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

In the Matter of the Application of
SHAWN GREEN, #97-A-0801,
Petitioner,

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

DECISION AND JUDGMENT
RJI # 16-1-2014-0538.106
INDEX # 2014-987
ORI # NY016015J

-against-

DONALD UHLER, Superintendent,
Upstate Correction Facility,
Respondent.

This is a proceeding for judgment pursuant to Article 78 of the Civil Practice Law and Rules was commenced upon the Petition of Shawn Green (hereinafter "petitioner"), verified on December 7, 2014 and filed in the Franklin County Clerk's office on December 23, 2014. At the commencement of the instant proceeding petitioner was an inmate at the Upstate Correctional Facility (hereinafter "Upstate"); however, during the course of the proceeding the New York State Department of Corrections and Community Supervision (hereinafter "DOCCS") transferred petitioner to the Elmira Correctional Facility. DOCCS subsequently transferred petitioner back to Upstate, where he currently remains confined.

In his verified pleading, petitioner challenges the results of multiple inmate grievance proceedings, one or more determinations of the DOCCS Central Office Media Review Committee, as well as the results of a Tier II disciplinary proceeding held at Upstate, which commenced on October 29, 2014 and was ultimately affirmed by Acting Captain T. Allen on December 9, 2014. *See* Respondent's Answer and Return at Exhibit "I".

In light of the confusion caused by petitioner's transfer from Upstate to Elmira Correctional Facility and his subsequent return back to Upstate, a series of Orders to Show Cause were issued providing various service time-frames for the underlying petition, respondent's answering papers and petitioner's reply thereto. Additionally, by

Letter Order dated July 16, 2015, the undersigned provided that respondent's supplemental/amended answering papers were to be served and mailed on or before August 14, 2015, with service of petitioner's reply to be made on or before September 4, 2015. The Court is in timely receipt of the parties' submissions, along with proof of service thereof, and has throughly reviewed the same.

Furthermore, by Letter Order, dated January 19, 2016, the undersigned directed respondent's counsel to serve and file supplemental answering papers on or before February 9, 2016, relating to the determinations made by DOCCS' Central Office Review Committee (hereinafter "CORC") with respect to petitioner's Grievance Complaint Nos. UST-55060-14 and UST-55161-14. The Court is in receipt of respondent's supplemental answering papers, including the requested CORC determinations that were previously omitted in respondent's Answer and Return.

Although the undersigned did not direct him to do so in the January 19, 2016 Letter Order, petitioner has submitted a supplemental letter Reply, dated February 5, 2016, in response to respondent's supplemental answering papers. In that supplemental Reply petitioner opposes the contentions raised in respondent's supplemental answering papers. Specifically, he argues that he has been prejudiced by delay and respondent's attorney's failure to include all relevant documents in the original answer and return, such that respondent should now be prohibited from raising the defense of petitioner's failure to exhaust his administrative remedies.

In his Verified Petition, petitioner raises the following claims alleging violations of his Fourteenth Amendment right to equal protection under the law: a.) Upstate has failed to stock the vending machines in its visiting rooms with healthy food items beneficial to inmates suffering from Diabetes (*see* Verified Petition at ¶5); b.) Upstate has allegedly engaged in the unlawful practice of requiring inmates receiving Special Housing Unit (hereinafter "SHU") sanctions to participate in the progressive inmate movement system (hereinafter "PIMS") (*see Id*. at ¶6); c.) Upstate has engaged in the unlawful practice of "retaining maximum status prisoners to serve Keeplock sanctions, who housed in a facility, other than one classified SHU, would possess all their personal belongings and privileges not penalized. (*sic*)" (*Id*. at ¶7); moreover, Upstate has misinterpreted and

misapplied the provisions of 7 NYCRR §301.6 (a), which govern Keeplock admission (*see* Verified Petition at ¶9); and d.) Upstate has routinely withheld from petitioner his issues of Hip Hop Weekly magazine, based upon their purported depiction of gang hand signs, despite the fact that "State prison population never received actual notice of [what] was prohibited." *Id*. at ¶10.

Next, petitioner asserts that he has suffered incidental damages as a result of respondent's negligence and breach of duty, by depriving inmates confined at Upstate of their personal property and various privileges without due process of law. *See Id*. at ¶¶11 – 14.

In relation to the results of his Tier II disciplinary hearing, petitioner alleges the following due process violations: a.) Officer M. Sisto's Misbehavior Report, dated October 16, 2014 was defective and insufficient on its face, as it did not contain adequate factual detail to provide petitioner was given proper notice of the charges (*see Id*. at ¶¶15 – 16); b.) the "audio/visual surveillance" of the underlying incident of misbehavior was "adversely altered and stalled", such that petitioner was unable to "establish falsification and frivolousness of Sisto's report" (*Id*. at ¶¶17 – 20); and c.) the delay in completing the Tier II disciplinary hearing purportedly resulted in Nurse Rabideau being unable to recall the alleged incident of misbehavior. S*ee Id*.

Accordingly, petitioner prays that a judgment be issued in accordance with the provisions of CPLR §7806 granting the following requested relief: a.) annulling and overturning the aforementioned grievance determinations and tier II disciplinary proceeding; b.) declaring respondent's determinations were "arbitrary, capricious, irrational and unauthorized"; c.) compelling respondent to ensure that the vending machines in Upstate's visiting room be appropriately stocked with "healthy food items for diabetic prisoners/visitors"; d.) instructing respondent that inmates who are transferred to Upstate to serve SHU sanctions are not to be mandated to participate in the PIMS program; e.) instructing respondent that any maximum status inmates confined to Upstate and serving a Keeplock sanction are to be issued all their personal belongings and not have their privileges withheld; f.) prohibiting respondent from compelling unwilling SHU inmates from participating in the PIMS program; g.) prohibiting respondent from

unlawfully housing maximum status inmates serving a Keeplock sanction in Upstate's SHU units or subjecting such inmates to the PIMS program; and h.) such other and further relief as the Court deems just and proper. *See* Verified Petition's Wherefore Clause at ¶¶ (a) – (h).

Petitioner's Fourteenth Amendment Claims:

In the first of petitioner's Fourteenth Amendment claims, he challenges the determination made on Grievance Complaint No. UST-55060-14. *See* Respondent's Answer and Return at Exhibit "M". In his grievance, petitioner avers that he is a diabetic and Upstate is the only DOCCS facility that he has been confined in that does not offer healthy food items as selections in the vending machines located in its visiting rooms. *See Id.* Based upon this alleged discriminatory practice, petitioner requests that "(1) fruit cups, (2) granola bars, (3) trail mix, (4) salad or (5) yogurt" be made available for purchasing in the visiting room vending machines. *Id.*

In light of a previous determination by CORC, on November 25, 2014, the Inmate Grievance Resolution Committee (hereinafter "IGRC") denied petitioner's grievance and informed him "to address any concerns regarding the selection of food offered in the vending machines to the Inmate Liaison Committee." *Id.* Petitioner appealed the IGRC's denial to respondent, and on December 30, 2014, respondent, in his capacity as Upstate Superintendent, informed petitioner that "[f]ood is provided based on the availability from the vendor and in accordance with a contract that is already in place. The vendor is being contacted regarding the feasibility of putting some healthier food selections in the vending machines." *Id.*

On January 2, 2015, petitioner appealed respondent's denial of his grievance to CORC, requesting that he "be provided with contracted vendor's food selection catalog, its suppliers' food product catalogs, companies that distribute healthy vendor (*sic*) machine food items (stock in other facilities['] visiting rooms' vendor [*sic*] machines) and expiration date of current vendor contract." Respondent's Supplemental Letter Memorandum at Supplemental Exhibit "1". In a determination dated April 1, 2015, CORC upheld respondent's denial of Grievance Complaint No. UST-55060-14, noting "that the vending machines in the visit rooms are stocked with items that the facility is

contractually obligated to purchase. Healthier options will be explored when the contract expires in July 2015.... CORC [further] notes that [petitioner] has since been transferred and advises him to address any further concerns regarding the selection of food offered in the vending machines to the Inmate Liaison Committee." *Id.*

In his Supplemental Letter Memorandum, respondent's counsel argues that petitioner's claim, relating to Grievance Complaint No. UST-55060-14 should be dismissed based upon petitioner's failure to properly exhaust his administrative remedies prior to commencement of the instant proceeding. Specifically, respondent's counsel points out that the instant proceeding was commenced on December 23, 2014, while petitioner's appeal of the IGRC's determination was still pending with respondent. Respondent issued his determination on December 30, 2014, which petitioner appealed to CORC and its final determination was not issued until April 1, 2015.

Petitioner's failure to await the outcome of his appeals to respondent and CORC constitutes a fatal procedural defect that warrants dismissal of the claim. *See Mascorro v. Annucci*, 123 AD3d 1268; *Hawes v. Fischer*, 119 AD3d 1304, 1305; *Hines v. Fischer*, 101 AD3d 1204, 1205 and *Muniz v. David*, 16 AD3d 939, 939-940. Moreover, the fact that his appeals were ultimately denied during the pendency of the instant proceeding does not remedy this defect. *See Torres v. Fischer*, 73 AD3d 1355, 1356; *Fernandez v. Goord*, 53 AD3d 961. Accordingly, petitioner's Fourteenth Amendment claim challenging the outcome of Grievance Complaint No. UST-55060-14 is dismissed.

In his next claim, petitioner challenges the outcome of his Grievance Complaint No. UST-54249-14, whereby he claims to be aggrieved by Upstate's mandatory policy of requiring SHU inmates participate in the PIMS program. *See* Respondent's Answer and Return at Exhibit "N". As for the requested action to be taken, petitioner sought to be removed "from Upstate's PIMS system and his SHU penalties being served at facility be govern (*sic*) by Directive #4933 solely; secondly all prisoners assigned to PIMS Level three receive privileges regardless [of the] gallery housed upon (*sic*)." *Id.*

After petitioner was provided with assistance by his requested grievance advisor, the IGRC denied petitioner's grievance, noting that "due to his behavior, grievant has not reached PIMS LEVEL III at any time, therefore he has not been eligible for those

privileges. As for inmate Green's request to be removed from the PIMS level system while being housed here, the Pims (*sic*) system is mandatory." Thereafter, petitioner appealed the IGRC's determination to respondent, claiming that he "was designated a PIMS Level III on June 2, 2014." *Id*. By written decision, dated June 27, 2014, petitioner's grievance was denied by the Acting Superintendent, who noted that "grievant's PIMs (*sic*) level never reach Level III. Grievant was advised that participation in the PIMs (*sic*) system is mandatory. Upon review of the information submitted, no misconduct was found by staff and no further action will be taken at this time. Grievance is denied." Respondent's Answer and Return at Exhibit "N".

On July 3, 2014, petitioner appealed the Acting Superintendent's denial of his grievance to CORC, inquiring what statutory or regulatory authority mandates participation in the PIMS system for inmates who are serving SHU sanctions. *Id*. In its decision, dated October 29, 2014, CORC upheld the Acting Superintendent's denial of Grievance Complaint No.: UST-54249-14, and provided the following as its basis for doing so:

> "CORC notes that the grievant has not been designated PIMS Level III while housed at Upstate CF, therefore, he is not entitled to the associated privileges. Further, inmates who receive SHU sanctions must participate in PIMS in accordance with the S-Block Manual. It is noted that the grievant is currently PIMS Level I." *Id*.

