

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

**747**

**TP 19-00191**

PRESENT: WHALEN, P.J., CENTRA, LINDLEY, DEJOSEPH, AND TROUTMAN, JJ.

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IN THE MATTER OF ANTOINE PORTER, 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 (MARCUS J. MASTRACCO 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 January 30, 2019) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination so appealed from is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated inmate rule 113.10 (7 NYCRR 270.2 [B] [14] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of that inmate rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul that part of a determination, following a tier III disciplinary hearing, that he violated inmate rules 100.10 (7 NYCRR 270.2 [B] [1] [i] [assault on an inmate]) and 113.10 (7 NYCRR 270.2 [B] [14] [i] [weapon possession]). As respondent correctly concedes, the determination that petitioner violated inmate rule 113.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling that part of the determination finding that petitioner violated that rule, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration

of the penalty (*see id.* at 1701). Contrary to petitioner's contention, the determination finding that he violated rule 100.10 is supported by substantial evidence (*see generally Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]; *People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Entered: June 28, 2019

Mark W. Bennett  
Clerk of the Court