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

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In the Matter of the Application of
TYRELL WILLIAMS, #12-B-3800,
Petitioner,

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

-against-

DECISION AND JUDGMENT
RJI #16-1-2015-0053.13
INDEX # 2015-86
ORI #NY016015J

ANTHONY J. ANNUCCI, Commissioner,
NYS Department of Corrections and Community
Supervision,
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 Tyrell Williams, verified on January 21, 2015 and filed in the Franklin County Clerk's office on January 29, 2015. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at Upstate and concluded on July 10, 2014. The Court issued an Order to Show Cause on February 11, 2015 and has received an reviewed respondent's Answer and Return, including *in camera* materials, verified on April 8, 2015 and supported by the Letter Memorandum of Christopher J. Fleury, Esq., Assistant Attorney General, dated April 8, 2015. The Court has also received and reviewed petitioner's Reply thereto, verified on April 21, 2015 and filed in the Franklin County Clerk's office on April 29, 2015.

As the result of an incident that occurred at the Upstate Correctional Facility on June 11, 2014 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (refusing direct order), 109.12 (movement violation), 124.12 (improper use of mess hall utensil) and 124.16 (mess hall serving/seating

violation). The inmate misbehavior report, authored by C.O. Ashline, alleged, in relevant part, as follows:

> " . . . I was collecting feed-up trays on upper C-gallery. Inmate Williams . . . refused to hand back his tray. Inmate Williams was given a direct order to hand back tray and still refused. Area supervisor . . . gave the Inmate several direct orders to return feed-up tray and cup. Inmate Williams . . . returned the tray and cup after several direct orders were given . . . Inmate Williams was then ordered to move downstairs . . . and initially refused to move. After speaking with the clergy and CIU, Inmate Williams finally complied."

A Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on June 13, 2014. At the conclusion of the hearing, on July 10, 2014, petitioner was found guilty as charged and a disposition was imposed confining him to the special housing unit for two months, with one month suspended and deferred for three months. In addition, the petitioner was denied various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on July 10, 2014 were affirmed. This proceeding ensued.

At the initial session of the Tier III Superintendent's Hearing on June 13, 2014, after the charges were read into the record and not guilty pleas were taken, petitioner requested additional time to consult with his attorney. He also indicated to the hearing officer that on or about the time of the June 11, 2014 incident he was experiencing mental health issues in the form of auditory hallucinations. The hearing officer subsequently adjourned the hearing to allow for petitioner to speak to his attorney and also to " . . . schedule confidential mental health testimony with the Office of Mental Health staff." When the superintendent's hearing was reconvened on June 30, 2014 petitioner expressed his unwillingness to continue and stated to the hearing officer that he wanted

his lawyer and "mental health." Petitioner's request for an additional adjournment was granted.

When the hearing reconvened on July 10, 2014 petitioner advised the hearing officer that although he had not spoken to counsel he no longer needed to and was withdrawing his request. Petitioner also withdrew his previous request for witnesses. The hearing officer then advised petitioner that on June 27, 2014 confidential testimony was taken from OMH staff and petitioner was provided with written notice that such testimony was taken outside his presence and that he was not permitted to review the testimony. The following colloquy then occurred:

"Liberty [Hearing Officer]:	Is there anything else you would like to say with regards to this misbehavior report?
Williams:	No.
Liberty:	And would you like to request any other witnesses?
Williams:	No.
Liberty:	And would you like to present any documents or evidence?
Williams:	No.
Liberty:	There is a video in the hearing packet. Do you want to watch that video?
Williams:	No.
Liberty:	Okay. Then at this time I am going to adjourn the evidentiary portion of the hearing to review the evidence that I do have. I'll make a decision and come back

> on tape and read my disposition into the record."

In this proceeding petitioner first argues that the Tier III Superintendent's Hearing was concluded in an untimely fashion without notice of any extension request. In this regard it is noted that 7 NYCRR §251-5.1(b) provides, in relevant part, as follows: "The . . . superintendent's hearing must be completed within 14 days following the writing of the misbehavior report unless otherwise authorized by the commissioner or his designee. Where a delay is authorized, the record of the hearing should reflect the reasons for any delay or adjournment, and an inmate should ordinarily been made aware of these reasons unless to do so would jeopardize institutional safety or correctional goals." Since the underlying inmate misbehavior report was written on June 11, 2014, the above-quoted regulation would require completion of the hearing on or before June 25, 2014 in the absence of an extension. The record herein (respondent's Exhibit I) reflects that the hearing officer first requested an extension on June 23, 2014 to obtain testimony from OMH staff. That extension request was granted to allow completion of the Tier III Superintendent's Hearing on or before June 30, 2014. The record further reflects that on June 30, 2014 the hearing officer requested an additional extension to allow petitioner to consult with his attorney. That extension request was also granted authorizing the completion of the hearing on or before July 7, 2014. The record next reflects that the hearing officer requested a third extension on July 7, 2014, again citing petitioner's request to speak with his attorney. The third extension request was granted, authorizing completion of the hearing on or before July 15, 2014.

Given the above-referenced extensions, it is clear that petitioner's Tier III Superintendent's Hearing was timely completed on July 10, 2014.[1] The reasons for the first two extension requests are apparent from the transcripts of the June 13, 2014 and June 30, 2014 sessions of the superintendent's hearing. Since petitioner asserts in his Reply that he did not request any extension after June 30, 2014 and, therefore, that the reason cited by the hearing officer in connection with the July 7, 2014 extension request was "fabricated," the Court finds that such irregularity does not support a reversal of the results and disposition of the Tier III Superintendent's Hearing concluded on July 10, 2014. Since the regulatory time frames set forth in 7 NYCRR §251-5(1) are directory, rather than mandatory, non-compliance with such time frames does not warrant reversal in the absence of substantial prejudice. *See Haigler v. Fischer*, 113 AD3d 768, *lv denied* 23 NY3d 902, *DeLaCruz v. Bezio*, 107 AD3d 1275, and *Konigsberg v. Selsky*, 255 AD2d 702. *See also Davidson v. State of New York*, 66 AD3d 1089. Petitioner's conclusory, un-documented assertion of prejudice in the form of witnesses allegedly unable to recall the incident of June 11, 2014 is simply unsupported by the record.

Petitioner's next argument to the contrary notwithstanding, the Court finds that although two of the charges against petitioner (improper use of mess hall utensil and mess hall serving/seating violation) would not support a Tier III designation, the remaining two charges (refusing direct order and movement violation) are designated by regulation as reviewable at either the Tier II or Tier III level. For this reason the Court finds that

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[1] In addition to challenging the timeliness of the completion of the hearing pursuant to 7 NYCRR §251-5.1(b), petitioner also purports to challenge the timeliness of the commencement of the hearing pursuant to 7 NYCRR §251-5.1(a). The seven-day commencement requirement set forth in §251-5.1(a) is only applicable where the inmate is confined pending his/her superintendent's hearing. Where, as here, however, the inmate is already confined on other charges at the time the misbehavior report is issued, the superintendent's hearing does not have to be commenced within the seven-day time frame. *See Bermudez v. Fischer*, 107 AD3d 1269 and *Serrano v. Goord*, 28 AD3d 838.

charges set forth in the inmate misbehavior report of June 11, 2014 were properly heard at the Tier III level.

Finally, the Court is not persuaded that the hearing officer improperly failed to consider petitioner's mental health issues as constituting mitigating circumstances with respect to the findings of guilt/disposition at the conclusion of the superintendent's hearing. The hearing officer complied with the mandates of 7 NYCRR §254.6(c) and petitioner did not request additional testimony with respect to his mental health status from other witnesses to the underlying incident or from clinical staff.

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: July 10, 2015 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice