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 #16-1-2013-0062.22
INDEX # 2013-158
ORI #NY016015J

-against-

BRIAN FISCHER, 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 Leonard Hinton, verified on February 13, 2013 and filed in the Franklin County Clerk's office on February 15, 2013. Petitioner, who is now an inmate at the Franklin Correctional Facility, is challenging the results of a Tier III Superintendent's Hearing held at the Upstate Correctional Facility and concluded on December 13, 2012. The Court issued an Order to Show Cause on February 25, 2013 and has received and reviewed respondent's Answer and Return, verified on April 12, 2013, supported by the April 12, 2013 Letter Memorandum of Glen Francis Michaels, Esq., Assistant Attorney General in Charge. The Court has also received and reviewed petitioner's Reply thereto, dated April 19, 2013 and filed in the Franklin County Clerk's office on April 23, 2013.

As the result of an incident that occurred at the Upstate Correctional Facility on November 15, 2012 petitioner was issued an inmate misbehavior report charging him with violations of inmate rules 107.10 (interference with employee), 118.22 (unhygienic act) and 101.20 (lewd conduct). The nature of the allegations set forth in the inmate

misbehavior report are not germane to the disposition of this proceeding. A Tier III Superintendent's Hearing was conducted at the Upstate Correctional Facility commencing on December 4, 2012. At the conclusion of the hearing, on December 13, 2012, petitioner was found guilty as charged and a disposition was imposed confining him to the special housing unit for four months (partially suspended and deferred) and directing the loss of various privileges for a like period of time. Upon administrative appeal the results and disposition of the Tier III Superintendent's Hearing concluded on December 13, 2012 were affirmed. This proceeding ensued.

Although petitioner was present when the superintendent's hearing commenced on December 4, 2012, he was not in attendance at the remaining sessions of the hearing on December 12, 2012 and December 13, 2012. Petitioner, who claims to have a "wheelchair order," states that he was present on the December 4, 2012 session of the superintendent's hearing because he was brought to the hearing in a wheelchair. In paragraph 8(C) of the petition, however, he goes on to allege as follows: "On 12-12-12 C.O. Vanorum [the escort officer] came to my cell for the hearing, yet he didn't have my wheelchair. I told him that I need my wheelchair. He said o.k., I'll be right back. But he never came back. On 12-13-12 Dep. Lira [the Hearing Officer] came to my cell and asked me 'did you refuse to go to your hearing?' I said no. I couldn't go because the officer didn't bring my wheelchair. Dep. Lira left and never came back." Citing *inter alia*, *Rush v. Goord*, 2 AD3d 1185 and 7 NYCRR §254.6(a)(2), petitioner argues that he was impermissibly denied his right to attend the underlying hearing.

"An inmate has a fundamental right to be present at a Superintendent hearing 'unless he or she refuses to attend, or is excluded for reasons of institutional safety or correctional goals' (7 NYCRR 254.6(a)(2))." *Holmes v. Drown*, 23 AD3d 793, 794 (other citations omitted). 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 Ifill v. Fischer,* 79 AD3d 1322*, Tafari v. Selsky*, 40 AD3d 1172 and *Spirles v. Wilcox*, 302 AD2d 826, *lv den* 100 NY2d 503.

A review of the transcript of the superintendent's hearing reveals that at the outset of the December 12, 2012 session Hearing Officer Lira questioned escort officer Vanorum, with respect to his attempt to bring the petitioner to the hearing. The following colloquy occurred:

"Vanorum: Um, inmate Hinton refused to come out for his hearing.

Lira: And you told him I was here for the hearing?

Vanorum: Yes, sir.

Lira: and can you tell me what your report was?

Vanorum: He said he didn't want to come out and I told him you were here for a hearing.

Lira: Okay and you know all that stuff and you push [sic] it explained the ramifications if he does or doesn't?

Vanorum: Yes I did.

Lira: Okay. All right, well, with that said, I will just carry on here. (inaudible) conduct with out him. Okay, thank you."

On December 12, 2012 Hearing Officer Lira made several rulings with respect to potential witnesses previously requested by petitioner and then adjourned the hearing

pending testimony from Nurse Fairchild, the author of the inmate misbehavior report. The hearing was reconvened on December 13, 2012 and at that time Hearing Officer Lira placed on the record a statement with respect to his own interaction with petitioner. According to Hearing Officer Lira, " . . . I went down and spoke to him [petitioner] and he refused the hearing again he does want to remain in his cell and I will continue this in his absence. He does understand that he, uh, the (inaudible) the same (inaudible) whether he is here or not." Testimony was then taken from the author if the inmate misbehavior report and the hearing was concluded.

The argument of respondent's counsel notwithstanding, the Court finds nothing in the hearing transcript confirming that petitioner was advised of his right to attend the hearing and/or warned that the hearing would proceed in his absence if he continued to refuse to attend. The Hearing Officer's questioning of C.O. Vanorum on December 12, 2012 was non-specific with respect to the issue of whether or not petitioner was advised of his right to attend the hearing and warned that the hearing would proceed in his absence if he refused to attend. Although the Hearing Officer may have been more specific in his statement with respect to his own conversation with petitioner, unfortunately the quality of the transcript - two "(inaudible)" entries in the same potentially crucial sentence - prevent the Court any conclusions with respect to the issue of whether or not petitioner was properly advised of his right to attend the hearing and/or warned that the hearing would be held in his absence if he refused to attend. Accordingly, the Court finds itself constrained to grant the petition on this ground without reaching other arguments advanced by petitioner.

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

ADJUDGED, that the petition is dismissed, without costs or disbursements, but only to the extent that the results and disposition of the Tier III Superintendent's Hearing concluded on December 13, 2012 are reversed and the respondent is directed to expunge all reference to the hearing, as well as the incident underlying same, from petitioner's institutional record.

Dated: September 12, 2013 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice