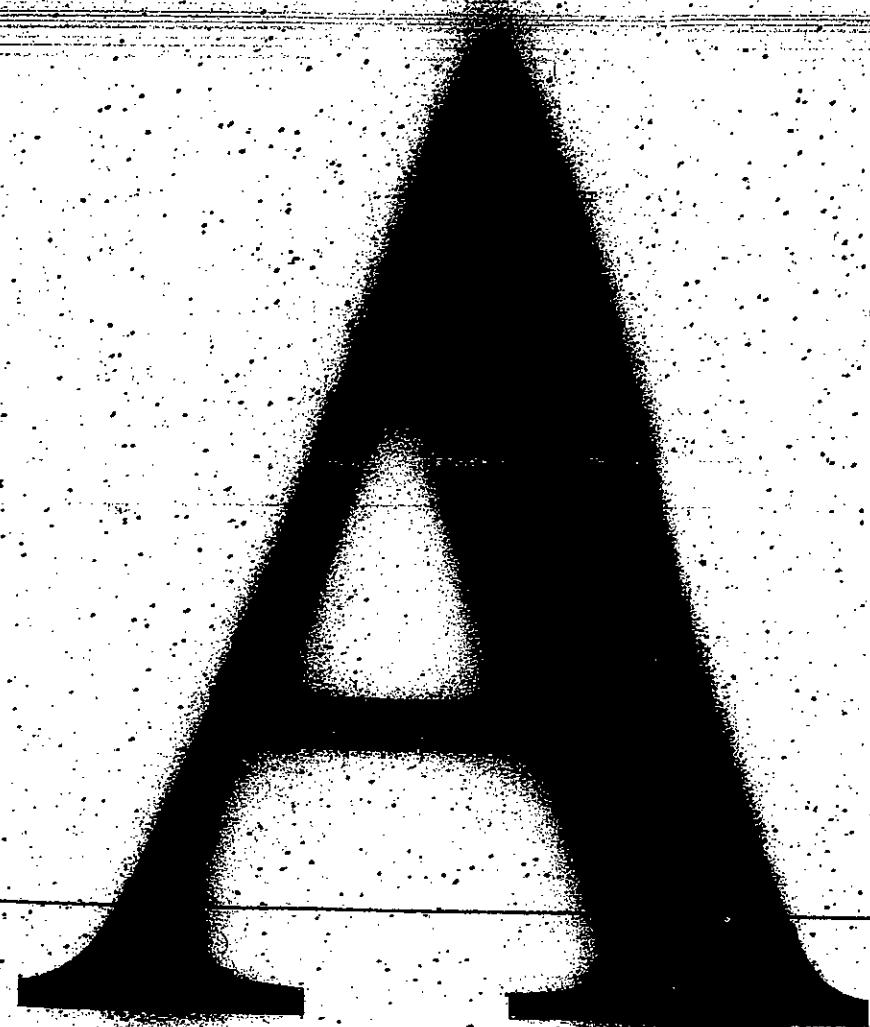


EXHIBIT



EXHIBIT

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: January 9, 2020

527677

In the Matter of ANDREW
HENDRICKS,
Appellant,

v

MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections
and Community Supervision,
et al.,
Respondents.

Calendar Date: December 17, 2019

Before: Lynch, J.P., Clark, Mulvey, Devine and Reynolds
Fitzgerald, JJ.

Andrew Hendricks, Dannemora, appellant pro se.

Letitia James, Attorney General, Albany (Martin A. Hotvet
of counsel), for respondents.

Reynolds Fitzgerald, J.

Appeals (1) from a judgment of the Supreme Court
(Feldstein, J.), entered March 18, 2019 in Clinton County,
which, in a proceeding pursuant to CPLR article 78, among other
things, granted respondents' motion to dismiss the petition, and
(2) from an order of said court, entered March 12, 2019 in
Clinton County, which dismissed the amended petition.

After petitioner was removed from his job in the prison tailor shop, he filed a grievance claiming that his removal was for retaliatory reasons. The Inmate Grievance Resolution Committee denied the grievance and the denial was subsequently upheld by respondent Superintendent of Clinton Correctional Facility. On February 6, 2018, petitioner appealed to the Central Office Review Committee (hereinafter CORC). In April 2018, prior to receiving a determination from CORC on the administrative appeal, petitioner commenced this CPLR article 78 proceeding challenging the denial of the grievance. Respondents, in turn, moved to dismiss the petition on the ground that petitioner failed to exhaust administrative remedies. Before Supreme Court decided the motion, petitioner sought to file an amended petition. By letter, denominated an order, Supreme Court declined to consider the amended petition because petitioner failed to seek leave to amend the petition. The court then issued a judgment granting respondents' motion and dismissed the petition. Petitioner appeals.

Petitioner contends, among other things, that Supreme Court erroneously dismissed his petition for failure to exhaust administrative remedies. Specifically, he asserts that he timely appealed the grievance determination to CORC and commenced this CPLR article 78 proceeding only after CORC failed to issue a determination within 30 days as required by 7 NYCRR 701.5 (d) (3) (iii). That regulation provides, in relevant part, that "CORK shall review each appeal, render a decision on the grievance, and transmit its decision to the facility . . . and any direct parties within 30 calendar days from the time the appeal was received" (7 NYCRR 701.5 [d] [3] [ii]). It is undisputed that CORC did not render its decision within 30 days of petitioner's February 6, 2018 appeal. However, contrary to petitioner's claim, this Court has held that the time limitations set forth in 7 NYCRR 701.5 (d) (3) (ii) are directory, not mandatory (see Matter of Golston v Director of Div. of Nutritional Servs., 168 AD3d 1299, 1300 [2019]; Matter of Jones v Fischer, 110 AD3d 1295, 1296 [2013], appeal dismissed 23 NY3d 955 [2014]). As such, petitioner must demonstrate that he was substantially prejudiced by CORC's delay in issuing a decision (see Matter of Golston v Director of Div. of Nutritional Servs., 168 AD3d at 1300; Matter of Jones v Fischer,

110 AD3d at 1296). Petitioner has not made that showing here. Accordingly, we find no error in Supreme Court's dismissal of the petition as premature.

Petitioner also challenges Supreme Court's failure to consider his amended petition and asserts that, because respondents' motion to dismiss was still pending at that time, he was not required to obtain leave of court. We are not persuaded. The procedure governing CPLR article 78 proceedings is set forth in CPLR 7804. With regard to pleadings, CPLR 7804 (d) specifically provides for service of a verified petition, verified answer and reply to a counterclaim or to new matter in the answer. As for other pleadings, the statute states that "[t]he court may permit such other pleadings as are authorized in an action upon such terms as it may specify" (CPLR 7804 [d]; see CPLR 402; Matter of Nagubandi v Polentz, 131 AD3d 639, 641 [2015]; Matter of Gomez v Fischer, 101 AD3d 1195, 1196 [2012]). In view of this, it was incumbent upon petitioner to obtain the court's permission to file the amended petition and, having failed to do so, Supreme Court was not bound to consider it.

We have considered petitioner's remaining contentions and find them to be unavailing.

Lynch, J.P., Clark, Mulvey and Devine, JJ., concur.

ORDERED that the judgment and order are affirmed, without costs.

ENTER:



Robert D. Mayberger
Clerk of the Court

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of ANDREW HENDRICKS,

Appellant,

NOTICE OF ENTRY

v

A.D. No. 527677

ANTHONY J. ANNUCCI, as Acting Commissioner
of Corrections and Community Supervision, et al.,

Respondents.

PLEASE TAKE NOTICE that the within is a true and complete copy of the
Memorandum and Order duly entered in the above-entitled matter in the Office of
the Clerk of the Supreme Court, Appellate Division, Third Department on
January 9, 2020.

Dated: January 9, 2020
Albany, New York

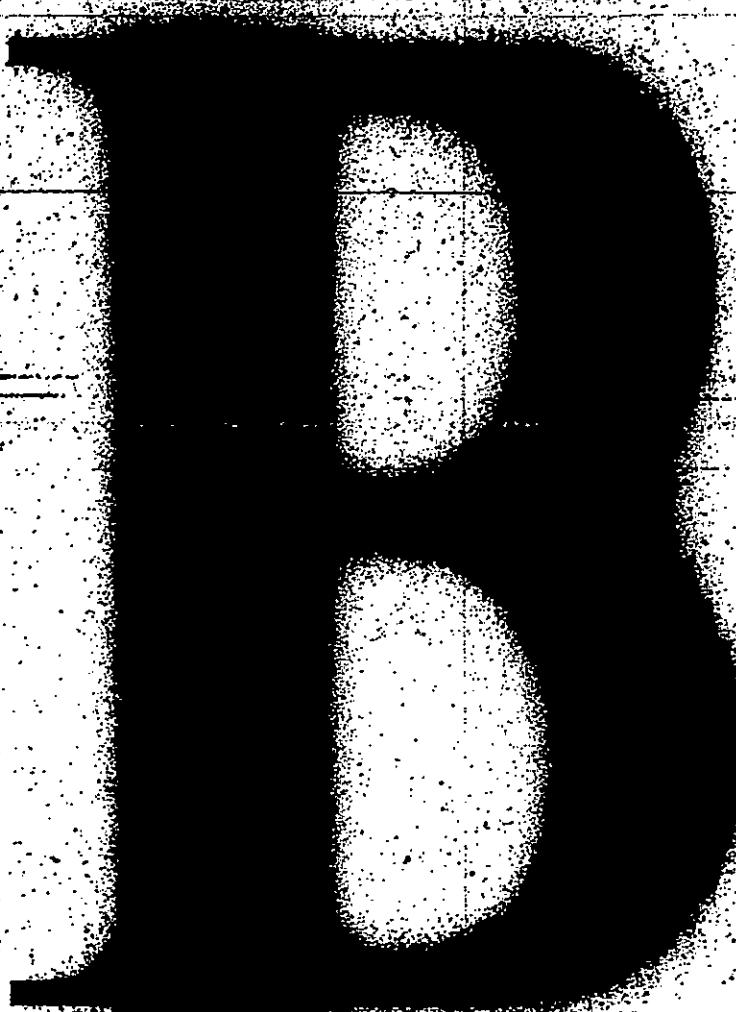
LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224

By: 

MARTIN A. HOTVET
Assistant Solicitor General
Telephone (518) 776-2048
OAG No. 18-023605

TO: Andrew Hendricks, #07-B-0269
Clinton Correctional Facility
1156 Rt. 374, P.O. Box 2001
Dannemora, New York 12929

EXHIBIT



EXHIBIT

STATE OF NEW YORK
SUPREME COURT

COUNTY OF CLINTON

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

-against-

ANTHONY ANNUCCI, COMMISSIONER
OF THE NEW YORK STATE DOCCS,
EARL BELL, SUPERINTENDENT
CLINTON CORRECTIONAL FACILITY,
Respondents.

DECISION, ORDER & JUDGMENT
RJI #09-1-2018-0200.11
INDEX #2018-553



Doc ID: 008503250003 Type: CIV
Recorded: 03/18/2019 at 01:50:12 PM
Fee Amt: \$0.00 Page 1 of 3
Clinton, NY
John H. Zurlo County Clerk

File 2018-00000553

This is a proceeding for judgment pursuant to Article 78 of the CPLR that was originated by the Petition of Andrew Hendricks, verified and supported by the Petitioner's Affidavit in Support of Order to Show Cause, dated on April 11, 2018 and were filed in the Clinton County Clerk's Office on April 18, 2018. Petitioner, who is an inmate at the Clinton Correctional Facility, challenges the disposition of an Inmate Grievance Complaint.

The Court issued a Decision and Amended Order to Show Cause on September 7, 2018¹. In response thereto, on December 12, 2018, the Court received a Motion to Dismiss for failure to exhaust administrative remedies, supported by an Affirmation of Christopher J. Fleury, Esq., Assistant Attorney General, dated December 10, 2018. On January 4, 2019, the Court received the Petitioner's Motion for a Default Judgment dated December 12, 2018.² Thereafter, on January 9, 2019, the Court received the Petitioner responsive papers to the Respondents' Motion.

¹ The Court references hereto and incorporates herein the procedural history included in the Decision and Amended Order to Show Cause dated September 7, 2018.

² The Court received the Respondents' letter opposition to the Petitioner's motion for default on December 24, 2018 explaining that the responsive papers were filed but not timely delivered to the Petitioner.

Preliminarily, the Court will deny the Petitioner's Motion for Default Judgment insofar as the Respondents' delay of one (1) business day was *de minimis* and accounted to be a law office failure. *See*, Fleury letter, 12/10/18.

Petitioner filed an Inmate Grievance Complaint (CLA-7828-17) dated November 21, 2017 on December 11, 2017 alleging that he was improperly fired from his employment at the tailor shop. The Inmate Grievance Resolution Committee (hereinafter referred to as the "IGRC") denied the Inmate Grievance finding that the Petitioner was fired for a specific but confidential reason. The Petitioner thereafter appealed the IGRC decision to the Superintendent who affirmed the IGRC decision on January 19, 2018. On February 6, 2018, the Petitioner appealed the Superintendent's decision to the Central Office Review Committee (hereinafter referred to as the "CORC").

The instant petition was filed with the Clinton County Clerk on April 18, 2018 prior to the issuance of a determination by the CORC. The petition acknowledges that the CORC had not determined the appeal as of the date of filing; however, the Petitioner "deemed the Respondents failure to act/respond to my Inmate Grievance Complaint to be a Constructive denial of my Inmate Grievance Complaint." Petition, ¶12. The Petitioner argues that the Respondents acted arbitrarily and capriciously for removing him from his employment at the tailor shop. The Petitioner seeks to vacate and reverse the "constructive denial" of his Inmate Grievance (CLA-7828-17), as well as, to reinstate the Petitioner to his previous employment in the tailor shop and award him lost wages since his removal.

Respondents argue that the Petitioner failed to exhaust his administrative remedies prior to commencing the action. Respondent further asserts that Directive 7 NYCRR §701.5(d)(3)(ii) is directory as opposed to mandatory and that the caselaw indicates that

absent demonstrable substantial prejudice, the administrative remedies must be exhausted prior to commencing a judicial proceeding. See, Matter of Jones v. Fischer, 110 AD3d 1295; Sheppard v. LeFevre, 116 AD2d 867.

"[A] petitioner must exhaust all his [or her] administrative remedies before seeking judicial review unless he or she is challenging an agency's action as unconstitutional or beyond its grant of power, or if resort to the available remedies would be futile or would cause the petitioner irreparable harm". Santiago v. Boll, 130 AD3d 1336, 1336.

Insofar as it is undisputed, indeed admitted, that the Petitioner failed to exhaust his administrative remedies prior to the instant action being commenced, the Respondents' motion to dismiss must be granted.

Based upon all of the above, it is, therefore, the decision of the Court and it is hereby ORDERED, that the Petitioner's motion for a default judgment is denied; and it is further

ORDERED, that the Respondents' motion to dismiss is granted; and it is further ADJUDGED, that the petition is dismissed.

Dated: March 11, 2019 at
Lake Pleasant, New York.


S. Peter Feldstein
Acting Supreme Court Justice

State of New York
Supreme Court, County of Clinton

Hon. S. Peter Feldstein, AJSC
In the Matter of the Application of

Andrew Hendricks, No. 07B0269,
Petitioner,

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

NOTICE OF ENTRY
Index No. 2018-0553
RJI No. 09-2018-0200.11

- against -

Anthony Annucci, Commissioner of
NYSDOCCS, Earl Bell, Superintendent
Clinton Correctional Facility,
Respondents.

PLEASE TAKE NOTICE that the DECISION, ORDER & JUDGMENT in this
action was entered in the Office of the County Clerk of Clinton County, on March
18, 2019

DATED: Plattsburgh, New York
March 20, 2019

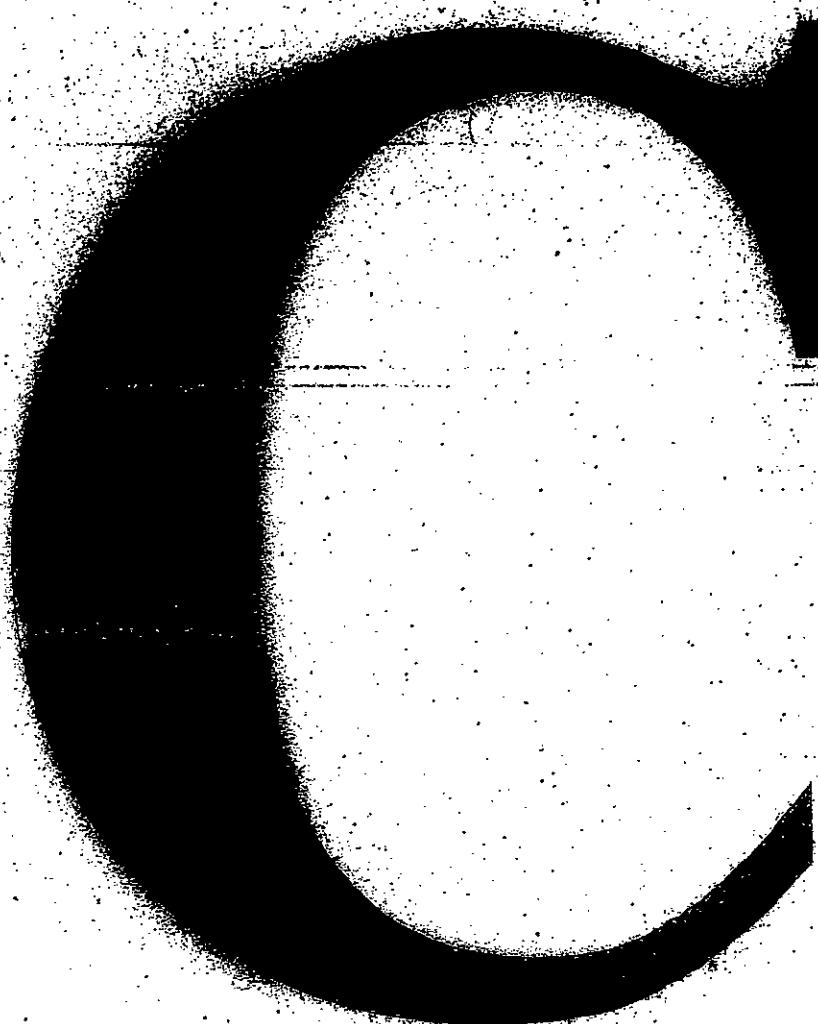
LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents.
43 Durkee Street, Suite 700
Plattsburgh, New York 12901

BY:


Christopher J. Fleury
Assistant Attorney General
of Counsel
Phone: (518) 562-3288

TO: Andrew Hendricks, No. 07B0269
Clinton Correctional Facility
PO Box 2001
Dannemora, NY 12929

EXHIBIT



EXHIBIT

State of New York
Supreme Court, Appellate Division
Third Judicial Department

RECEIVED
ALBANY APR 8 2020
RECEIVED

2020 APR -8 PM 2:57

Decided and Entered: April 6, 2020

527677

18-023405
Hotuet

In the Matter of ANDREW HENDRICKS,

v

Appellant,

DECISION AND ORDER
ON MOTION

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections and
Community Supervision, et al.,
Respondents.

Motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals.

Motion for permission to proceed as a poor person.

Upon the papers filed in support of the motions and the papers filed in opposition to the motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals, it is

ORDERED that the motion for reargument or, in the alternative, for permission to appeal to the Court of Appeals is denied, without costs, and it is further

ORDERED that the motion for permission to proceed as a poor person is denied, without costs, as unnecessary.

Lynch, J.P., Clark, Mulvey, Devine and Reynolds Fitzgerald, JJ., concur.

ENTER:



Robert D. Mayberger
Clerk of the Court

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

In the Matter of ANDREW HENDRICKS,

Appellant,

v

NOTICE OF ENTRY

A.D. No. 527677

ANTHONY J. ANNUCCI, as Acting Commissioner
of Corrections and Community Supervision, et al.,

Respondents.

PLEASE TAKE NOTICE that the within is a true and complete copy of the
Decision and Order on Motion duly entered in the above-entitled matter in the
Office of the Clerk of the Supreme Court, Appellate Division, Third Department on
April 6, 2020.

Dated: April 6, 2020
Albany, New York

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224

By: 

MARTIN A. HOTVET
Assistant Solicitor General
Telephone (518) 776-2048
OAG No. 18-023605

TO: ANDREW HENDRICKS, 07-B-0269
Clinton Correctional Facility
1156 Rt. 374, P.O. Box 2001
Dannemora, New York 12929

EXHIBIT

D

State of New York
Court of Appeals

*Decided and Entered on the
tenth day of September, 2020*

Present, Hon. Janet DiFiore, *Chief Judge, presiding.*

Mo. No. 2020-326.

In the Matter of Andrew Hendricks,
Appellant,

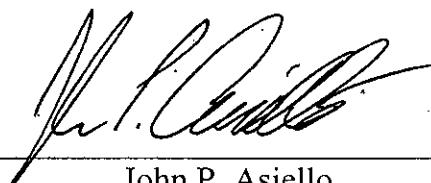
v.

Anthony J. Annucci, &c.,
et al.,
Respondents.

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the motion is denied.



John P. Asiello
Clerk of the Court