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

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In the Matter of the Application of
MICHAEL KIRSHTEIN, #96-A-7220,
Petitioner,

For a Judgment Pursuant to Article 78
Of the Civil Practice Laws and Rules

-against-

DECISION AND JUDGMENT
RJI #09-1-2007-0219.020
INDEX # 07-0483
ORI #NY009013J

BRIAN S. FISCHER, Acting Commissioner,
NYS Department of Correctional Services,
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 Michael Kirshtein, verified on April 3, 2007, and stamped as filed in the Clinton County Clerk's office on April 9, 2007. Petitioner, who is now an inmate at the Attica Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Clinton Correctional Facility Annex on December 15, 2006. The Court issued an Order to Show Cause on April 20, 2007. The Court next received and reviewed respondent's Answer and Return, verified on June 1, 2007, as well as respondent's Letter Memorandum of June 1, 2007. The petitioner then filed an amended petition in the Clinton County Clerk's office on June 7, 2007. The petitioner also filed his Reply to the respondent's original answering papers on June 19, 2007. By Letter Order dated August 6, 2007, the Court directed the respondents to serve and mail answering papers in response to the amended petition. The Court has since received and reviewed respondent's "ANSWER AND RETURN TO AMENDED PETITION," verified on August 24, 2007, as well as respondent's Letter Memorandum of August 24, 2007. The Court has also received and reviewed petitioner's Reply thereto, mailed directly to chambers and received on September 6, 2007.

As the result of an incident that occurred at the Clinton Correctional Facility Annex on December 11, 2006, the petitioner was issued an inmate misbehavior report charging him with a violation of inmate rule 113.24 (inmate shall not use or be under influence of any narcotics or controlled substances unless prescribed by a health service provider and then only in the amount prescribed). It is alleged in the inmate misbehavior report that two urinalysis tests performed on a sample provided by the petitioner proved positive for opiates. A Tier III Superintendent's Hearing was held at the Clinton Correctional Facility Annex on December 15, 2006. At the conclusion of the hearing the petitioner was found guilty as charged and a disposition was imposed confining him the special housing unit for six months, directing the loss of various privileges for a like period of time and recommending the loss of 12 months good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing of December 15, 2006, were affirmed. This proceeding ensued.

In the original petition it was asserted that "[t]he hearing officer's permitting of evidence regarding the urinalysis testing and the procedures used during testing violated petitioner's rights to have dispositions based on substantial evidence . . ." That assertion, however, is not included in the amended petition. Rather, *citing Woodward v. Governor's Office of Employee Relations*, 279 AD2d 725, the amended petition sets forth only one cause of action, in conclusory fashion, as follows: "The hearing officer conducting a tier 3 hearing was in violation of petitioner's due process rights where hearing officer is a Senior Correctional Counselor and ineligible to conduct tier 3 hearings pursuant to . . . 7 N.Y.C.R.R. Part 253.1 [should be 254.1] . . . [and] Civil Service Law §61 subdivision 2."

Once the amended petition was served it superceded the original petition and became the only petition in this proceeding. *See State University Construction Fund v. Aetna Casualty & Surety Company*, 169 AD2d 52 and *Schoenborn v. Kinderhill Corp.*, 98 AD2d 831. *See also O'Ferral v. City of New York*, 8 AD3d 457. Accordingly, the Court finds petitioner's originally-asserted substantial evidence cause of action to be no longer pending. Transfer to the Appellate Division, Third Department, pursuant to CPLR §7804(g), therefore, is not required.

7 NYCRR §254.1 provides, in relevant part, that "[t]he person appointed to conduct the superintendent's hearing shall be either the superintendent, a deputy superintendent, captain or commissioner's hearing officer employed by the department's central office, but the superintendent may, in his or her discretion, designate some other employee to conduct the proceeding." At the very outset of the Superintendent's Hearing at issue the hearing officer identified himself as Senior Counselor William Lopez and stated that he ". . . was designated to conduct this hearing by Superintendent Artus pursuant to New York State Code Rules Regulations Number 7, Section 254.1." The petitioner did not interpose any objection during the Superintendent's Hearing with regard to Senior Counselor Lopez's authority to conduct the hearing. In addition, the issue was not raised by the petitioner on administrative appeal. Accordingly, the Court finds that this issue is not preserved for review in this proceeding. *See James v. Goord*, 38 AD3d 1074, *Scott v. Goord*, 272 AD2d 704 and *Malik v. Coughlin*, 133 Misc2d 245.

In any event, even if the Court were to reach the merits of the single cause of action asserted in the amended petition, and even if the Court were to conclude that Counselor Lopez was performing work out of title when he presided over the Tier III Superintendent's Hearing, the Court would still find no basis to vacate the results and

disposition of that hearing. Civil Service Law §61(2) provides, in relevant part, that ". . . except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed . . . to such position . . ." In *Woodward v. Governor's Office of Employee Relations*, 279 AD2d 725, a grade 22 Senior Correction Counselor assigned to conduct Tier III Superintendent's Hearings filed an out-of-title work grievance seeking either the removal of his name from the list of individuals assigned to conduct such hearings or, the alternative, that he be properly compensated for performing the tasks of a grade 25 Hearing Officer. Although the Appellate Division, Third Department, ultimately upheld the Senior Correction Counselor's grievance, nothing in the *Woodward* decision even remotely suggests that the results and dispositions of any Tier III Superintendent's Hearing's already presided over by the Senior Correction Counselor were suspect. The only issue before the *Woodward* court was the proper level of compensation to be paid to the Senior Correction Counselor.

In the case at bar Hearing Officer, Lopez stated on the record that he had been designated by the superintendent to conduct the hearing pursuant to 7 NYCRR §254.1. There is no evidence to suggest otherwise. The Court would find, therefore, that the Tier III Superintendent's Hearing in the case at bar was properly presided over by Counselor Lopez.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ADJUDGED, that the petition is dismissed.

Dated: October 23 , 2007 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice