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

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In the Matter of the Application of
LEONARD HINTON, #96-A-0837,
Petitioner,

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

DECISION AND JUDGMENT
RJI #16-1-2012-0353.80
INDEX # 2012-743
ORI #NY016015J

-against-

DAVID ROCK, Superintendent,
Upstate Correctional Facility,

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 Leonard Hinton, verified on August 14, 2012 and filed in the Franklin County Clerk's office on August 16, 2012. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier II Disciplinary Hearing held at the Upstate Correctional Facility and concluded on July 24, 2012.

The Court issued an Order to Show Cause on August 23, 2012 and received and reviewed respondent's original Answer, verified on November 5, 2012, as well as petitioner's original Reply thereto, dated November 23, 2012 and filed in the Franklin County Clerk's office on November 30, 2012. By Decision and Order dated January 9, 2013 the Court denied respondent's request for an order transferring this proceeding to the Appellate Division, Third Department and directed him to submit supplemental answering papers. The Court has since received and reviewed respondent's supplemental Answer, verified on February 4, 2013, supported by the Affirmation of Gregory J. Rodriguez, Esq., Assistant Attorney General, dated February 1, 2013. The Court has also

received and reviewed petitioner's supplemental Reply thereto, dated February 8, 2013 and filed in the Franklin County Clerk's office on February 15, 2013.

As a result of an incident that occurred at the Upstate Correctional Facility on July 10, 2012 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 107.10 (interference with employee), 101.20 (lewd conduct) and 106.10 (failure to obey direct order). The inmate misbehavior report, authored by Nurse Fairchild, alleged that during her medication run/nursing sick call petitioner purposely exposed himself and, in doing so, " . . . [h]e obstructed and interfered with my morning medication run and nursing sick call duties with his lewd behavior. He was verbally reprimanded and nursing sick call was terminated. Has been previously counseled on this behavior." A Tier II Disciplinary Hearing was commenced at the Upstate Correctional Facility on July 20, 2012. At the conclusion of the hearing, on July 24, 2012, petitioner was found guilty of all three charges and a disposition was imposed confining him to keeplock status for 30 days and denying various privileges for a like period of time. In addition, the hearing officer invoked a two-month special housing unit and loss of privileges penalty imposed but suspended upon disposition of an April 17, 2012 superintendent's hearing[1]. Upon administrative appeal the results and disposition of the Tier II Disciplinary Hearing concluded on July 24, 2012 were affirmed. This proceeding ensued.

The petitioner first argues that the inmate misbehavior report failed to adequately specify or allege that he had been given a direct order or that he had interfered with the author of the report. Petitioner also argues that he was denied the right to introduce

[1] The results and disposition of the Tier III Superintendent's Hearing concluded on April 17, 2012 were subsequently vacated by Decision and Judgment of this Court dated December 17, 2012 (Franklin County Index No. 2012-573).

documentary evidence in the forms of a July 9, 2012 security video and certain unspecified "documentary complaints and grievances." Finally, petitioner argues that an unknown correction officer escorting Nurse Fairchild on her rounds failed to endorse the inmate misbehavior report in violation of 7 NYCRR §251-3.1(b).

"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." *Faison v. Senkowski*, 255 AD2d 625, 626, *app dis* 93 NY2d 847 (citations omitted). *See Tinker v. Bezio*, 106 AD3d 1356, *Kimbrough v. Fischer*, 96 AD3d 1256 and *Nova v. Selsky*, 54 AD3d 453. Upon review of the entire record in the case at bar, this Court concludes that such standard was met. In this regard it is noted that the inmate misbehavior report included an allegation that petitioner's behavior interfered with Nurse Fairchild's morning medication run and sick call duties. The inmate misbehavior report also alleged that petitioner had " . . . been previously counseled on this behavior." In view of such allegations, the Court finds that petitioner was sufficiently apprised of the particulars of the charges against him so as to enable him to effectively respond by attempting to develop a defense that his alleged lewd behavior - even if established to the satisfaction of the hearing officer - did not interfere with Nurse Fairchild's duties and/or that the alleged previous counseling either did not take place or did not constitute a direct order to refrain from subsequent lewd behavior.[2]

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[2] Had petitioner argued in this proceeding that there was insufficient evidence in the hearing record to establish that he interfered with Nurse Fairchild's duties and/or that he was previously given a direct order to refrain from the kind behavior alleged in the inmate misbehavior report, this Court would have found that the substantial evidence issue had been raised and that transfer to the Appellate Division, Third Department, was therefore required. In its Decision and Order of January 9, 2013 the Court already determined that the arguments advanced in the petition constituted, in relevant part, "strictly procedural/due process challenges to the sufficiency of the inmate misbehavior report . . ." As was noted in the Decision and Order of January 9, 2013, moreover, petitioner affirmatively argued in his original Reply of November 23, 2012 that no substantial evidence issue was raised in his petition. Accordingly, in this Decision and Judgment petitioner's argument with respect to the adequacy of the inmate misbehavior report is addressed purely at the procedural/due process level.

At the superintendent's hearing concluded on June 24, 2012 petitioner took the position that he did not expose himself to Nurse Fairchild and that the issuance of the inmate misbehavior report was part of a pattern of harassment on the part of Nurse Fairchild in retaliation for his submission of letters of complaint/grievances against her. In paragraph 9(A) of the petition it is alleged " . . . that petitioner sought to present the 7-9-12 video (which he purchased), as evidence in his defense to show that the nurse called petitioner derogatory names and threatened petitioner. Petitioner also sought to present written documentary complaints and grievances on his behalf. The hearing officer out right denied petitioner to present this evidence, which is error. (7-9-12 video = [Exhibit] A) (2-3-12 letter = [Exhibit] B) (6-21-12 letter= [Exhibit] C) . . ." Copies of petitioner's February 3, 2012 and June 21, 2012 letters of complaint were annexed to his petition.

An inmate at a Tier III Superintendent's Hearing has a limited constitutional and regulatory right to submit relevant documentary evidence on his/her behalf provided institutional safety and correctional goals are not unduly jeopardized. *See Wolff McDonnell,* 418 US 539 at 566 and 7 NYCRR §254.6(a)(3). While testimony/documentary evidence relating to past grievances filed by an inmate against the correction officer who authored an inmate misbehavior report is plainly relevant to such inmate's retaliation defense (*see Washington v. Napoli*, 61 AD3d 1243, *lv denied* 13 NY3d 704 and *Perkins v. Goord*, 257 AD2d 821), a hearing officer presiding at a prison disciplinary proceeding may, in the exercise of his or her discretion, limit the volume of evidence submitted in connection with a retaliation defense in order to avoid an extended collateral hearing within the disciplinary hearing. *See Shapard v. Coombe*, 234 AD2d 744.

Before proceeding further, the Court finds it appropriate to note, for petitioner's benefit, that the term retaliation "defense" is something of a misnomer. The mere fact

that an inmate charged in an inmate misbehavior report can establish that he/she previously filed one or more grievances against the author of the report is not directly relevant to the issue of whether or not the inmate committed the acts alleged in the report. Where, however, the allegations set forth in an underlying misbehavior report are disputed by an inmate, through his/her own testimony and/or the testimony of witnesses, the alleged retaliatory motivation of the author of the report may be relevant as part of a collateral challenge to such author's credibility.

The Court ultimately finds, for the reasons set forth below, that the hearing officer at the Tier III Superintendent's Hearing concluded on July 24, 2012 afforded petitioner sufficient leeway to develop a retaliation defense. As far as the July 9, 2012 security video is concerned, the Court initially notes that such video is obviously not a video purporting to depict the July 10, 2012 incident underlying the issuance of the inmate misbehavior report. Rather, petitioner sought to introduce the July 9, 2012 video because it would allegedly show Nurse Fairchild making derogatory comments to petitioner, such as " . . . you need a bath. You stink real bad . . . [a]nd other, you know, demeaning and very unprofessional statements." According to petitioner's testimony, the July 9, 2012 security video would show that Nurse Fairchild has " . . . been retaliating . . ." The Court has little difficulty in concluding that the hearing officer did not err in declining to facilitate the introduction of the July 9, 2012 security video tape into evidence. Petitioner was permitted to testify as to his version of the events of July 10, 2012. In addition, petitioner was also permitted to testify, at least in a limited fashion, as to his version of the events of July 9, 2012. As alluded to previously, even if the hearing officer ultimately found that Nurse Fairchild directed certain derogatory language towards petitioner on July 9, 2012, such finding would not be directly relevant to the issue of whether or not petitioner exposed himself to Nurse Fairchild on July 10, 2012.

With respect to petitioner's letters of complaint dated February 3, 2012 and June 21, 2012, it appears from the record that he provided copies of such letters to the hearing officer and that the hearing officer was acquainted with the contents of such letters. As far as formal grievances are concerned, the hearing officer acknowledged the existence of such grievances.[3] It is also clear from the record that petitioner was permitted to testify, at least in a limited fashion, with respect to the nature of his complaints/grievances against Nurse Fairchild. In view of all these circumstances, the Court finds that the failure of the hearing officer to formally receive into evidence copies of the letters of complaints/grievances did not constitute reverseable error. *See Washington v. Napoli*, 73 AD3d 1300.

Turning to petitioner's third and final cause of action, the Court notes that 7 NYCRR §251-3.1(b) provides that "[t]he misbehavior report shall be made by the employee who has observed the incident or who has ascertained the facts of the incident. Where more than one employee has personal knowledge of the facts, each employee shall make a separate report or, where appropriate, each employee shall endorse his/her name on a report made by one of the employees." (Emphasis added). In the case at bar, however, there is nothing in the record to suggest that the correction officer accompanying Nurse Fairchild on her rounds personally observed petitioner's alleged lewd conduct. Rather, it would appear that his only potential knowledge of the underlying incident came second-hand, through the statements of the author of the inmate misbehavior report. Accordingly, the Court finds that the escort officer did not have

[3] The Court has serious concerns with respect to the hearing officer's off-the-record examination of petitioner's grievances against Nurse Fairchild. It would have been better practice for the hearing officer to have a representative of the Upstate Correctional Facility Grievance Office testify during the course of the superintendent's hearing and/or to actually receive the grievance record into evidence at the superintendent's hearing. Nevertheless, under the facts and circumstances of this case, the Court finds that any error on the part of the hearing officer was harmless.

"personal knowledge" of the facts of the incident underlying the issuance of the inmate misbehavior report. Accordingly, nothing in 7 NYCRR §251-3.1(b) required the escort officer to make a separate inmate misbehavior report or endorse the report authored by Nurse Fairchild.

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: June 25, 2013 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice