

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

Decided and Entered: January 18, 2007

98479

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In the Matter of ALFONSO  
RIZZUTO,  
Petitioner,

v

MEMORANDUM AND JUDGMENT

GLENN S. GOORD, as Commissioner  
of Correctional Services,  
Respondent.

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Calendar Date: November 21, 2006

Before: Cardona, P.J., Mercure, Crew III, Mugglin and  
Lahtinen, JJ.

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Alfonso Rizzuto, Auburn, petitioner pro se.

Andrew M. Cuomo, Attorney General, Albany (Nancy A. Spiegel  
of counsel), for respondent.

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Crew III, J.

Proceeding pursuant to CPLR article 78 (transferred to this  
Court by order of the Supreme Court, entered in Albany County) to  
review a determination of respondent which found petitioner  
guilty of violating certain prison disciplinary rules.

Petitioner, a prison inmate, was charged in a misbehavior  
report with making false statements, possessing an unauthorized  
valuable and using a prepaid telephone calling card. Following a  
tier III disciplinary hearing, petitioner was found guilty as  
charged and a penalty of four months' confinement and a  
corresponding loss of privileges was imposed. Upon  
administrative review, the respective penalties were reduced to

three months. Petitioner then commenced this proceeding pursuant to CPLR article 78 seeking to annul respondent's determination.

Preliminarily, respondent concedes and our review of the record reveals that the charge of using a prepaid telephone calling card is not supported by substantial evidence and, to that extent, the underlying determination must be annulled (see Matter of Arpa v David, 32 AD3d 1140, 1141 [2006]). In light of the fact that there was no recommended loss of good time and given that petitioner already has served the three months ultimately imposed, we need not remit for a redetermination of the penalty (see Matter of Zhang v Murphy, 1 AD3d 784 [2003]).

Turning to the balance of this proceeding, petitioner addressed only two of the 70 "questions presented" in his brief. As to the issues briefed, we are satisfied that the misbehavior report, the testimony of the correction officers at issue and petitioner's own admissions constitute substantial evidence to support the findings of guilt relative to the charges of making false statements and possessing an unauthorized valuable. To the extent that petitioner attempted to explain away his conduct and/or assert that the charges were issued in retaliation for various grievances he had filed, this created a credibility issue for the Hearing Officer to resolve (see Matter of Hamilton v Selsky, 13 AD3d 844, 845 [2004], lv denied 5 NY3d 704 [2005]). Nor are we persuaded that petitioner was denied the right to call certain witnesses to testify at the disciplinary hearing, as the record reflects that the sought-after testimony would have been either irrelevant or redundant (see Matter of Pettus v West, 28 AD3d 907, 908 [2006]).

Cardona, P.J., Mercure, Mugglin and Lahtinen, JJ., concur.

ADJUDGED that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of using a prepaid telephone calling card; petition granted to that extent and respondent is directed to expunge all references thereto from petitioner's institutional record; and, as so modified, confirmed.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is written in a cursive style with a large, looping initial "M".

Michael J. Novack  
Clerk of the Court