In counsel's Supplemental Letter Memorandum, dated August 6, 2015, respondent's attorney argues that petitioner's request to be removed from the PIMS program was properly denied since all DOCCS inmates who receive an SHU sanction are required to participate in the PIMS program. In addition, counsel notes that petitioner never attained PIMS Level III status prior to the filing of his grievance, and, as such, he was ineligible for the concomitant privileges available at the upper levels of the PIMS program. Assistant Attorney General Fleury further contends that "[r]espondent's denial of this grievance was appropriately based upon the relevant facts and rules governing grievances. As such, the denial was not arbitrary or capricious and [p]etitioner's claim is without merit." Respondent's Supplemental Letter Memorandum at pgs. 5-6.

Having thoroughly reviewed the record as it stands before the Court, the

undersigned hereby finds that CORC's denial of petitioner's Grievance Complaint No. UST-54249-14 was neither arbitrary nor capricious, nor did it constitute an abuse of discretion. Apart from petitioner's conclusory assertion that he reached PIMS Level III on June 2, 2014, he has offered no record evidence to support such assertion. Accordingly, the Court finds that CORC's determination was appropriate given the facts presented.

In his next claim, which relates to Grievance Complaint No. UST-55161-14, petitioner contends that Upstate engages in an unlawful practice of "retaining maximum status prisoners to serve Keeplock sanctions, who housed in a facility, other than one classified SHU, would possess all their personal belongings and privileges not penalized. (*sic*)" Verified Petition at ¶7; *see also* Respondent's Answer and Return at Exhibit "O". As is set forth in his grievance, petitioner requested that Upstate discontinue this purportedly unlawful practice and that the "SHU vs Keeplock paragraph set forth within [the] initial information packet be revised or removed therefrom altogether". Respondent's Answer and Return at Exhibit "O".

On December 2, 2014, the IGRC denied petitioner's grievance, based upon a prior CORC determination (*see Id.*), as well as the provisions of the 7 NYCRR §301.3 (a)(3), which provide that "[d]etention admissions may be used ... (3) in cases where an inmate is awaiting transfer from Southport Correctional Facility or a double-celled SHU". Thereafter, petitioner appealed the IGRC's determination to respondent, contending that Upstate's misuse of detention admission until his Keeplock penalty was completed further exposed the State to liability for deprivation of his property and privileges. Petitioner further asserted that Upstate staff continued to engage in the practice, despite their purported knowledge of such practice being unlawful. *See* Respondent's Answer and Return at Exhibit "O".

By decision dated, December 22, 2014, respondent concurred with the IGRC's denial of petitioner grievance, relying on CORC's prior determination on the issue and 7 NYCRR §301.3 (a)(3). Based upon the information submitted, respondent found no misconduct by Upstate staff and, in so doing, denied petitioner's Grievance Complaint No.: UST-55161-14. *See Id.* The following day, petitioner appealed respondent's

determination to CORC, arguing that he was not "awaiting transfer following the expiration of his SHU penalty, but won't be transferred from Upstate until his Keeplock penalty expires [on] January 3, 2015." Respondent's Answer and Return at Exhibit "O".

By decision dated March 11, 2015, CORC denied petitioner's grievance as without merit, asserting that petitioner "was appropriately held in Upstate CF SHU from 12/4/14 to 1/6/15 as a detention admission in accordance with Directive #4933, § 301.3 (a)(3). For clarification, CORC notes that Upstate CF serves as a SHU facility for selected inmates serving disciplinary dispositions specifying assignment to a SHU or keeplock, and that the housing units consist of double cells as outlined in Directive #0023. CORC also notes that inmates of any security classification are eligible for placement at the facility." Respondent's Supplemental Letter Memorandum at Supplemental Exhibit "2".

As is set forth in his Supplemental Letter Memorandum, respondent's counsel argues that petitioner's claim relating to Grievance Complaint No. UST-55161-14 must be dismissed as a result of petitioner's failure to fully exhaust his administrative remedies. Counsel notes that on December 22, 2014, respondent denied petitioner's grievance, and the day after petitioner appealed the denial to CORC and commenced the instant proceeding. *See* Respondent's Answer and Return at Exhibit "O". CORC final determination upon petitioner's grievance was not issued until March 11, 2015. *See* Respondent's Supplemental Letter Memorandum at Supplemental Exhibit "2".

Once again, the record clearly demonstrates that petitioner commenced the instant article 78 proceeding prior to properly exhausting the administrative remedies available to him on this grievance. *See Mascorro v. Annucci*, *supra* 123 AD3d 1268; *Hawes v. Fischer*, *supra* 119 AD3d at 1305; *Hines v. Fischer*, *supra* 101 AD3d at 1205 and *Muniz v. David*, *supra* 16 AD3d at 939-940. Furthermore, CORC's ultimate denial of petitioner's grievance during the pendency of the proceeding does not remedy this fatal procedural defect. *See Torres v. Fischer*, *supra* 73 AD3d at 1356; *Fernandez v. Goord*, *supra* 53 AD3d 961. As such, petitioner's Fourteenth Amendment claim, which challenges the outcome of Grievance Complaint No. UST-55161-14 is hereby dismissed based upon petitioner's failure to exhaust his administrative remedies.

In his next Fourteenth Amendment claim, which relates to Grievance Complaint

No. UST-54153-14, petitioner argues that Upstate has routinely withheld his issues of Hip Hop Weekly magazine, based upon their purported depiction of gang hand signs, despite the fact that "State prison population never received actual notice of [what] was prohibited." Verified Petition at ¶10; *see also* Respondent's Answer and Return at Exhibit "P". In relation to said grievance, petitioner requested that the following action be taken: "all his conversion of magazines claims be filed and process[ed] is accordance with Directive #2733 or magazines be issued to him without damages." Respondent's Answer and Return at Exhibit "P".

On June 10, 2014, the IGRC closed and dismissed Grievance Complaint No. UST-54153-14 in accordance with the provisions of 7 NYCRR §701.5 (b)(4)(i)(c)(1), finding that petitioner was seeking a decision otherwise attainable through the media review process. *See* Respondent's Answer and Return at Exhibit "P". Thereafter, petitioner sought to reopen the IGRC's dismissal, arguing that his grievance related to the inappropriate "conversion" of his magazines, which amounted to wrongful detention of his personal property. Accordingly, petitioner contended that a hearing should be held on his grievance pursuant to 7 NYCRR §701.5 (b)(4)(iii). *See Id*. Via a memorandum dated June 26, 2014 the IGRC informed petitioner that it would not revisit its dismissal of Grievance Complaint No.: UST-54153-14. As such, the grievance remained closed and the IGRC informed petitioner that he could challenge the dismissal by the filing of a separate grievance complaint. *See Id*.

In his Supplemental Letter Memorandum, respondent's counsel argues denial of petitioner's grievance was based upon the rules and regulations governing grievances and media review. Accordingly, counsel asserts that their dismissal was neither arbitrary, nor capricious, and, as such, petitioner's claim is without merit.

Inasmuch as petitioner challenges the findings of the Central Office Media Review Committee (hereinafter "COMRC"), which the undersigned cannot readily determine to be the case, the Court's review is limited to whether such findings were arbitrary and capricious or constitute an abuse of discretion. *See* CPLR §7803 (3). In each of its appellate determinations (*see* respondent's Answer and Return at Exhibit "R"), COMRC found that multiple pages of each respective issue of Hip Hop Weekly contained

depictions of "handsigns which are related to unauthorized groups, the possession of which is violation of a security rule. In the opinion of the COMRC, this material could encourage disobedience toward prison personnel."

