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 #16-1-2011-0288.61
INDEX # 2011-637
ORI #NY016015J

-against-

BRIAN S. FISCHER, Commissioner,
NYS Department of Correctional Services,

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 June 28, 2011 and filed in the Franklin County Clerk's office on June 30, 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 and concluded on February 2, 2011. The Court issued an Order to Show Cause on July 6, 2011 and has received and reviewed respondent's Answer, verified on August 29, 2011 and supported by the Affirmation of Christopher W. Hall, Esq., Assistant Attorney General, dated August 29, 2011. The Court has also received and reviewed petitioner's Reply thereto, filed in the Franklin County Clerk's office on September 21, 2011.

As the result of incidents that occurred at the Upstate Correctional Facility on January 19, 2011 petitioner was issued two inmate misbehavior reports. The first report, authored by C.O. Gravlin, charged petitioner with violations of inmate rules 113.14

(inmate shall not possess unauthorized medication) and 114.10 (smuggling any item from one area to another). The first inmate misbehavior report alleged, in relevant part, that C.O. Gravlin " . . . conducted a pat frisk of inmate Hinton . . . Inmate Hinton was being moved from 11 building to 10 building when the pat frisk was conducted. Inmate Hinton had a total of 29 pills in his front right pocket. The block nurse identified the pills as 18 neurontin 600mg and 11 Baclofen 10mg. Both are prescription meds given to the inmate on medication rounds." The second inmate misbehavior report, authored by C.O. Bogardus, charged petitioner with a second violation of inmate rule 113.14 (unauthorized medication). The second inmate misbehavior report alleged, in relevant part, as follows: " . . . I C.O. Bogardus was helping give inmate Hinton . . . his level I property after being transferred from 11 building to 10 building. As I was going through his letters I noticed envelopes with no address with objects in them and sealed. I opened the envelopes and found pills . . . Nurse Holmes identified them and counted them, this is what she came up with: 319-Neurontin 600mg, 205-Baclofen 10mg, 100- Amlodipine 5mg . . ."

On February 2, 2011 a single Tier III Superintendent's Hearing was commenced in petitioner's absence with respect to the charges set forth in both inmate misbehavior reports. At the conclusion of the hearing on February 3, 2011 petitioner was found guilty of all three charges and a disposition was imposed confining him to the special housing unit for 36 months, directing the loss of various privileges for a like period of time and recommending the loss of 36 months good time. Upon administrative appeal all dispositional penalties were reduced from 36 months to 18 months but the results of the Superintendent's Hearing were otherwise affirmed. This proceeding ensued.

Petitioner first asserts that the Tier III Superintendent's Hearing was unlawfully conducted in his absence. In this regard the Court notes that " . . . [a]n 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' . . . When an inmate is denied his right to be present, the record must contain the basis underlying a hearing officer's determination." *Holmes v. Drown*, 23 AD3d 793, 794 (citations omitted). *See also*, 7 NYCRR §254.6(a)(2). "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 order for an inmate to knowingly, voluntarily and intelligently waive his or her fundamental right to attend a Tier III Superintendent's Hearing, the inmate must be advised of that right and be warned that the hearing will proceed in his or her absence if the refusal to attend persists. *See Rush v. Goord*, 2 AD3d 1185 and *Spirles v. Wilcox*, 302 AD2d 826, *lv den* 100 NY2d 503.

At the outset of the hearing, on February 2, 2011, the hearing officer stated as follows:

> " . . . I instructed the supervisor of ten building Sergeant Yaddow to go to the inmate's cell to retrieve him and inform him that this hearing would be conducted at this time um. Inmate Hinton, although he does have a wheel chair out of cell, medical staff including the Nurse Practitioner are very clear that inmate Hinton, that inmate Hinton is capable of standing in order to um, to um, have the hand restraints be applied and then he is given a wheel chair outside the cell. I confirmed that with . . . Nurse Practitioner prior to um, the sergeant going to the cell."

Sergeant Yaddow then testified that when he attempted to escort petitioner to the hearing the petitioner " . . . kneeled in front of the cell door, refusing to stand up for restraint procedures. I informed him that the disciplinary would be held without him and this would be considered a refusal." The hearing officer also stated for the record that in view of the serious nature of the charges set forth in the two inmate misbehavior reports he personally went to petitioner's cell but, at that time, " . . . inmate Hinton refused to stand for myself, stating that he could not stand." The hearing officer proceeded to conduct the Tier III Superintendent's Hearing in petitioner's absence, having " . . . documented in section 12 of the record sheet, I, I, inmate clearly refusing directions regarding frisk procedures and um, exiting the cell long standing established procedures for the safety of both staff and inmates in this facility."

Before concluding the hearing on February 3, 2011 the hearing officer took testimony from Nurse Practitioner Lashway, who confirmed that although petitioner had a wheelchair order for out of cell activities, he had no medical limitations with regard to compliance with facility procedures to be handcuffed and pat frisked upon exiting his cell. According to Nurse Practitioner Lashway, petitioner " . . . has the capacity to be able to stand up and comply with security for the hand cuffs." In addition, the hearing officer stated for the record that he returned to petitioner's cell on February 3, 2011 but that petitioner again failed to comply with facility restraint procedures.

Based upon the foregoing, the Court finds that the hearing officer did not err in conducting the Tier III Superintendent's Hearing in the absence of petitioner. *See*

Johnson v. Racette, 282 AD2d 899 and *Sanders v. Coughlin*, 168 AD2d 719, *lv den* 77 NY2d 806.[1]

Petitioner next asserts that he did not receive a copy of the written hearing disposition sheet, including the statement of evidence relied upon by the hearing officer and the statement of reason(s) for the disposition imposed. Since the hearing was conducted in petitioner's absence, it is clear that he was not simply handed a copy of the disposition sheet immediately upon the conclusion of the hearing. Instead, after reading the written disposition sheet into the record the hearing officer stated that he " . . . will indeed make sure the inmates a copy [sic] of this immediately following this hearing . . ." On the bottom of page two of the written disposition sheet, moreover, the hearing officer noted that petitioner did not attend the hearing but received the disposition sheet on February 3, 2011 at 2:00 PM "via mail." Since the record sheet indicates that the hearing ended on February 3, 2011 at 2:00 PM and since the hearing officer, after reading the written disposition sheet into the record, stated, in effect, a future intent to provide petitioner with a copy of the disposition sheet, it is not clear that the "via mail" reference on the bottom of page two of the disposition sheet is reflective of a mailing that had already taken place or, rather, a mailing that was intended to take place in the near future. In this regard the Court notes that the record contains no affidavit from the hearing officer or other documentary evidence establishing that the written disposition sheet was,

[1] To the extent petitioner provided the Court with a copy of an audiotape of the underlying Tier III Superintendent's Hearing in support of his claim that the record of the hearing was erased and taped over to address the issues raised in his administrative appeal, the Court rejects such claim. Notwithstanding some unusual sounds emanating from the audiotape in question, it is far from clear that any alteration has occurred. Moreover, since petitioner was not present during any portion of the hearing, his allegations of improper conduct on the part of DOCCS employees represent mere speculation.

in fact, mailed to the petitioner after the hearing had been concluded. In view of petitioner's consistent assertions of non-receipt (*see* Exhibits D and E annexed to respondent's Answer), the Court concludes that petitioner must prevail on this point. Although remittal with the direction that the written statement of disposition be forthwith served upon petitioner would ordinarily constitute a proper remedy (*see Vargas v. Coughlin*, 168 AD2d 917), it is clear that petitioner has already received, at least in the context of this proceeding, a copy of the written disposition sheet which is annexed to respondent's Answer as Exhibit C. Accordingly, the Court will simply direct respondent to process any additional administrative appeal petitioner files within 30 days after service of a copy of this Decision and Judgment with notice of entry.

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 respondent is directed to process any additional administrative appeal from the results and disposition of the Tier III Superintendent's Hearing concluded on February 3, 2011 that petitioner files within 30 days service of a copy of this Decision and Judgment with notice of entry.

Dated: December 2, 2011 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice