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

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In the Matter of the Application of
JESSIE J. BARNES, #09-B-2707,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2011-0511.98
INDEX # 2011-1167
ORI #NY016015J

-against-

ALBERT PRACK, DOCCS Director of
Special Housing Units, and **DONALD UHLER**,
Deputy 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 Jessie J. Barnes, verified on November 29, 2011 and filed in the Franklin County Clerk's office on December 1, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility on September 27, 2011. The Court issued an Order to Show Cause on December 6, 2011 and has received and reviewed respondents' Answer, verified on January 27, 2012 as well as petitioner's "Reply Letter" dated February 13, 2012 and received directly in chambers on February 16, 2012.

As the result of an incident that occurred at the Upstate Correctional Facility on September 15, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 102.10 (threats), 104.11 (violent conduct), 107.10 (verbal interference with employee), 107.11 (harassment) and 106.10 (failure to obey direct order). This inmate misbehavior report, authored by C. O. Ramsdell, alleged that legal mail was to be delivered to petitioner in his cell along with a sign-up sheet so that

petitioner could sign for receipt of such mail. According to the inmate misbehavior report, however, "Inmate Barnes took the [sign-up] sheet and began screaming threats at me stating 'Ramsdell you is a fucking pussy, I get out in six months. I'm going to look up your address, then I'm going to come in your house and murder your wife, then I'm gonna murder you, you fucking faggot ass pussy.' I ordered him to sign the sheet and return it to me. He stated, 'fuck you, you fuckin pussy I'll give it back when I'm ready.' Eventually inmate Barnes returned the sign up sheet and was given his mail."

As a result of an incident that occurred at the Upstate Correctional Facility on September 16, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 107.20 (inmate shall not lie or provide incomplete, misleading or false statement or information) and 107.10 (verbal obstruction or interference with employee). This inmate misbehavior report, authored by Nurse Fairchild, alleged, in relevant part, as follows: " . . . [A]fter not being at the cell door with his light on for nursing sick call, Barnes . . . demanded emergency sick call for pain of his amputated finger when holding his finger down. Barnes is well aware that emergency sick call is for life threatening situations only. Barnes interrupted my morning medication run and nursing sick call by claiming an emergency and then by shouting loudly on the gallery that he was going to write me up and that I am a stupid white cracker bitch."

A Tier III Superintendent's Hearing with respect to the charges set forth in both inmate misbehavior reports was held at the Upstate Correctional Facility on September 27, 2011. At the conclusion of the hearing petitioner was found not guilty of the charges set forth in the inmate misbehavior report authored by Nurse Fairchild but guilty of the four charges set forth in the inmate misbehavior report authored by C.O. Ramsdell. A disposition was imposed placing petitioner on a restricted diet for 14 days in accordance with the provisions set forth in 7 NYCRR §304.2. Upon administrative

appeal the results and disposition of the Tier III Superintendent's Hearing of September 27, 2011 were affirmed. This proceeding ensued.

The petitioner argues that his due process rights were violated when the hearing officer presiding at the Tier III Superintendent's Hearing of September 27, 2011 conducted such hearing in his absence. "An inmate has a fundamental right to be present at a Superintendent's hearing 'unless he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals'(7 NYCRR 254.6(a)(2))." *Holmes v. Drown*, 23 AD3d 793, 794 (citations omitted). "Unless an inmate knowingly, voluntarily and intelligently relinquishes his right to attend the [Tier III] hearing or his presence would jeopardize institutional safety or correctional goals, he must be present." *Sanders v. Coughlin*, 168 AD2d 719, 721, *lv den* 77 NY2d 806 (citations omitted) (emphasis added). In reviewing the hearing officer's determination to exclude an inmate from a Tier III Superintendent's Hearing the Court should bear in mind the following:

> "Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others . . .or for the rules designed to provide an orderly and reasonably safe prison life . . .[T]he inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment and despair are commonplace . . .[T]he reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involves confrontations between inmates and authority . . .[T]he basic and unavoidable task of providing reasonable personal safety for guards and inmates maybe at stake . . ." *Wolff v. McDonnell*, 418 U.S. 539 at 561-562.

At the outset of the September 27, 2011 hearing the hearing officer placed the following on the record:

> " . . . [I]t is approximately 1:16 PM. My name is Dep Uhler; I will be conducting a tier three hearing on Inmate Barnes . . .I had two hearings to do on inmate Barnes today, they were two separate incidents. I got inmate Barnes out for the first hearing, um, he started on the company um, being argumentative towards staff. Sergeant Yaddow told him to quiet down in which he did comply to some degree. He came into my hearing room with clenched fists and threatening gestures towards myself and making a statement on tape at the previous hearing that I always tell officers to assault him and grab him on the company. Um, he continued to ramble on, even after I told him to stop. Um, but it was really based on his body gesture that it was clearly of assaultive type manner. Also, inmate Barnes has seriously assaulted staff on three occasions in the past six months. So, with that being said it is clearly unpredictable hearing patterns that he has exhibited I have had him removed from the hearing. I will conduct this hearing in his absence."

Although the record herein does not contain a transcript of the earlier hearing referenced by the hearing officer at the outset of the superintendent's hearing that is the subject of this proceeding, the petitioner does not take issue with the accuracy of the hearing officer's above-quoted statements with regard to the prior hearing nor does he suggest that his removal from the prior hearing was challenged in any forum. Referencing, *inter alia*, *Berrian v. Selsky*, 306 AD2d 771, *app dis* 100 NY2d 631, *cert denied* 543 U.S. 841, petitioner instead asserts that even though an inmate's disruptive behavior resulted in his "justifiable exclusion" from a prior hearing, such behavior cannot, in and of itself, justify the inmate's exclusion from a subsequent, unrelated hearing. Although the Appellate Division, Third Department, concluded that the *Berrian* petitioner's disruptive conduct just prior to a Tier III Superintendent's Hearing supported the determination that such behavior was a threat to institutional safety and correction goals and, thus, justified Mr. Berrian's exclusion from that hearing, a different conclusion was reached with respect to the continuation of an unrelated Tier II Disciplinary Hearing approximately one hour later. According to the *Berrian* court, "[n]o evidence exists that petitioner was aware that his conduct immediately preceding his Tier III hearing would

result of his exclusion from a subsequent hearing on an unrelated charge in front of a different hearing officer; thus it cannot be said that petitioner knowingly waived his right to be present at that [Tier II] hearing. Moreover, the correction officer who escorted petitioner back to his cell [after his exclusion from the Tier III hearing] reported no further trouble with petitioner. Nevertheless, no attempt was made to produce petitioner for the conclusion of his Tier II hearing despite the fact that, at that time, petitioner's conduct was not interfering with any proceeding in progress and no determination had been made on the record by the Hearing Officer that petitioner's absence was justified. *Id* at 772-773(citations omitted).

Approximately one year after issuing its decision in *Berrian*, the Appellate Division, Third Department, considered a somewhat similar set of circumstances in *Alexander v. Ricks*, 8 AD3d 942. Inmate Alexander was the subject of five separate Tier III Superintendent's Hearings pending before the same hearing officer at the same time. On March 23, 2001 Mr. Alexander was removed from one of the hearings "for persistent insolent and disruptive behavior after being warned several times as to the consequences of continuing such behavior." Mr. Alexander's conduct, however, did not directly result in him being excluded from participation in any of the other remaining hearings on that day. Three days later, on March 26, 2001, Mr. Alexander was "forcibly removed" from one of his remaining hearing and a "struggle ensued" as correction officers attempted to return petitioner to his cell. As a result of petitioner's "violent conduct" on March 26, 2001, as well as his "persistent insolent and disruptive behavior" at the hearing on March 23, 2001, " . . .the Hearing Officer ruled, at the beginning [continuation?] of the next hearing, that petitioner had forfeited his right to be present." *Id* at 943. Thereafter, all of the remaining hearings were continued and concluded in petitioner's absence.

Although specifically noting its contrasting decision in *Berrian*, the Third Department in *Alexander* found as follows: "The record supports the Hearing Officer's conclusion that barring petitioner from the remaining hearings was necessary in order to preserve 'institutional safety or correctional goals,' given the proximity in time between the violent outburst and the other hearings, the nature of the outburst itself, and petitioner's prior conduct on March 23, 2001. As such, under the particular circumstances of this case, we cannot say that the Hearing Officer abused his discretion in removing petitioner from the remaining hearings." *Id* at 944 (citations omitted).

In the case at bar the offending conduct of petitioner appears to fall somewhere in between the offending conduct noted by the Appellate Division, Third Department, in the contrasting decisions in *Berrian* and *Alexander*. Mr. Berrian's "continued yelling," which was described as "becoming louder and threatening," occurred in the waiting area outside the hearing room and had the effect of disrupting other hearings that were in progress. There is nothing in the *Berrian* decision, however, to suggest that any threatening language was directed at DOCCS staff. Mr. Alexander, on the other hand, was "forcibly removed" from the hearing room itself and a "struggle ensued" as correction officers attempted to return him to his cell. Thus, Mr. Alexander's "violent conduct" directly threatened the health and safety of DOCCS staff as well as the inmate himself. Although there is nothing in the record currently before this Court to suggest that Mr. Barnes' offending conduct at the earlier hearing degenerated into any actual physical confrontation with DOCCS staff, his "clenched fists and threatening gestures" were described by being directed towards the hearing officer himself and "clearly of assaultive type manner." Given the proximity in time between the threatening gestures observed at

the initial hearing and the commencement of the later hearing[1], the nature of such misconduct itself and petitioner's history of assaults on staff, as described by the hearing officer at the later hearing, this Court finds no basis to conclude that the hearing officer abused his discretion in conducting the later hearing in the absence of petitioner. *See Alexander v. Ricks*, 8 AD3d 942.

Finally, petitioner's assertions to the contrary notwithstanding, the Court finds no basis to conclude that the hearing officer was biased against him or that the determination of guilt flowed from any alleged bias. *See McGowan v. Fischer,* 88 AD3d 1038, *Gimenez v. Artus*, 63 AD3d 1461 and *Arnold v. Fischer*, 60 AD3d 1177.

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 2, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice

[1] Although an examination of the record herein does not reveal the precise amount of time that elapsed between the threatening gestures observed at the initial hearing and the 1:16 PM commencement of the hearing that is the subject of this proceeding, it is clear that the two hearings were conducted on the same day and the Court therefore concludes that the later hearing must have commenced no more than a few hours after the first ended.