STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
DAVID YAW, #09-B-1874,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION AND ORDER

-against-

ANTHONY ANNUCCI, Acting Commissioner, New York State Department of Corrections and Community Supervision,

Respondents.

(Supreme Court, Albany County, Special Term, March 27, 2015)
Index No. 699-15
(RJI No. 01-15-ST6487)

(Acting Justice Debra J. Young, Presiding)

APPEARANCES: Michael Cassidy, Esq.
Prisoners' Legal Services of New York
For Petitioner
121 Bridge Street, Suite 202
Plattsburgh, New York 12901

Hon. Eric T. Schneiderman
Attorney General of New York State
Attorney for Respondent
(Justin Engel, Esq., Assistant Attorney General,
of Counsel)
Department of Law
The Capitol
Albany, New York 12224

YOUNG, J.:

The petitioner has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated August 11, 2014, which found him guilty of violating certain prison rules. Respondents move for dismissal of the petition alleging, *inter alia*, that the determination was reached in compliance with all statutory and regulatory requirements and that the petitioner failed to state a cause of action.

As a result of an incident that occurred on July 16, 2014, petitioner was issued an Inmate Misbehavior Report charging him with violation of inmate rule 113.13, Inmates shall not be under the influence of any alcoholic beverage or intoxicant. The misbehavior report recites as follows:

> On 6/30/14 you submitted a sample of your urine as [per departmental policy regarding urinalysis testing, Directive 4937. On 7/16/14, I CO D. Stevenson performed a urinalysis test on the above mentioned sample using the Viva Jr. Testing system. As a result of this test your urine sample tested positive for synthetic mariluana [sic] A second test of your urine sample was performed by me on 7/16/14 at approximately 12 14 PM. The result of the second test was again positive for synthetic marijuana. The presence of this substance in your urine indicates that you had recently used banned intoxicants.

A Tier III Disciplinary Hearing was initially held on July 25, 2014. Following this disciplinary hearing, petitioner was found guilty of the charge. The penalty imposed was twelve (12) months confinement in the Special Housing Unit (SHU), with corresponding loss of recreation, packages, commissary, phone and visits. Upon administrative appeal, in a memorandum dated October 20, 2014, the determination was modified on the basis that the incident, although serious, did not warrant the penalty imposed. The penalty imposed after

administrative appeal was 9 months Special Housing Unit, 12 months loss of recreation, packages, commissary and phone, together with 18 days loss of visitation. This proceeding ensued. Petitioner seeks reversal of the disciplinary hearing and expungement of his institutional record. He alleges that the hearing officer violated his fundamental right to be present at the hearing.

Petitioner contends that the hearing officer did not warn him prior to directing his removal from the disciplinary hearing on August 11, 2014. Petitioner further asserts that there is no indication that the situation was so out of control that warnings could be dispensed with or deemed unnecessary. Petitioner further asserts that respondent has not demonstrated that petitioner's behavior rose to the level of disruption requiring removal. Petitioner notes that the hearing officer failed to turn on the tape recorder after reconvening the hearing despite petitioner's presence in the room as well as a requested witness, CO Stevenson. After petitioner's removal the hearing officer recounts on the record what purportedly occurred. The hearing officer states that petitioner was uncooperative without describing or explaining how petitioner had been uncooperative.[1] She states on the record that "Inmate Yaw had paperwork in his possession that he wanted me to go through, and I did not go through the paper work. I tried four times to get inmate Yaw to uh, cooperate and he was uncooperative." Petitioner asserts that the proper remedy is expungement as petitioner's due process rights were violated. Alternatively, petitioner asserts that

[1]Petitioner asserts that the hearing officer stated that petitioner was belligerent. However, this Court's review of the hearing transcript does not include any statement that petitioner was belligerent, rather that petitioner was uncooperative.

expungement is the proper remedy even if the violation were not considered to be constitutional in nature as petitioner will have served the entire penalty as of April 2015.

The scope of judicial review of such administrative determinations is limited to analyzing whether (1) the respondent agency took the action without or in excess of its jurisdiction, or (2) the determination was (a) made in violation of lawful procedure or of positive statutory or constitutional requirements, (b) affected by an error of law, (c) an abuse of discretion or (d) arbitrary and capricious in that the agency took action without a sound basis in reason or without regard for the facts. Barring such wrongs, the Court must confirm the determination (Matter of Pell v Board of Education of Union Free School, 34 NY2d 222, 231). The Court is not authorized simply to substitute its judgment for the respondent's.

"An inmate has a fundamental right to be present during a prison disciplinary hearing unless he or she is excluded for reasons of institutional safety or correctional goals" (Matter of Cornwall v Fischer, 78 AD3d 1337, 1337–1338 [2010] [internal quotation marks and citations omitted]). At the hearing, while petitioner was warned on the first day of the hearing on July 25, 2014 that his continual interruption of the hearing officer while she was speaking would result in entry of a not guilty plea and proceeding with the hearing without petitioner, there is no indication in the record that petitioner was warned on August 11, 2014 that his behavior was such that if it continued he would be removed. In fact, the tape recorder was not turned on by the hearing officer so there is no record that this Court can review as to what petitioner was doing which the hearing officer deemed uncooperative and resulted in the hearing officer removing him from the hearing. Nor was there ever any explanation as to why the tape recorder was not turned on despite the presence of petitioner

and a witness in the hearing room with the hearing officer. Respondent has not demonstrated that petitioner's behavior rose to the level that would warrant his removal from the hearing (see Matter of West v Prack, 96 AD3d 1314, 1314 [2012]; Matter of Holmes v Drown, 23 AD3d 793, 794 [2005]).

Accordingly, the determination finding petitioner guilty of the charge is annulled, without costs, the petition is granted to that extent, and respondent is directed to expunge all references thereto from petitioner's institutional record.

This Memorandum constitutes the Decision and Order of the Court. All papers, including this Decision and Order, are returned to the attorney for petitioner. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

SO ORDERED.
ENTER.

Dated: Troy, New York
March 31, 2015

DEBRA J. YOUNG
Acting Supreme Court Justice

Papers Considered:

(1) Verified Petition dated February 11, 2015;
(2) Answer dated March 18, 2015;
(3) Affirmation of Justin Engel, Esq., dated March 18, 2014, with exhibits annexed;
(4) Reply Affirmation dated March 24, 2015.