3] Since inmate Medaro never agreed to testify, the Court does not mean to suggest that the hearing officer was under any obligation to personally communicate with that inmate to assess the authenticity of his refusal. Such personal communication, however, would have been sufficient in lieu of the hearing officer's communication with the correction officer(s) who witnessed inmate Medaro's execution of the refusal forms.

hearing, the proper remedy. *See Jamison v. Fischer*, 78 AD3d 1466, *aff'g* 2010 WL 1020088, 2010 NY Slip Op 30548(U).

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 March 27, 2011 are vacated and the respondent is directed to expunge all reference to said hearing, as well as the incident underlying same, from petitioner's institutional record and to refund to petitioner's inmate account any mandatory surcharge imposed upon disposition.

Dated: December 30, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice