STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of FRANK J. POVOSKI, JR.,

Petitioner,

-against-

BRIAN FISCHER,

Respondents,

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 # 01-11-ST2819 Index No. 3599-11

Appearances: Frank J. Povoski, Jr.
Inmate No. 05-B-2531
Petitioner, Pro Se
Clinton Correctional Facility
1156 Route 374
P.O. Box 2001,
Dannemora, NY 12929

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Attorney General
State of New York
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The Capitol
Albany, New York 12224
(Cathy Y. Sheehan,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Clinton Correctional Facility, commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated November 25, 2010 in which he was found guilty of violating prison rules. Specifically, he was found

guilty of violating Rule 108.13, possession of escape paraphernalia. Of particular relevance here, the Hearing Officer imposed a penalty which included a twenty-four month term in the special housing unit (SHU), commencing on November 24, 2010.

The petitioner alleges that the Hearing Officer erred in finding him guilty by reason that the petitioner never received a copy of the rule book prohibiting such conduct. He also maintains that the misbehavior report charging him with possession of escape paraphernalia was inadequate to provide notice of the charge; that he was denied adequate employee assistance; that the Hearing Officer relied upon evidence expunged from his inmate record; that his right to call witnesses was denied; that the search of his cell was unlawful; that he was not allowed to review confidential testimony taken out of his presence; that major portions of the hearing tape recording are inaudible; that his due process rights were violated; that the Hearing Officer was biased; that the Hearing Officer failed to consider his mental condition; that the Hearing Officer prevented him from presenting documentary evidence; that the Hearing Officer failed to "make a bona fide evaluation of the evidence"; and that the testimony of witness Goodie was not recorded.

Motion For A Stay of Penalties

The petitioner has made a motion for a stay of the penalty on grounds that he will suffer irreparable injury. He argues that if he continues to be confined in SHU, he will be unable to complete mandatory programming, which is essential to obtain an earned eligibility certificate to assure release on parole (see Correction Law § 805). He argues that continued confinement in SHU results in loss of family visits, loss of career opportunities, loss of

wages, potential loss of his home, and the risk that his elderly mother will die before his release. Continued confinement in SHU, he argues, carries with it poor food, poor health care and infringement of his liberty interest. He argues that the equities clearly balance in his favor because the respondent will suffer no hardship if his application is granted. He argues that his release from SHU will benefit the respondent, inasmuch as confinement in SHU is more costly than confinement in the general prison population.

In a letter dated August 25, 2011, the respondent indicates that the petitioner failed to serve a copy of his motion for a stay upon the respondent; and that it only became aware of the motion as a result of the Court's August 16, 2011 order in which the Court directed the respondent to serve a response to the motion. With respect to the relief requested in the petition, the respondent concedes that the hearing tape did not record the entire hearing and requests that the Court order a re-hearing. The respondent argues that the petitioner should continue to be housed in SHU pending the re-hearing, pursuant to Rule 301.3 of the Rules of the Department of Correctional Services (see 7 NYCRR 301.3).[1]

The Court is of the view that an application for a stay of penalties is governed by the same standard applicable to a motion for a preliminary injunction. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's

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[1]Rule 301.3 of the Rules of the Department of Correctional Services, entitled "Detention admissions" recites as follows: "(a) Detention admissions may be used in the following cases: (1) in the case of an inmate who is awaiting initial appearance before or determination of a disciplinary hearing or superintendent's hearing []" (see 7 NYCRR 301.3).

favor (Nobu Next Door, LLC v Fine Arts Hous., Inc., 4 NY3d 839, 840 [2005]; Emerald Green Property Owners Association, Inc. v Jada Developers, LLC, 63 AD3d 1396, 1397 [3rd Dept., 2009]; SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., 63 AD3d 1429, 1430-1431 [3rd Dept., 2009]; Green Harbour Homeowners' Association, Inc. v Ermiger, 67 AD3d 1116, 1117 [3rd Dept., 2009]). It is a drastic remedy, which should be used sparingly (Clark v Cuomo, 103 AD2d 244, 246 [3rd Dept., 1984]; Welcher v Sobol, 222 AD2d 1001, 1002 [3rd Dept., 1995]). The party seeking the preliminary injunction has the burden of proof of demonstrating his or her entitlement to such relief (see SYNC Realty Group, Inc. v Rotterdam Ventures, Inc., supra; Schulz v State, 217 AD2d 393 [3rd Dept., 1995]; Aetna Ins. Co. v Capasso, 75 NY2d 860).

