

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

Decided and Entered: June 28, 2012

513146

In the Matter of PERCY D.
WEST,
Appellant,
v

MEMORANDUM AND ORDER

ALBERT PRACK, as Acting
Director of Special
Housing and Inmate
Disciplinary Programs,
Respondent.

Calendar Date: May 24, 2012

Before: Mercure, J.P., Kavanagh, Stein, McCarthy and
Egan Jr., JJ.

Percy D. West, Pine City, appellant pro se.

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

Egan Jr., J.

Appeal from a judgment of the Supreme Court (Cerio Jr.,
J.), entered July 22, 2011 in Chemung County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 78, to review a determination of the Commissioner of
Corrections and Community Supervision finding petitioner guilty
of violating certain prison disciplinary rules.

Petitioner, a prison inmate, was charged in a misbehavior
report with soliciting a sexual act, engaging in lewd conduct and
violating visiting room procedures after a correction officer

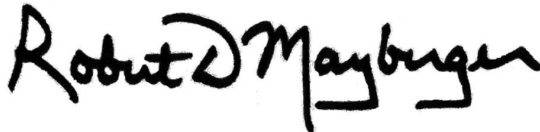
allegedly witnessed him masturbating and engaging in other prohibited conduct with his wife during a visit. Following a tier III disciplinary hearing, petitioner was found guilty of all charges. Petitioner's subsequent administrative appeal proved to be unsuccessful, prompting him to commence this CPLR article 78 proceeding to challenge the determination. Supreme Court dismissed the petition and petitioner now appeals.

We reverse. "An inmate has a fundamental right to be present during a prison disciplinary hearing unless he or she is excluded for reasons of institutional safety or correctional goals" (Matter of Cornwall v Fischer, 78 AD3d 1337, 1337-1338 [2010] [internal quotation marks and citations omitted]). Here, during the preliminary stages of the hearing, petitioner was asked by the Hearing Officer whether he was satisfied with his employee assistance, and petitioner responded that he had been told by his assistant that he would be permitted to view a videotape of the incident prior to the hearing. The Hearing Officer denied that request. When petitioner attempted to register his objection and reiterate his desire to view the tape before the hearing in order to prepare his defense, the Hearing Officer had petitioner removed from the hearing – citing petitioner's frequent interruptions. Although the record reveals that petitioner interrupted the Hearing Officer once during this brief exchange, our review does not demonstrate that petitioner's behavior rose to the level of disruption required to warrant his exclusion from the hearing (see Matter of Cornwall v Fischer, 78 AD3d at 1338; Matter of Holmes v Drown, 23 AD3d 793, 794 [2005]; compare Matter of Pitts v Fischer, 54 AD3d 477 [2008]; Matter of Marie v Goord, 34 AD3d 1019 [2006]). In light of our holding, the remainder of petitioner's procedural arguments are academic.

Mercure, J.P., Kavanagh, Stein and McCarthy, JJ., concur.

ORDERED that the judgment is reversed, on the law, without costs, petition granted, determination annulled and the Commissioner of Corrections and Community Supervision is directed to expunge all references thereto from petitioner's institutional record.

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