The Court finds that COMRC's findings, in each instance, were made in accordance the provisions of 7 NYCRR §712.2, and were "reasonably related to the legitimate penological interest of maintaining prison security" (citation and quotation marks omitted). *Mercado v. Selsky*, 47 AD3d 1167, 1168. *See also Buford v. Goord*, 258 AD2d 761, 762; *Tenance v. Goord*, 278 AD2d 549, 550, *lv denied* 96 NY2d 707.

Petitioner also argues that DOCCS inmates should have been given notice of prohibited media pursuant to the provisions of Correction Law §138 (3). *See* Verified Petition at ¶10. The Court hereby concurs with respondent's counsel, in that the subdivision cited by petitioner provides that "[f]acility rules shall be specific and precise giving all inmates actual notice of the conduct prohibited. Facility rules shall state the range of disciplinary sanctions which can be imposed for violation of each rule." Correction Law §138 (3). This provision has no bearing on the media review process set forth in 7 NYCRR Part 712, and, as such, the Court hereby denies petitioner's claim that his issues of Hip Hop Weekly have been wrongfully withheld is hereby denied.

Petitioner's Claims for Incidental Damages:

As noted above, petitioner also claims that he has suffered incidental damages as a result of respondent's negligence and breach of duty, by depriving inmates confined at Upstate of their personal property and various privileges without due process of law. *See* Verified Petition at ¶¶11 – 14.

Pursuant to the provisions of CPLR §7806, "damages granted the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity." It is well established that "damages for loss of privileges and confiscated property, unlike reimbursement for hearing surcharges, are consequential damages and are not 'incidental to the primary relief sought by petitioner' (*Matter of Hodges v. Jones*, 195 AD2d 647, 648 [1993]; *see* CPLR 7806; *Matter of Loftin v. New York City Dept. of Social Servs.*, 267

AD2d 78, 78 [1999], *lv dismissed* 95 NY2d 897 [2000], *rearg denied* 96 NY2d 755 [2001]; *cf. Matter of Campbell v. Hollins*, 249 AD2d 994, 995 [1998]; *see generally Matter of Gross v. Perales*, 72 NY2d 231, 237 [1988], *rearg denied* 72 NY2d 1042 [1988])." *Bennefield v. Annucci*, 122 AD3d 1329, 1330. Based upon the foregoing, petitioner's claim for incidental damages is hereby denied.

Petitioner's Due Process Claims:

As noted above, petitioner raises three due process claims in relation to his Tier II disciplinary hearing. Petitioner first claims that Officer M. Sisto's Inmate Misbehavior Report, dated October 16, 2014 was defective, as it failed to provide him with adequate factual detail to give him proper notice of the charges alleged therein. *See* Verified Petition at ¶¶15-16. Next, petitioner asserts that the "audio/visual surveillance" of the underlying incident of misbehavior was "adversely altered and stalled", such that petitioner was unable to "establish falsification and frivolousness of Sisto's report." *Id.* at ¶¶17 – 20. Finally, petitioner contends that the delay in completing the Tier II disciplinary hearing purportedly resulted in Nurse Rabideau being unable to recall the alleged incident of misbehavior. S*ee Id.* at ¶¶17 – 20.

According to the Inmate Misbehavior Report, which is annexed to respondent's Answer and Return at Exhibit "A", on October 16, 2014, petitioner was charged with making threats (102.10), refusing a direct order (106.10), verbal interference with an employee (107.10) and use of abusive or obscene language (107.11). *See* 7 NYCRR §270.2 (3)(i); (7)(i); (8)(i) and (ii). As author of the Misbehavior Report, Officer M. Sisto provided the following description of the alleged incident:

> "On the above date and approximate time while assigned as 8/9 Rover, I CO M. Sisto was escorting the 8 Block Nurse around for the Medication Run. Upon Reaching A-14 Cell Inmate Green #97A0801 was standing at his door. Nurse N. Rabideau told Inmate Green to turn on his light. The Inmate then state 'Why? Do you need to see everything in my Cell?' I then Ordered the Inmate to do what he was told, and turn the light on. Inmate Green then stated 'I am not here for doing what I am told.' Again, I gave the Inmate a direct order to turn on his light. I gave the Inmate another direct order to turn on his light. Inmate Green then started yelling 'Fuck you you are here for Security and you Bitch are here for Medical.'

> I then told the Inmate that he will not talk to Security or Medical Staff that way. Nurse Rabideau also informed the Inmate not to speak to her that way. The Inmate again started yelling 'You are here for medical, give me my fucking Medication'. Nurse Rabideau informed the Inmate that he was a refusal. As I was walking away Inmate stated 'I know your family and friends, you are fucking with the wrong person, you cracker'". Respondent's Answer and Return at Exhibit "A".

According to the Tier II Case Data Sheet, which is annexed to respondent's Answer and Return at Exhibit "B", Officer B. Dabiew served petitioner with a copy of the Inmate Misbehavior Report on October 17, 2014 at 7:12 a.m. No notation was made on the portion of the Data sheet regarding a request by petitioner for employee assistance. *See* Respondent's Answer and Return at Exhibit "B"; *see also* 7 NYCRR Subpart 251-4 and §253.4. The Tier II Case Data Sheet further indicated that the disciplinary hearing was to be commenced by October 30, 2014. *See* Respondent's Answer and Return at Exhibit "B".

A Tier II Disciplinary Hearing was commenced at Upstate on October 29, 2014. At the conclusion of the hearing, on November 26, 2014, petitioner was found not guilty of violating inmate rule 102.10 (making threats), but found guilty of the three remaining charges. *See* Respondent's Answer and Return at Exhibit "G". A disposition was imposed of 30 days Keeplock, with a concomitant loss of packages, commissary and phone privileges; the Hearing Officer suspended each penalty for 30 days and further deferred the 30 day penalties for a period of 90 days. According to his written disposition, the Hearing Officer relied upon Officer M. Sisto's Inmate Misbehavior Report and verbal testimony, as well as the testimony of Nurse Rabideau. Moreover, the Hearing Officer indicated that the reason for the disposition was that "[t]his type of conduct cannot be tolerated. All order from facility staff must be followed. Hopefully this disposition will deter future similar behavior." *Id.* Thereafter, petitioner appealed the Hearing Officer's disposition to respondent (*see Id.* at Exhibit "H"), and on December 9, 2014, Acting Captain T. Allen affirmed the disposition and penalty imposed. *See* Respondent's Answer and Return at Exhibit "I".

Initially, petitioner argues, in effect, that the Inmate Misbehavior Report was not

in compliance with the provisions of 7 NYCRR §251-3.1 (c) inasmuch as Officer Sisto's description of the incident purportedly failed to "specify how [the] incident described therein physically or verbally interferred (*sic*) with him to substantiate [the] charge and provide notice." Verified Petition at ¶16. "The measure of a misbehavior report's sufficiency is whether it provides inmates with enough particulars of the charge against them to enable them to make an effective response." *Faison v. Senkowski*, 255 A.D.2d 625, 626, *app dis* 93 NY2d 847. Upon review of the Inmate Misbehavior Report, and the entire record as it stands before the Court, the undersigned hereby finds that this standard has been met. Officer Sisto's description of the incident provides petitioner with adequate notice of the staff orders which he refused to follow, the nature of his verbal interference and the obscene language petitioner used during such interference. Contrary to petitioner's allegations, the underlying Inmate Misbehavior Report provided petitioner with sufficient notice of the incident in question, such that he was able to adequately prepare a defense to the charges alleged therein. *See Fogan v. Goord*, 45 A.D.3d 1012, 1012-1013.

In his next due process claim, petitioner argues that Upstate's audio/visual surveillance of the underlying incident of misbehavior was altered to petitioner's detriment, and, as a result thereof, he was unable to demonstrate that the allegations set forth in the Inmate Misbehavior Report had been falsified by Officer Sisto. Respondent's counsel argues that, apart from the speculative allegations set forth in his pleading, petitioner has failed to any evidence to show that the surveillance video had been tampered with; moreover, counsel argues that there is no evidence that the inaudibility of the surveillance footage was done intentionally or caused in bad faith.

The record reflects that, upon petitioner's request, Hearing Officer Spinner secured the surveillance footage of incident in question and viewed it with petitioner. *See* Respondent's Answer and Return at Exhibit "F", pgs. 4-5. However, the Hearing Officer ultimately determined that he was unable to rely upon the audio-visual footage, as he was unable to observe petitioner in the video footage and "[t]he audio was terrible". *See* Respondent's Answer and Return at Exhibit "F" at pgs. 5, 14, 29, 30 and 31-32. Instead, the record reflects that the Hearing Officer relied upon the allegations set forth in the

Inmate Misbehavior Report and the testimony proffered by Officer Sisto and Nurse Rabideau. *See* Respondent's Answer and Return at Exhibit "G".

Petitioner failed to substantiate his allegation that the surveillance footage was "adversely altered" with record evidence. In any event, the Hearing Officer's decision not to rely upon the audio-video footage is of no import, as the author and co-signatory of the Inmate Misbehavior Report "who observed the incident first hand were available to testify and to be subject to cross-examination". *Harris v. Selsky*, 236 AD2d 723, 724. In the absence of a clear showing of bad faith on the part of Upstate staff in the production and maintenance of the surveillance footage, the Court is not persuaded by petitioner's conclusory allegations of adverse alteration of the same. *See generally Espinal v. Coughlin*, 153 AD2d, *app dis* 74 NY2d 944, *lv denied* 75 NY2d 705.

Finally, petitioner contends that the delay in completing the Tier II disciplinary hearing purportedly resulted in Nurse Rabideau being unable to recall the alleged incident of misbehavior. S*ee Id*. at ¶¶17 – 20. Pursuant to the provisions of 7 NYCRR §251-5.1 (b), where an inmate is not confined pending the outcome of a Tier II disciplinary hearing, such 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 be made aware of these reasons unless to do so would jeopardize institutional safety or correctional goals."

In the instant proceeding, the underlying Inmate Misbehavior Report was issued on October 16, 2014. *See* Respondent's Answer and Return at Exhibit "A". The record reflects that petitioner was not confined during the pendency of the Tier II disciplinary hearing as a result of the alleged incident of misbehavior. *See Id* at ¶7. The Tier II disciplinary hearing commenced on October 29, 2014, within the 14-day time constraint provided by the DOCCS regulation. *See Id*. at Exhibit "F". As noted above, during the course of the hearing, petitioner requested that Officer M. Sisto and Nurse Rabideau be called to testify, as the signatories of the Inmate Misbehavior Report. *See* Respondent's Answer and Return at Exhibit "F", pg 6. At the conclusion of Officer Sisto's testimony, the matter was adjourned, as Nurse Rabideau was unavailable to testify. *See Id*. at pg 17.

Thereafter, the Hearing Officer made several hearing extension requests, all of which were granted, with the ultimate instruction that the hearing to be completed by November 26, 2014. *See Id* at Exhibit "E". Furthermore, the record reflects that the Hearing Officer conveyed to petitioner the reason for the adjournment was the nurse's unavailability on October 29, 2014. *See* Respondent's Answer and Return at Exhibit "F", pgs 17–18.

Nurse Rabideau's testimony was taken on the 26th of November, 2014, and contrary to petitioner's allegations, the nurse was able recollect the underlying incident of misbehavior, and was able to testify as such, corroborating the testimony of Officer Sisto in the process thereof. *See Id*. at pg 19. Accordingly, the record belies petitioner's allegations; therefore, petitioner's due process claim is hereby denied.

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: March 10, 2016 at
Indian Lake, New York

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S. Peter Feldstein
Acting Justice, Supreme Court