

**SUPREME COURT OF THE STATE OF NEW YORK**  
***Appellate Division, Fourth Judicial Department***

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**TP 18-02024**

PRESENT: WHALEN, P.J., SMITH, DEJOSEPH, NEMOYER, AND CURRAN, JJ.

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IN THE MATTER OF TERELL VIERA, JR., PETITIONER,

V

MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK  
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY  
SUPERVISION, RESPONDENT.

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WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF  
COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (ROBYN P. RYAN OF COUNSEL),  
FOR RESPONDENT.

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Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered October 29, 2018) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated an inmate rule.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul a determination, following a tier II disciplinary hearing, that he violated inmate rule 116.13 (7 NYCRR 270.2 [B] [17] [iv] [possession of stolen property]). Contrary to petitioner's contention, the misbehavior report, the testimony of the author of that report, and the photograph of the property constitute substantial evidence to support the determination that he violated that inmate rule (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Petitioner failed to exhaust his administrative remedies with respect to his contention that he was denied employee assistance, inasmuch as he failed to raise that contention in his administrative appeal, " 'and this Court has no discretionary authority to reach that contention' " (*Matter of McFadden v Prack*, 93 AD3d 1268, 1269 [4th Dept 2012]; *see Matter of Stewart v Fischer*, 109 AD3d 1122, 1123 [4th Dept 2013], *lv denied* 22 NY3d 858 [2013]; *Matter of Nelson v Coughlin*, 188 AD2d 1071, 1071 [4th Dept 1992], *appeal dismissed* 81 NY2d 834 [1993]).

Entered: March 22, 2019

Mark W. Bennett  
Clerk of the Court