

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

432

CA 08-00678

PRESENT: SMITH, J.P., CENTRA, FAHEY, AND PINE, JJ.

---

IN THE MATTER OF ANTHONY MEDINA,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

HAROLD GRAHAM, SUPERINTENDENT, AUBURN  
CORRECTIONAL FACILITY, RESPONDENT-RESPONDENT.

---

ANTHONY MEDINA, PETITIONER-APPELLANT PRO SE.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

---

Appeal from a judgment (denominated order) of the Supreme Court, Cayuga County (Thomas G. Leone, A.J.), entered March 6, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously vacated, the determinations are modified on the law and the petition is granted in part by annulling those parts of the determinations finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]) and 106.10 (7 NYCRR 270.2 [B] [7] [i]) and by vacating the recommended loss of good time for the violations of those rules and as modified the determinations are confirmed without costs, and respondent is directed to expunge from petitioner's institutional record all references to the violations of those rules.

Memorandum: Petitioner appeals from a judgment dismissing his CPLR article 78 petition that challenged two disciplinary determinations arising from two hearings involving two misbehavior reports. We note at the outset that, because the petition raises substantial evidence issues, Supreme Court should have transferred the proceeding to this Court pursuant to CPLR 7804 (g). We therefore vacate the judgment and consider the merits of the proceeding de novo (see *Matter of Grillo v Coughlin*, 201 AD2d 905). As respondent correctly concedes, the charges in the misbehavior report dated January 9, 2007 are not supported by substantial evidence (see generally *People ex rel. Vega v Smith*, 66 NY2d 130, 139). We therefore modify the determinations and grant the petition in part by annulling those parts of the determinations finding that petitioner violated inmate rules 100.13 (7 NYCRR 270.2 [B] [1] [iv]) and 106.10 (7 NYCRR 270.2 [B] [7] [i]) and by vacating the recommended loss of good time for the violations of those rules, and we direct respondent

to expunge from petitioner's institutional record all references to the violations of those rules. We reject petitioner's contentions with respect to the second misbehavior report.

Entered: March 26, 2010

Patricia L. Morgan  
Clerk of the Court