

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

927

CA 24-01875

PRESENT: LINDLEY, J.P., BANNISTER, GREENWOOD, NOWAK, AND HANNAH, JJ.

IN THE MATTER OF JEFFREY HIERRO, PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

DANIEL F. MARTUSCELLO, III, ACTING COMMISSIONER,
NEW YORK STATE DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION, RESPONDENT-RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (NORMAN P. EFFMAN OF
COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court,
Wyoming County (Melissa Lightcap Cianfrini, A.J.), entered October 31,
2024, 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 reversed on the law without costs, the motion is denied,
the petition is reinstated, and respondent is granted 20 days from
service of the order of this Court with notice of entry to serve and
file an answer.

Memorandum: Petitioner appeals from a judgment that granted
respondent's pre-answer motion to dismiss as untimely petitioner's
CPLR article 78 petition seeking to annul a determination, following a
tier II disciplinary hearing, that he violated an incarcerated
individual rule. We reverse.

A proceeding pursuant to CPLR article 78 must be commenced within
four months after the determination to be reviewed becomes "final and
binding upon the petitioner" (CPLR 217 [1]). Here, the determination
in question "became final and binding upon petitioner once he received
notice of it" (*Matter of Wiegand v Crandall*, 118 AD3d 1355, 1356 [4th
Dept 2014]), and it was respondent's burden to "establish[] such
date" (*Matter of Feldman v New York State Teachers' Retirement Sys.*,
14 AD3d 769, 770 [3d Dept 2005]). As petitioner contends, and
respondent correctly concedes, respondent failed to establish when
petitioner actually received the results of his administrative appeal
and, thus, respondent failed to meet his burden of establishing that
the statute of limitations began to run more than four months prior to
the commencement of the proceeding (see *Matter of Mintz v City of*

Rochester, 200 AD3d 1650, 1652 [4th Dept 2021]; *cf. Feldman*, 14 AD3d at 770).

We further agree with petitioner and respondent that the court erroneously concluded that the matter was rendered moot by petitioner's release to parole; as petitioner and respondent agree, petitioner remains in the custody of the Department of Corrections and Community Supervision.