

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

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CA 13-00261

PRESENT: CENTRA, J.P., PERADOTTO, CARNI, VALENTINO, AND WHALEN, JJ.

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IN THE MATTER OF AHJEMIN ROSS-SIMMONS,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF CORRECTIONS AND COMMUNITY  
SUPERVISION, RESPONDENT-RESPONDENT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF  
COUNSEL), FOR PETITIONER-APPELLANT.

ERIC T. SCHNEIDERMAN, ATTORNEY GENERAL, ALBANY (MARCUS J. MASTRACCO OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County (Mark H. Dadd, A.J.), entered November 20, 2012 in a proceeding pursuant to CPLR article 78. The judgment denied the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously affirmed without costs.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated certain inmate rules. Petitioner failed to exhaust his administrative remedies with respect to his claims that he was denied his right to be present during the testimony of his witnesses and the author of the misbehavior report, and this Court has no discretionary authority to reach those claims (*see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123, lv denied 22 NY3d 858; *Matter of Fuentes v Fischer*, 89 AD3d 1468, 1469). Contrary to petitioner's contention, Supreme Court properly concluded that "the penalty is not so disproportionate to the offense as to be shocking to one's sense of fairness" (*Matter of Ciotoli v Goord*, 256 AD2d 1192, 1193).

Entered: March 21, 2014

Frances E. Cafarell  
Clerk of the Court