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

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In the Matter of the Application of
TIMOTHY HARNETT, #01-A-3567,
Petitioner,

for Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION AND JUDGMENT
RJI #16-1-2010-0270.57
INDEX # 2010-668
ORI #NY016015J

-against-

ALBERT PRACK, Acting Director, Special Housing Inmate Disciplinary Program, and **DAVID A. ROCK**, Superintendent, Upstate Correctional Facility,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Timothy Harnett, verified on May 4, 2010 and filed in the Franklin County Clerk's office on May 20, 2010. Petitioner, who is an inmate at the Upstate Correctional Facility, challenged the results of four separate inmate disciplinary proceedings conducted at the Upstate Correctional Facility on May 15, 2009, September 23, 2009, January 14, 2010 and February 25, 2010, respectively. The Court issued an Order to Show Cause on May 27, 2010 and an Amended Order to Show Cause on June 16, 2010. The Court received and reviewed respondents' Answer, verified on August 25, 2010. Certain exhibits referenced in the Answer (Exhibit F, *in camera* Exhibit J and Exhibit L), however, were not served/filed along with the Answer. The missing exhibits were subsequently provided to the Court and petitioner under counsel's cover letter of September 17, 2010. The Court also received and reviewed petitioner's Reply, filed in the Franklin County Clerk's office on September 29, 2010.

The respondents' Answer did not address petitioner's challenges on the merits. Rather, respondents asserted that petitioner raised the "substantial evidence" question (CPLR §7803(4)) as part of his challenge to the results of the Tier III Superintendent's Hearing of February 25, 2010 and that this proceeding should therefore be transferred to the Appellate Division, Third Department. According to the respondents, however, ". . . if the Court does not deem it appropriate to transfer this proceeding to the Appellate Division, the respondent respectfully request that he be given a reasonable period of time to submit a further written response on the merits." The respondents also asserted that petitioner failed to exhaust administrative remedies with respect to the May 15, 2009 and September 23, 2009 hearings.

By Decision and Order dated November 15, 2010 the Court found that petitioner had not raised "substantial evidence" question and, therefore, that there was no basis to direct this proceeding be transferred to the Appellate Division, Third Department. The Court did find, however, that petitioner had failed to exhaust administrative remedies with respect to the Tier II Disciplinary Hearing of May 15, 2009 and the Tier III Superintendent's Hearing of September 23, 2009. Accordingly, the Court severed and dismissed petitioner's challenges to the results of those two hearings and directed respondents to serve answering papers with respect to petitioner's challenges to the results of the Tier III Superintendent's Hearings of January 14, 2010 and February 25, 2010. In response thereto the Court has received and reviewed the Affirmation of C. Harris Dague, Esq., Assistant Attorney General, dated January 19, 2011 and submitted on behalf of the respondents. Under cover letter dated February 4, 2011 counsel for the respondents supplied chambers with a supplemental *in camera* exhibit consisting of a video disc associated with the Tier III Superintendent's Hearing of February 25, 2010.

The Court has also received and reviewed petitioner's Reply, filed in the Franklin County Clerk's office on February 7, 2011.

Tier III Superintendent's Hearing of January 14, 2010

As the result of an incident that occurred at the Upstate Correctional Facility on January 8, 2010 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 101.20 (lewd conduct), 106.10 (failure to obey a direct order), 107.10 (interference with employee) and 107.11 (harassment). The inmate misbehavior report, authored by a civilian teacher (Ms. Trinque), alleged in relevant part as follows: " . . .while making rounds on upper C gallery, I . . . was informed by Inmate Timothy Harnett . . . that he had books to return. When I opened the hatch, said inmate was observed with his penis in his hand intentionally masturbating. I told Inmate Harnett to stop, but he continued. I closed the hatch and continued with my rounds. I informed the C gallery officer of Inmate Harnett's behavior." A Tier III Superintendent's Hearing was conducted with respect to such charges on January 14, 2010. At the conclusion of the hearing petitioner was found guilty as charged and a disposition was imposed confining him to the special housing unit for 90 days, directing the loss of various privileges for a like period of time and recommending the loss of 90 days good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing on January 14, 2010 were affirmed.

