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 #16-1-2012-0093.26
INDEX # 2012-196
ORI #NY016015J

-against-

ALBERT PRACK, Director NYS
DOCCS Special Housing,

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 Jessie J. Barnes, verified on February 9, 2012 and filed in the Franklin County Clerk's office on March 6, 2012. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging the results of two Tier III Superintendent Hearings held at Upstate Correctional Facility and concluded on December 8, 2011 and December 15, 2011, respectively. The Court issued an Order to Show Cause on March 19, 2012 and has received and reviewed respondent's Answer, verified on June 8, 2012. No Reply thereto has been received from petitioner.

As the result of an incident that occurred at the Upstate Correctional Facility on November 21, 2011 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 106.10 (direct order), 124.12 (messhall procedures) and 107.10 (interference). The inmate misbehavior report, authored by C.O. Hyde, alleged in relevant part as follows: " . . . I was collecting feed up trays on lower C Gallery. When I got to C-8 cell, inmate Barnes . . .told me that he was not going to give me the styrofoam tray that

the restricted diet comes on. I told inmate Barnes to give me the tray. He still refused to comply. Console and area supervisor notified. Several minutes later the tray was recovered." A Tier III Superintendent's Hearing was commenced at the Upstate Correctional Facility on December 5, 2011. At the conclusion of the hearing, on December 8, 2011, petitioner was found guilty as charged and a disposition was imposed placing him on a restricted diet for five days. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on December 8, 2011 were affirmed.

In the Misbehavior Report Tier Assistant Request Sheet apparently submitted by petitioner to his hearing assistant (7 NYCRR Subpart 251-4) petitioner sought a "[c]opy of November 21, 2011 videotape of [C.O.] Hyde and [C.O.?] Willette at my cell for breakfast confiscating my toilet paper thru [sic] . . . [C.O.?] Yaddow approaching my cell and Willette picking up toilet paper returning it to me and collecting styro-foam tray." Petitioner specifically requested his assistant " . . . to write the starting time of videotape and ending time, to assure videotape contains requested information . . ." It thus appears that petitioner sought to obtain a copy of the security videotape depicting his cell during a time period extending an unspecified duration before the 8:00 AM incident described in the inmate misbehavior report as well as an unspecified duration after such incident.

During an early portion of the superintendent's hearing, prior to viewing the security video depicting his cell at the time of the incident described in the inmate misbehavior report, petitioner referenced his concern with respect to events before and after 8:00 AM as follows: " . . . Officer Hyde and Willard [Willette?] at my cell for breakfast confiscated the toilet paper then there Yaddow approaching my cell and Willard picking up the toilet paper and returning to me." A bit later the follow colloquy occurred:

Bullis
[Hearing Officer]: "You're describing to me, you appear to be describing some other incident other than what's describe in the misbehavior report.

Barnes: I'm not describe, I'm describing everything the, the, the misbehavior report from beginning to end. Not just what, not just ex, ex, exclude.

Bullis: Well Mr. Barnes if its during the date, time and location as described in the report it will be on the DVD. So if it something else you are referring to unless you can explain to me why that's material and relevant as to whether or not you violated the rules.

Barnes: Okay, I carry on relevant because they came to my cell, they took my toilet paper and I asked them to give it back to me and they, I didn't have no toilet paper. They didn't have no reason to confiscate it. It was in the box when they got there. They didn't have no reason to confiscate the toilet paper. I asked like a man, I say look that's my toilet paper I don't have any toilet paper.

Bullis: What does that have to do with . . . [w]hether or not you . . .handed your tray back.

Barnes: Its got a lot to do with cause they took something that I need. What I'm do, do, do without toilet paper; they didn't have no reason to take it. The toilet paper, it's, it's gonna be on the video tape anyway. The toilet paper laying right there on the floor. But the fact is when they came to my cell and they took it and said, they said take your hand out of the box. I said alright, I need my toilet paper. Oh we gonna give you toilet paper they took the toilet paper nothing [sic] on the floor merked [walked?] off and just left it there. You know why cause they doing the same atrochits [atrocious?] garbage, nonsense every week when they come in here

> and you (inaudible) so if you don't let me get the video tape I'm gonna raise objections like I'm suppose to . . ."

Still prior to viewing the security video the hearing officer stated that the full extent of the video sought to be viewed by petitioner did not appear to be relevant to the disposition of the charges set forth in the inmate misbehavior report. According to the hearing officer "[y]ou [petitioner] are not telling me that yes you did hold your tray and the reason you did it is for other reasons and your [you're?] justified to do it. You've not made that argument to me . . .I'm finding that's not material and relevant and your objection is noted."

When the security video was actually viewed petitioner immediately stated "[w]here's the rest of the video . . .that ain't half of the video tape." The hearing officer responded as follows: "I'm going to note that the video tape was of the date, time and location as so described in the misbehavior report regarding the incident as so described . . .The purpose of this hearing is very limited. It's for me to determine whether or not you violated the specific rules as described in the inmate misbehavior report."

Later in the hearing, on December 8, 2011, C.O. Hyde testified at the request of petitioner. When petitioner attempted to question the witness with respect to the manner in which breakfast was served (obviously before the 8:00 AM incident described in the inmate misbehavior report) the hearing officer did not permit such inquiry noting, " . . . I'm going to find based on what you're telling me it's not material and relevant. You propose no bases whatsoever as to why that's material and relevant."

The Court finds that the hearing officer did not err in failing to produce the expanded security video requested by petitioner or in preventing petitioner from questioning C.O. Hyde with respect to the alleged occurrences leading up to the 8:00 AM

incident described in the inmate misbehavior report. "In view of the characteristics of the correctional system and the compelling interests of the State in the preservation of security and order within correctional facilities, the recognition and enforcement even of constitutional rights may have to await resolution in administrative or judicial proceedings; self-help by the inmate cannot be recognized as an acceptable remedy. There must, in most instances (including this case), be compliance with the orders of the correction personal, or acceptance of the penalties properly applicable to noncompliance. The risks inescapably attendant on the refusal of an inmate to carry out even an illegal order of a correction officer are such as to require compliance at the time with the right of retrospective administrative or judicial determination as to the legality of the order." *Rivera v. Smith*, 63 NY2d 501, 515.

The above-quoted observations of the Court of Appeals in *Rivera* are readily applicable to the facts and circumstances in the case at bar where petitioner's refusal to turn over the styrofoam tray, when ordered, apparently represented his response to the alleged unlawful confiscation of his toilet paper earlier in the day. Although petitioner was free to file an inmate grievance with respect to such alleged unlawful confiscation, he was not free to respond thereto by failing to comply with C.O. Hyde's direct order to return the breakfast tray. Since the confiscation of the toilet paper, even if proven, would not constitute a defense to the charges set forth in the inmate misbehavior report, the hearing officer properly determined that evidence of such confiscation, whether in the form of the expanded security video or the testimony of C.O. Hyde, was not relevant.

With respect to the Tier III Superintendent's Hearing concluded on December 15, 2011, respondent asserts that on May 11, 2012, after this proceeding had been commenced, the results and disposition of such hearing were administratively reversed because the hearing tape was found to be inaudible. According to respondent, " . . .all

records containing references of the Tier III [Superintendent's] hearing at Upstate Correctional Facility . . . were expunged . . ." Accordingly, petitioner argues that petitioner's challenge to the results and disposition of the Tier III Superintendent's Hearing concluded on December 15, 2011 have been rendered moot.

The Court finds that any mandatory surcharge imposed upon disposition of the Tier III Superintendent's Hearing concluded on December 15, 2011 must be refunded to petitioner's inmate account, if such action has not already been taken. Once that is accomplished, the petitioner will have received all of the relief which this Court could grant with respect to the superintendent's hearing concluded on December 15, 2011 and petitioner's challenge with respect to the results and disposition thereof would be rendered moot. *See Kairis v. Fischer*, 86 AD3d 868 and *Mastropietro v. Fischer*, 81 AD3d 1022.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby

ORDERED, that respondent shall refund to petitioner's inmate account any surcharge imposed upon disposition of the Tier III Superintendent's Hearing concluded on December 15, 2011, if that action has not already been taken; and it is further

ADJUDGED, that the petition is dismissed.

Dated: September 27, 2012 at
Indian Lake, New York.

S. Peter Feldstein
Acting Supreme Court Justice