The Court finds that the petitioner has not demonstrated the likelihood of success on the merits or that the equities balance in his favor. Petitioner's claims concerning the prospect of irreparable injury are speculative and conjectural. The Court finds that the motion for a stay of penalties must be denied.

Defendant's Motion For A Default Judgment

Prior to the return date of the original order to show cause, the petitioner requested an extension of time to serve the respondent. As a result, on August 1, 2011 the Court issued an amended order to show cause making the proceeding returnable on October 7, 2011. Because the respondent has failed to either make a motion or serve an answer to the petition, the petitioner has made a motion for judgment pursuant to CPLR 3215. The Court notes that CPLR 7804 (e) provides in pertinent part:

> (e) Answering affidavits; record to be filed; default. The body or officer shall file with the answer a certified transcript of the record of the proceedings under consideration, unless such a transcript has already been filed with the clerk of the court. The respondent shall also serve and submit with the answer affidavits or other written proof showing such evidentiary facts as shall entitle him to a t rial of any issue of fact. *The court may order the body or officer to supply any defect or omission in the answer, transcript, or an answering affidavit.* Statements made in the answer, transcript or an answering affidavit are not conclusive upon the petitioner. *Should the body or officer fail either to file and serve an answer or to move to dismiss, the court may either issue a judgment in favor of the petitioner or order that an answer be submitted* (emphasis supplied).

The Court has reviewed the relevant law with respect to the application of CPLR §7804 (e). Professor Vincent C. Alexander in his commentary on this section has stated:

> "Provision is made in the last sentence of CPLR 7804 (e) for entry of a default judgment against the respondent for failure to serve an answer. Such entry is not mandatory, however, and courts are likely to exercise their discretion to permit service of an untimely pleading." (Alexander, McKinney's Consolidated Laws, Practice Commentary C7804:6, Main Volume, p. 656.).

Elsewhere it has been stated:

> "As would be expected, however, the sanction of default is not favored, and the court will generally either direct that an answer be served or issue an order directing that a default judgment will be entered unless the answer and a complete record is filed." (8 Weinstein-Korn-Miller, New York Civil Practice, Para. 7804.05).

Under the circumstances, the Court finds that the respondent should be directed to serve and file an answer (or make an appropriate motion) with regard to petitioner's amended order to show cause dated August 1, 2011.

Accordingly it is

ORDERED, that petitioner's motion for a stay of penalties is denied; and it is

ORDERED, that petitioner's motion for a default judgment is denied; and it is

ORDERED, that respondent be and hereby is directed to serve and file an answer, or make an appropriate motion, within twenty (20) days of the date hereof; and it is further

ORDERED, that respondent re-notice the proceeding in conformity with CPLR 7804 (f); and it is further

ORDERED, that the proceeding be referred to the undersigned for disposition.

This shall constitute the decision, order and judgment of the Court. All papers will be retained by the Court until final disposition of the proceeding.

ENTER

Dated: November 16, 2011
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated June 9, 2011, Amended Order To Show Cause dated August 1, 2011, Petition, Supporting Papers and Exhibits
2. Respondent's Letter Dated August 25, 2011, Supporting Papers and Exhibits
3. Notice of Motion For A Stay dated May 16, 2011, Supporting Papers and Exhibits
4. Letter Dated August 25, 2011 From Assistant Attorney General Cathy Y. Sheehan
5. Letter Dated September15, 2011 From Assistant Attorney General Cathy Y. Sheehan
6. Petitioner's Affidavit In Opposition Of Request For re-Hearing, Dated August 8, 2011, and Exhibits
7. Notice of Motion For A Default Judgment dated October 3, 2011, Supporting Papers and Exhibits