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

---X

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 #16-1-2011-0538.107
INDEX # 2011-1211
ORI #NY016015J

-against-

BRIAN FISCHER, Commissioner, NYS Department of Corrections and Community Supervision, **KAREN BELLAMY**, Director, DOCCS Inmate Grievance Program, **DAVID A. ROCK,** Superintendent, Upstate Correctional Facility, and **DONALD UHLER**, Deputy Superintendent of Security, Upstate Correctional Facility,

Respondents.

---X

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 December 8, 2011 and filed in the Franklin County Clerk's office on December 19, 2011. Petitioner, who is an inmate at the Upstate Correctional Facility, is challenging a razor deprivation order that was apparently upheld on November 16, 2011 by determination of the Inmate Grievance Program Central Office Review Committee in the context of Inmate Grievance UST-46951-11. An Order to Show Cause was issued on December 28, 2011. By Decision and Order dated April 19, 2012 respondents' motion to dismiss on personal jurisdiction grounds was denied and they were directed to serve answering papers. The Court has since received and reviewed respondents' Answer, verified on May 18, 2012, as well as petitioner's Notice of Motion supported by his affidavit, sworn to on May 24, 2012.

Although not denominated as such, the Court finds that petitioner's "motion" is the functional equivalent of a Reply.

Under the provisions of 7 NYCRR §304.5(b) an inmate confined in a Special Housing Unit (SHU) has the right to shave two times per week. The regulation provides, however, that "[s]having equipment will be on an issue basis and must be returned after use." Notwithstanding the forgoing, "[a]n order depriving an [SHU] inmate of a specific item, privilege or service may be issued where it is determined that a threat to the safety or security of staff, inmates or State property exists." 7 NYCRR §305.2(a). "Each deprivation order must be reviewed on a daily basis by the deputy superintendent for security or, in his/her absence, the O. D. [Officer of the Day?] or higher ranking authority. If the O. D. is not present at the facility (weekends or holidays) the watch commander will personally review the deprivation order and sign the form indicating approval or discontinuance. This review shall be documented by the reviewing officer, who shall initial and date the order, adding any comments that are appropriate. If the deprivation order has been in effect for seven days, the superintendent and inmate shall receive a written notice of renewal on the seventh day and, thereafter, every seventh day that the order remains in effect." 7 NYCRR §305.2(c). "The written order and any notice of renewal thereof must briefly state the reason(s) for the deprivation and contain the following notice to the inmate: 'You may write to the deputy superintendent for security or his/her designee to make a statement on the need for continuing the deprivation order.' " 7 NYCRR §305.2(d).

On or about July 19, 2011 a misbehavior report was filed against petitioner apparently based upon his refusal to promptly return his razor after shaving. On that date

an order was issued pursuant to 7 NYCRR §305.2 depriving petitioner of his access to razors.

On August 18, 2011 petitioner filed an inmate grievance complaint (UST-46951-11) dated August 14, 2011 alleging as follows: "I have been on an illegal razor deprivation for over 25 consecutive days without a single razor deprivation by Uhler [Deputy Superintendent for Security, Upstate Correctional Facility]." Although not stated in a particularly clear fashion, it appears that petitioner's inmate grievance complaint challenged not only the initial issuance of the razor deprivation order but also the continuance of the order for more than 25 days. An un-dated investigative report (Respondents' Exhibit B) prepared in response to petitioner's grievance stated, in its totality, as follows: "Inmate Barnes is on a razor deprivation order. This order began on 7/19/11 and has continued since that date. I have included a copy of the deprivation order." Notwithstanding the forgoing, no copy of the initial deprivation order was included as part of Exhibit B. Indeed, it does not appear that a copy of the initial July 19, 2011 deprivation order has been included in any part of the record herein. Exhibit B does include a copy of a Deprivation Order Renewal dated August 13, 2011 as well as a copy of a Deprivation Order Renewal dated October 8, 2011.[1] The August 13, 2011 renewal order included reference to the continuation of the deprivation order, based upon daily review (7 NYCRR §305.2(c)) on August 16, 2011 only.

On August 23, 2011 the Inmate Grievance Resolution Committee [IGRC] addressed petitioner's grievance employing language identical to that in the aforementioned

[1] It is clear to the Court that the un-dated investigative report must of been completed well before October 8, 2011 and, therefore, that the Deprivation Order Review dated October 8, 2011 could not have been part of such report.

investigative report. Respondent's papers thus document only one deprivation order renewal and one deprivation order daily review between July 19, 2011, when the deprivation order was apparently first issued, and the filing of petitioner's inmate grievance complaint on August 18, 2011.

On August 30, 2011 the Superintendent of the Upstate Correctional Facility issued a decision concurring with the I.G.R.C. response. According to the superintendent's decision, "[t]he grievant is advised that all the issues raised in his grievance are addressed in the response from the I.G.R.C. The grievant is advised that in accordance with . . . [7NYCRR §] 305.2 Deprivation order, (a), which states, in part . . . 'An order depriving an inmate of a specific item, privilege or service may be issued when it is determined that a threat to the safety of security of staff, inmates or State property exists.' Upon review of the information submitted, staff acted appropriately in this matter, no misconduct by staff was found and no further action will be taken at this time. Grievance is denied." Upon administrative appeal, the DOCCS Inmate Grievance Program Central Office Review Committee (CORC) issued a decision on November 16, 2011 upholding the determination of the facility superintendent for the reasons stated by the superintendent. The CORC noted that petitioner " . . . was properly placed on razor deprivation on 7/25/11[2] . . . CORC advises the grievant that he may write to the Deputy Superintendent for Security to make a statement on the need for continuing the deprivation order. Further CORC advises the grievant that he is ultimately responsible for his actions while incarcerated and notes no malfeasance by staff."

[2] The record before the Court sheds no light on the internal discrepancy with respect to the date of the initial razor deprivation order.

In order to prevail on his challenge to the final results of inmate grievance proceeding UST-46951-11 petitioner " . . . must carry the heavy burden of demonstrating that the determination by CORC is irrational or arbitrary and capricious." *Frejomil v. Fischer*, 68 AD3d 1371, 1372 (citations omitted). *See Williams v. Goord*, 41 AD3d 1118, *lv den* 9 NY3d 812 and *Winkler v. New York State Department of Correctional Services*, 34 AD3d 993. It is also noted that correctional officials are to be accorded wide latitude in taking measures to ensure the safety and security of correctional facilities, including determining what items of personal property will be placed in the hands of a particular inmate. *See Abreu v. Fischer*, 97 AD3d 877 and *Davis v. Fischer*, 76 AD3d 1152. In the case at bar, however, there is nothing in the record before the Court to indicate that the July 19, 2011 razor deprivation order was followed-up with all of the daily reviews and/or weekly renewals mandated under the provisions of 7 NYCRR §305.2(c). The Court therefore finds that the November 16, 2011 final CORC determination with respect to grievance UST-46951-11 is irrational and/or arbitrary capricious and must be overturned. As a result, the Court also finds that the July 19, 2011 razor deprivation order has lapsed.

Nothing in this Decision and Judgment should be construed by either party as representing a finding that the razor deprivation order of July 19, 2011 was unlawfully issued in the first instance or that DOCCS officials are precluded from re-issuing a razor deprivation order at this time if it is determined that a threat to the safety of security of staff, if inmates, or State property still exists. *See* 7 NYCRR §305.2(a). If such razor deprivation order is re-issued, however, DOCCS officials are obliged to comply with departmental regulations with respect to daily review and weekly renewal.

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

ADJUDGED that the petition is granted, without costs or disbursements, but only to the extent that the November 16, 2011 final CORC determination in grievance USG-46951-11 is vacated; and it is further

ADJUDGED, that the July 19, 2011 razor deprivation order is no longer of any force and effect.

Dated: October 1, 2012 at
Indian Lake, New York.

_____
S. Peter Feldstein
Acting Supreme Court Justice