Petitioner did not attend the January 14, 2010 Superintendent's Hearing. At the outset thereof C.O. Richards, the correction officer charged with the responsibility of bringing petitioner from his cell to the hearing room, testified on the record, in relevant part, as follows: " . . . I went to inmate Harnett's cell; I asked him if he wanted to go to his tier 3 hearing. He stated yes, and that he wanted to be handcuffed to the front with a waist chain. I explained to inmate Harnett that this is not the procedure for a level one

inmate at Upstate that they must be handcuffed behind the back. He continued to argue with me, I explain [sic] to him that if he did not want to fallow [sic] the procedure it would be the same as a refusal. I then asked him if he had any witnesses or any oral or written documentation he wanted me to present on his behalf and he said no." When asked by the presiding hearing officer if petitioner had been informed that the hearing would be conducted in his absence, C.O. Richards responded in the affirmative.

The petition before the Court raises no issue with respect to the fact that the Tier III Superintendent's Hearing of January 14, 2010 was conducted in the absence of petitioner. Instead, petitioner advances a variety of arguments related to the procedures associated with the hearing. More specifically, petitioner purports to challenge the authority of the presiding hearing officer to conduct the hearing, the failure of certain DOCS staff to file a separate inmate misbehavior report or to endorse the inmate misbehavior report authored by Ms. Trinque, the denial of witnesses, the failure to include the video of the underlying incident as part of the electronic record of the hearing, the failure of the hearing officer to review an additional video and the failure of the hearing officer to provide a legally sufficient statement of evidence relied upon. This Court finds, however, that petitioner's unchallenged refusal to appeal at the hearing constituted a waiver of his right to challenge any alleged procedural irregularities. *See Raqiyb v. Fischer*, 82 AD3d 1432, *McFadden v. Dubray*, 61 AD3d 1170 and *Al Jihad v. Mann*, 159 AD2d 914, *lv den* 76 NY2d 706. Accordingly, this Court finds no basis to disturb the results and disposition of the Tier III Superintendent's Hearing of January 14, 2010.

Tier III Superintendent's Hearing of February 25, 2010

As a result of an incident that occurred at the Upstate Correctional Facility on February 18, 2010 petitioner was issued an inmate misbehavior report charging him with

a violation of inmate rule 101.20 (lewd conduct). The inmate misbehavior report, authored by C.O. Marshall, alleged, in relevant part, as follows: " . . . I CO D. Marshall was picking up breakfast trays in 10 Bldg on C gallery. When I opened the hatch on 12 cell Inmate Harnett gave me his trays and stood by the hatch and was masturbating. I closed the hatch and told Inmate Harnett he was getting written-up. Area Sgt. Notified." A Tier III Superintendent's Hearing with respect to this charge was conducted on February 25, 2010. At the conclusion of the hearing petitioner was found guilty and a disposition was imposed confining him to the special housing unit for 4 months, directing the loss of various privileges for a like period time and recommending the loss of 4 months good time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing of February 25, 2010 were affirmed.

Citing 7 NYCRR §251-3.1(b), petitioner first asserts that the area sergeant, referred to in the inmate misbehavior report, " . . . failed to make a separate [inmate misbehavior] report or endorse his or her name on the report [authored by C.O. Marshall] . . ." The regulation in question, however, only requires a separate report or endorsement to the existing report where the additional DOCS employee has "personal knowledge" of the facts giving rise to the issuance of the initial inmate misbehavior report. In the case at bar, however, there is nothing in the record to suggest that the area sergeant observed the petitioner's offending conduct. Rather, it appears that his/her only knowledge of the underlying incident came second-hand, when the author of the inmate misbehavior report reported the incident. Accordingly, the Court finds that the area sergeant did not have "personal knowledge" of the facts of the incident underlying the issuance of the inmate misbehavior report of C.O. Marshall. Accordingly, nothing in 7 NYCRR §251-3.1(b) required the area sergeant to make a separate inmate misbehavior report or endorse the report authored by C.O. Marshall.

Petitioner next asserts that although the hearing officer presiding at the Tier III Superintendent's Hearing of February 25, 2010 " . . . reviewed a security video tape of the alleged incident recited in the misbehavior report . . . [he] failed to review the other security video tape of when the area sergeant was notified of the alleged incident . . ." When petitioner meet with his employee assistant in anticipation of the February 25, 2010 hearing he submitted a written request for "[a]ll video tapes of incident." The employee assistant form was checked to reflect petitioner's video request. At the outset of the hearing the presiding hearing officer noted that petitioner had " . . . requested a video which we have here which we will view." After petitioner declined to make a statement in response to the inmate misbehavior report the video in question was viewed. Although the hearing officer did not described for the record what he and petitioner observed when the tape was viewed, the video provided to the Court, approximately four minutes in length, showed a female correction officer, presumably C.O. Marshall, opening the hatches to several cells, one of which presumably housed petitioner. While some indistinct background noise was audible, no specific conversation could be discerned and the video provided no insight as to what C.O. Marshall observed inside any cell. After the video had been viewed the hearing officer asked petitioner " . . . other than the video, do you have any other evidence you want to present in the form of any documents or witnesses?" The petitioner replied that he wanted to call witnesses and the discussion went off in that direction. There was no further mention of the security video that had been viewed, or any security video that had not been viewed, during the remainder of the hearing.

The petitioner had clear, but limited, due process and regulatory rights to present relevant documentary evidence in his defense at the Tier III Superintendent's Hearing. *See Wolff v. McDonnell*, 418 US 539, 566 and 7 NYCRR §254.6 (a)(3). In the case at bar,

however, there is nothing in the record to suggest that petitioner sought the introduction into evidence of any security videotape other than the tape, apparently depicting the incident in question, that was viewed during the hearing. Ignoring any potential relevancy issue, the Court finds that petitioner's general written request for " [a]ll video tapes of incident" did not constitute a clear request for the submission of a tangential security video showing C.O. Marshall's interaction with the area sergeant after the incident underlying the issuance of the misbehavior report had occurred. In this regard it is noted that petitioner interposed no objection when the hearing officer moved on to other issues after viewing the security videotape of the incident underlying the issuance of the misbehavior report.

The next issue raised by petitioner in connection with the Tier III Superintendent's Hearing of February 25, 2010 relates to the testimony purported to be that of C.O. Marshall. On the relevant portion of page fourteen of the petition it is alleged that when testimony by speaker phone from C.O. Marshall was elicited the hearing officer conspired to allow a different DOCS employee to testify, pretending to be the otherwise unavailable C.O. Marshall. According to petitioner, "[a]s the alleged witness gave testimony I said: 'I know [C.O. Marshall's] voice and that's not her.' I was then arbitrarily removed from the hearing. While I was in my cell location I obtained a witness interview notice form 2176, and two hearing disposition papers. Hearing Officer Bullis had tried to conceal his conspiracy and arbitrary acts towards me by lying on his written witness interview notice form 2176. He had indicated D. Marshall testimony was taken in the presence of me and I was removed from the hearing during D. Marshall testimony. This act by hearing officer Bullis was an infringement of my rights administered under state statute Directive #4932, section 250.2(e), which states: disciplinary action 'must' never be arbitrary or capricious, or administered for the purpose of retaliation or revenge.' " (Emphasis in original).

A review of the transcript of the hearing reveals a certain level of tension between the hearing officer and petitioner, with the hearing officer warning petitioner at one point that if he continued interrupting " . . . the hearing will continue, but it will continue without you." Later, after the individual purporting to be C.O. Marshall started to testify by speaker phone as to what she observed inside petitioner's cell, the following colloquy occurred:

"Harnett:	I want to make an objection.
Bullis [Hearing Officer]:	Okay, I'm not, no you listen to me, I going [sic] to advise you . . .(Inaudible - both talking at the same time)
Bullis:	I'm not going to have any argument . . . (inaudible - both talking at the same time)
Harnett:	I'm making an objection now, that's not her.
Bullis:	Your objection is noted. Now I'm going . . . (inaudible - both talking at the same time)
Harnett:	You know that's not her, mother fucker.
Bullis:	. . . Get this inmate out of here, (inaudible), inmate is being removed from the hearing room now for acting in a threatening manner toward the hearing officer. Hearing will continue in his absence . . ."

Neither an inmate's due process nor regulatory rights are ordinarily violated by the receipt of testimony via speaker phone at a prison disciplinary proceeding. *See Davis v. Prack,* 58 AD3d 977 and *Chavis v. Goord*, 45 Ad3d 1063. Petitioner's bald assertion that the individual who identified herself as C.O. Marshall and testified via speaker phone at the Tier III Superintendent's Hearing of February 25, 2010 was not, in fact, C.O. Marshall, was insufficient, in and of itself, to overcome the presumption of honesty and integrity

that attaches to administrative hearing officers. *See Donlon v. Mills,* 260 AD2d 971 and *People ex rel Johnson v. New York State Board of Parole*, 180 AD2d 914. Although petitioner may have been afforded an opportunity to develop his theory that the individual providing testimony via speaker phone was not the C.O. Marshall through cross-examination of the witness, his opportunity to do so was he effectively waived by his removal from the hearing at the outset of the testimony in question. The Court finds, moreover, that petitioner's persistent interruptions, despite warnings to cease such conduct, coupled with the vulgar language directed at the hearing officer served as sufficient basis for his removal from the hearing. *See Chavis v. Goord*, 45 AD3d 1235 and *Green v. Goord*, 32 AD3d 1076.

In the "WITNESS INTERVIEW NOTICE" form, apparently provided to petitioner along with the written disposition on February 25, 2010, the hearing officer explained the taking of testimony from C.O. Marshall outside the presence of petitioner as follows: "The majority of the testimony was taken in the presence of Inmate Harnett who was removed from the hearing during her testimony due to his violently threatening behavior towards this CHO [Commissioner's Hearing Officer]." To the extent petitioner suggests that this statement is indicative of deceitfulness on the part of the hearing officer, since C.O. Marshall's initial testimony was received via speaker phone rather than in the presence of petitioner, this Court finds that testimony received by speaker phone constitutes testimony "in the presence of the inmate" within the meaning of 7 NYCRR §254.5(b). That regulation provides as follows:

> "Any witness shall be allowed to testify at the hearing in the presence of the inmate unless the hearing officer determines that doing so will jeopardize institutional safety or correctional goals. Where an inmate is not permitted to have a witness present, such witness maybe interview out of the presence of the inmate and such interview tape recorded. The recording of the witness' statement is to be made available to the inmate at the hearing

> unless the hearing officer determines that so doing would jeopardize institutional safety or correctional goals."

The clear import of the regulation is that where, as in the case at bar, the witness testifies from a remote location via some form of electronic device, but the inmate is present to hear such testimony in real time, interpose objections and pose his own questions to the witness, such testimony must be considered as having been taken in the presence of the inmate. Accordingly, the Court finds nothing erroneous, much less deceitful, in the hearing officer's statement that the speaker phone testimony of C.O. Marshall was initially taken in the presence of petitioner.

Finally, the Court perceives no constitutional and/or regulatory violation in the hearing officer's mention of petitioner's prison disciplinary record of lewd conduct and criminal conviction of a sex offense as factors in determining the level of dispositional penalties imposed following the Tier III Superintendent's Hearing. *See Feliciano v. Goord*, 255 AD2d 843.

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: May 18, 2011 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice