STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JACK MADDALONI,

Petitioner,

-against-

GLENN GOORD, Commissioner,

Respondent,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-06-ST6850 Index No. 3133-06

Appearances:

Jack Maddaloni
Inmate No. 93-A-2518
Petitioner, Pro Se
Auburn Correctional Facility
P.O. Box 618
Auburn, NY 13024

Eliot Spitzer
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Megan M. Brown,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Auburn Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination on November 7, 2005 concerning two inmate misbehavior reports. The incidents occurred approximately one hour apart on October 4, 2005, as the petitioner was being transferred from A-Block to J-Block at Green Haven Correctional Facility.

The first misbehavior report indicates that Corrections Officers Oltman and Carlson discovered a ten inch ice pick type weapon while searching petitioner's property. The weapon was wrapped in newspaper and concealed in a sock found in the bottom of a plastic tote. Petitioner was charged with a violation of Rule 113.10, possession of a weapon and Rule 114.10, smuggling.

The second misbehavior report alleges that Corrections Officer Hayes, while conducting a second search of petitioner's property, found items which had allegedly been altered, or were classified as contraband. Petitioner was charged with a violation of Rule 113.11, possession of an altered item; Rule 113.23, possession of contraband; and Rule 118.31, altering or rewiring a n electrical device[1].

The Court turns first to petitioner's argument that the hearing was not timely concluded.

§ 251-5.1 of the Rules of the Department of Correctional Services, entitled

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[1]The charges related to violations of Rule 113.11 and Rule 118.31 were dismissed in an administrative appeals decision dated January 11, 2006 of Donald Selsky, Director of Special Housing/Inmate Disciplinary Program.

"Timeliness" recites as follows:

> "(a) Where an inmate is confined pending a disciplinary hearing or superintendent's hearing, the hearing must be commenced as soon as is reasonably practicable following the inmate's initial confinement pending said disciplinary hearing or superintendent's hearing, but, in no event may it be commenced beyond seven days of said confinement without authorization of the commissioner or his designee.
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> "(b)The disciplinary hearing or superintendent's hearing must be completed within 14 days following the writing of the misbehavior report unless otherwise authorized by the commissioner or his designee. Where a delay is authorized, the record of the hearing should reflect the reasons for any delay or adjournment, and an inmate should ordinarily be made aware of these reasons unless to do so would jeopardize institutional safety or correctional goals.
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> "(c) Violation hearings must be completed within seven days of the writing of the misbehavior report."

As pointed out by the respondent, the misbehavior reports are dated October 4, 2005. The hearing was commenced on October 10, 2005. A timely written extension was granted on October 21, 2005 to October 25, 2005. While a second extension was not granted until October 26, 2005, the Hearing Officer explained that he was unable to obtain an extension on October 25, 2005 because the hearing ran so late on the previous day. The Court finds the foregoing to be a reasonable explanation with regard to why the second extension was one day late. Moreover, it has been held that § 251-5.1 (a) of the Rules of the Department of Correctional Services is directory not mandatory (see, Matter of Proctor v Coombe, 234 AD2d 749, [3rd Dept., 1996]; Matter of Konigsberg v Selsky, 255 AD2d 702, 702-703 [3rd

Dept., 1998]; Matter of Byas v Goord, 272 AD2d 800, lv denied 95 NY2d 765; Matter of Taylor v Coughlin, 135 AD2d 992), and where no substantial prejudice has been shown, the delay does not warrant annulment (see, id.; Matter of Edmonds v Coombe, 239 AD2d 798 [3rd Dept., 1997]; Matter of Chappelle v Coombe, 234 AD2d 779, 780 [Third Dept., 1996]). Petitioner has failed to demonstrate how or in what manner he has suffered specific and substantial harm by reason of the brief delay.

Petitioner next argues that the search of his property was improperly conducted by reason that he was denied the right to observe the search. Directive 4910, paragraph V (c) (1) recites as follows:

> General Confinement. The search of a general confinement housing unit may be conducted with or without the inmate being present. If the inmate is removed from quarters prior to the search, he or she shall be placed outside the immediate area to be searched but allowed to observe the search. However, if, in the opinion of a supervisory security staff member, the inmate presents a danger to the safety and security of the facility, the inmate shall be removed from the area and not allowed to observe the search.

While it is true that Directive 4910, paragraph V (c) (1) requires an inmate to be present during a search of his or her housing unit, this was not a search of his housing unit, nor was he removed from the housing unit for the purpose of conducting a search. Rather, the search occurred during petitioner's transfer to a different cell. The Court discerns no violation of the Directive (see Matter of Alston v Goord, 4 AD3d 708 [3rd Dept., 2004]; Matter of Perkins v Goord, 290 AD2d 700 [3rd Dept., 2002]).

The failure of all corrections officers who witnessed the property search to sign the misbehavior report has been held to be only a technical violation of the regulation from which no prejudice flows (Matter of Serra v Selsky, 223 AD2d 845 [3rd Dept., 1996]; Matter of Smith v Walker, 209 AD2d 799, lv denied, 85 NY2d 807; Matter of Smith v Coughlin, 170 AD2d 845). As stated in Matter of Hernandez v Goord (268 AD2d 727 [3rd Dept., 2000]), "there is no regulation prohibiting the consideration of multiple misbehavior reports in the context of a single disciplinary hearing" (id., at 727; see also, Matter of Carlton v Selsky, 270 AD2d 547 [3rd Dept., 2000]).

With respect to the sufficiency of the misbehavior reports, petitioner alleges that they are vague in that there is no mention of whether the searches were random, based on suspicion, or based on confidential information. He asserts that the reports do not mention whether he was present at the time of the search or how petitioner's property arrived at that particular location. "The measure of a misbehavior report's sufficiency is whether it provides inmates with enough particulars of the charge against them to enable them to make an effective response" (Matter of Faison v Senkowski, 255 AD2d 625 [3rd Dept., 1998] at 626, citing Matter of Abdur-Raheem v Mann, 85 NY2d 113, 123; Matter of Alvarez v Coombe, 239 AD2d 810). The Court finds that the misbehavior reports were sufficient in that they satisfied the requirements of 7 NYCRR § 251-3.1 (c).

In his reply affidavit the petitioner argued that the record submitted by the respondent was incomplete in that it omitted the testimony of Corrections Officer Surber. By order dated

November 16, 2006 the Court directed the respondent to file and serve the testimony of Officer Surber. On December 13, 2006 respondent submitted a second transcript of the hearing, which included the testimony of Officer Surber. The Court notes petitioner's objections to consideration of the new transcript and finds them to be without merit. To the extent that petitioner argues that the transcript of the hearing is incomplete, the Court finds that the alleged deficiencies in the transcript do not preclude meaningful review of the determination (see Matter of Locke v Senkowski, 254 AD2d 553).

Lastly, the petitioner maintains that the Tier II charge (a violation of Rule 113.11) should not have been included in the same hearing with the Tier III charges. As respondent points out however, and as previously noted, the charge involving a violation of Rule 113.11 was dismissed on administrative appeal. The Court finds the argument to have no merit.

The Court has reviewed petitioner's remaining arguments and finds them to be without merit.

The Court finds the determination was not irrational, in violation of lawful procedure, affected by an error of law, irrational or arbitrary and capricious. The petition must therefore be dismissed.

Accordingly, it is

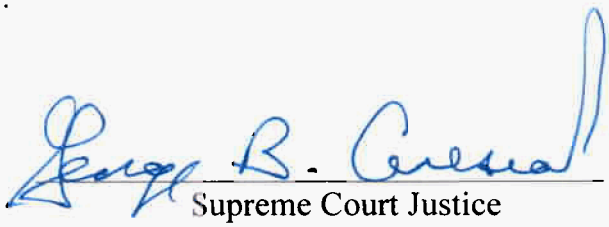
ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondent who is directed to enter this

Decision/Order/Judgment without notice and to serve petitioner with a copy of this Decision/Order with notice of entry.

ENTER

Dated: March 8, 2007
Troy, New York



Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated May 18, 2006, Petition, Supporting Papers and Exhibits
2. Answer dated August 16, 2006
3. Affirmation of Megan M. Brown, Esq., dated August 16, 2006
4. Reply Affidavit of Jack Maddaloni, verified August 28, 2006
5. Respondent's Transcript certified December 11, 2005
6. Petitioner's Letter dated December 18, 2006