

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

Decided and Entered: December 22, 2011

512165

In the Matter of ALBERT
TULLOCH,

Appellant,

v

MEMORANDUM AND ORDER

BRIAN FISCHER, as Commissioner
of Corrections and
Community Supervision,
Respondent.

Calendar Date: November 2, 2011

Before: Peters, J.P., Spain, Lahtinen, Kavanagh and
Egan Jr., JJ.

Albert Tulloch, Fallsburg, appellant pro se.

Eric T. Schneiderman, Attorney General, Albany (Peter H.
Schiff of counsel), for respondent.

Appeal from a judgment of the Supreme Court (Ceresia Jr.,
J.), entered March 18, 2011 in Albany County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 78, to review two determinations of respondent finding
petitioner guilty of violating certain prison disciplinary rules.

Following an incident in the mess hall during which he
apparently slashed a fellow inmate in the neck and leg with a
butcher knife, petitioner was charged in a misbehavior report
with assault and possession of a weapon. Following a tier III
disciplinary hearing, petitioner was found guilty of both charges

and that determination was affirmed on administrative appeal.¹ Petitioner then commenced this CPLR article 78 proceeding to challenge the determination, and Supreme Court dismissed the application without a hearing. This appeal ensued.

We affirm. We first reject petitioner's contention that the determination must be annulled because he received inadequate prehearing assistance. While he claims that his assistant failed to interview potential witnesses and report back, we note that the inmate assistant form listed no potential witnesses and was signed by petitioner indicating his satisfaction with his assistance. In any event, the Hearing Officer attempted to obtain the testimony of two witnesses named by petitioner at the hearing as well as seven other inmates who were present at the time of the incident, thereby curing any deficiencies that may have been present in the prehearing assistance, and petitioner has demonstrated no prejudice (see Matter of Washington v Fischer, 85 AD3d 1484, 1484-1485 [2011]; Matter of Mayo v Fischer, 82 AD3d 1421, 1422 [2011], lv denied 17 NY3d 702 [2011]).

We also find unpersuasive petitioner's contention that he was denied the right to call witnesses. There is no indication that the requested inmates, including the victim, had ever agreed to testify and, therefore, the witness refusal forms indicating the reason for the refusal and signed by each inmate and an employee witness adequately protected petitioner's right (see Matter of Tafari v Fischer, 78 AD3d 1405, 1406 [2010], lv denied 16 NY3d 704 [2011]; Matter of Hill v Selsky, 19 AD3d 64, 66-67 [2005]). Furthermore, petitioner had no right to cross-examine the confidential witnesses (see Matter of Barton v New York State Dept. of Correctional Servs., 81 AD3d 1029, 1030 [2011]; Matter of Shabazz v Artus, 72 AD3d 1299, 1300 [2010]). Finally, there was no requirement that the author of the misbehavior report testify absent a request from petitioner (see Matter of Hernandez v Selsky, 62 AD3d 1177, 1178 [2009]; Matter of Donato v Goord,

¹ The disciplinary hearing and determination encompassed charges stemming from a second misbehavior report which are not at issue here.

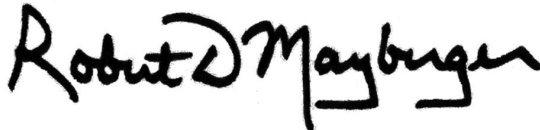
278 AD2d 641, 641 [2000], lv denied 96 NY2d 711 [2001]).

Petitioner's remaining contentions have been considered and found to be either unpreserved or lacking in merit.

Peters, J.P., Spain, Lahtinen, Kavanagh and Egan Jr., JJ., concur.

ORDERED that the judgment is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court