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

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In the Matter of the Application of
ANDREW HENDRICKS, #07-B-0269,
Petitioner,

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

DECISION AND JUDGMENT
RJI #09-1-2016-0137.15
INDEX #2016-0365

-against-

ANTHONY ANNUCCI, Acting Commissioner,
New York State Department of Corrections and
Community Supervision, and
MICHAEL KIRKPATRICK, Superintendent,
Clinton Correctional Facility,
Respondents.

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This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Andrew Hendricks, verified on March 17, 2016 and filed in the Clinton County Clerk's office on March 24, 2016. Petitioner, an inmate at the Clinton Correctional Facility, is challenging the results of a Tier III Superintendent's Disciplinary Hearing held at the Clinton Correctional Facility Annex and concluded on October 28,2015.

On October 17, 2015, Petitioner was directed to provide a urine sample for testing which was, in fact, submitted for urinalysis on October 19, 2015. Thereafter, the petitioner was charged by misbehavior report of violating rule 113.24 (Inmates shall not use or be under the influence of any narcotics or controlled substances unless prescribed by health services providers, and then only in the amount prescribed.) Petitioner was immediately placed into keep-lock status. Petitioner requested an employee assistant and was assigned his first choice, B. Cronin. Ms. Cronin met with the petitioner at which time he requested Ms. Cronin interview C.O. Parsons. Petitioner also provided a list of questions which he sought to be addressed at the hearing and also requested the manual of the testing equipment. The Tier III Superintendent's Disciplinary Hearing commenced on October 23, 2015 before Captain Holdridge, Hearing Officer.

Pursuant to the urine testing protocol indicated in Directive #4937, prior to submitting a urine specimen, an inmate is to be asked if he has taken medication in the previous month. If the first test results are positive for substances and the inmate disclosed that he had taken medication, the officer is required to inquire of the medical personnel as to whether the medication prescribed to the inmate would produce a false-positive result in the urinalysis.[1] In this matter, the petitioner asserts that Officer Parsons failed to do so and this failure to comply with regulations warrants reversal and expungement of the disciplinary disposition.

> ". . . The inmate shall also be asked if s/he has been taking any medication in the past month, and the inmate's response shall be noted on the request for urinalysis test form. If the inmate's response is "yes" and the subsequent test results are positive, an inquiry shall be made to medical personnel as to what medications the inmate has received in the past month which may lead to a positive result (emphasis added)." 7 NYCRR §1020.4(d)(2).

During the hearing, petitioner asked Officer Parsons whether he followed this protocol:

> "HENDRICKS: In the case where a person has stated that he was on medications, what is the procedures as follows? After the second test is is eh (*sic*) shown to be positive?
>
> HOLDRIDGE: Is there any difference?
>
> PARSONS: Usually if there's after the first test, if it says see medical. I have had this discussion several times with Medical, there is no inmate at this facility that is prescribed any type of medication that will make that test positive for marijuana. So we automatically inaudible the second test and issue the misbehavior." Resp. Ex. H, p. 12.

[1] The testing protocol also requires a second urinalysis of any positive test result. Directive #4937(G)(1)(d).

While Officer Parsons did not specifically inquire of the medical department regarding the medications that the petitioner were allegedly prescribed, Hearing Officer Holdridge attempted to ascertain the list of medications directly from the petitioner. The petitioner refused to provide such information to assist in his own defense.[2] Although the respondents must adhere to its own regulations, petitioner must demonstrate how he was prejudiced by the officer's failure to contact the medical department as Officer Parsons testified that he was already aware that there were not any inmates prescribed medication that would result in a false-positive for THC or marijuana. *See Gatson v. Selsky*, 220 AD2d 906. Furthermore, Hearing Officer Holdridge attempted to alleviate any potential prejudice by ascertaining which medications petitioner was prescribed, however, petitioner's unwillingness to cooperate created an impediment to such relief. *See Coates v. Fischer*, 108 AD3d 997.

Petitioner alleges that he was not provided with the proper documentation regarding the Emit "Viva Jr." Drug Detection System that was used for the urinalysis at issue. However, upon review of the hearing transcript, petitioner's assertions are belied therein as the Hearing Officer reviewed the documents provided and confirmed they were correct as well as in order. While the petitioner requested Ms. Cronin, the employee assistant, to be present while he reviewed the manual, the petitioner's request was denied by the Hearing Officer as Ms. Cronin did not have any specialized knowledge about the drug testing equipment. The petitioner was allowed two hours to review the manual and then, more importantly, allowed to ask Officer Parsons relevant questions regarding procedure. "The Hearing Officer remedied any alleged defect in the prehearing assistance by ensuring that petitioner received all the documentation which he requested, and petitioner has failed to demonstrate that any inadequacy prejudiced his defense." *Martino v. Goord*, 38 A.D.3d 958, 959.

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[2] The Court notes that the petitioner has included (Ex. E) information relative to hydrochlorothiazide and other information regarding the potential risks of false-positive urinalysis results from certain medications. The Court will not consider same as it is outside the record before the Hearing Officer.

Petitioner also argued that the testing equipment used, the Emit "Viva Jr." Drug Detection System, is not addressed by Directive #4937, Appendix C, because the directive included testing protocols for machines that were used decades before the Emit "Viva Jr." Drug Detection System was even created. However, the Appendix C attached to the petition is dated 10/22/2014[3] thereby negating petitioner's theory that the testing protocols were out of date. It appears that the petitioner confused the currently used testing protocols with the case law included in Appendix C which referenced analytical methods surveyed in the 1970's and 1980's regarding the methodological use of urinalysis. Nonetheless, the petitioner has not provided any case law that would invalidate the currently used methodology of urinalysis.

Pursuant to the provisions of 7 NYCRR §251-4.1(a)(4), "[a]n inmate shall have the opportunity to pick an employee from an established list of persons who shall assist the inmate when a misbehavior report has been issued against the inmate if: . . . the inmate is confined pending a superintendent's hearing to be conducted pursuant to [7 NYCRR Part 254]". Moreover, 7 NYCRR §251-4.2 provides, in pertinent part, that "the assistant's role is to speak with the inmate charged, to explain the charges to the inmate, interview witnesses and to report the results of his efforts to the inmate. He may assist the inmate in obtaining documentary evidence or written statements which may be necessary."

In order to prevail on a claim of inadequate employee assistance, an inmate petitioner must establish that prejudice resulted from the assistant's failure to comply with applicable regulations. *See Serrano v. Coughlin*, 152 AD2d 790; *see also Perretti v. Fischer*, 58 AD3d 999. Also, any potential prejudice can be alleviated by corrective action taken by the hearing officer. *See Hart v. Fischer*, 89 AD3d 1357, *Harris v. Selsky*, 28 AD3d 982 and *Blackwell v. Goord*, 5 AD3d 883, *lv denied*, 2 NY3d 708.

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[3] The Appendix C annexed to the respondents' papers was a newer version approved 12/4/2015.

In the matter at bar, the petitioner alleges that the employee assistant failed to speak directly to Officer Parsons prior to the hearing and instead, Ms. Cronin spoke with Officer Parsons' secretary. The petitioner has failed to assert how he was prejudiced other than a bald and conclusory statement: "This left me with unreliable information and my defense was prejudiced." Petition, ¶12. Petitioner had a full and fair opportunity to question Officer Parsons during the hearing. "[A]ny of the assistant's inadequacies were remedied by the Hearing Officer and petitioner has failed to demonstrate that he was prejudiced thereby." *Jackson v. Fischer*, 87 AD3d 775, 775–76.

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: August 24, 2016 at
Indian Lake, New York.

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S. Peter Feldstein
Acting Supreme Court Justice