

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

Decided and Entered: August 2, 2012

513563

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In the Matter of JOSEPH  
DUSHOCK,  
  
Petitioner,  
  
v

MEMORANDUM AND JUDGMENT

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

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Calendar Date: June 6, 2012

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

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Joseph Dushock, Department of Social Services, Single  
Homeless Assessment Center, Valhalla, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Frank K.  
Walsh of counsel), for respondent.

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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 the Commissioner of Corrections and  
Community Supervision which found petitioner guilty of violating  
a prison disciplinary rule.

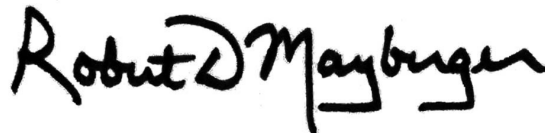
Petitioner, a prison inmate, was charged with a  
disciplinary infraction after a search of his cube resulted in  
the discovery of a weapon. Petitioner was found guilty of this  
charge following a tier III disciplinary hearing and the  
determination was affirmed on administrative appeal with a  
modified penalty. This CPLR article 78 proceeding ensued.

Because we find that the determination was not supported by substantial evidence, we annul. In his cube – which was shared by five other inmates – the weapon – a metal rod with a taped handle that was sharpened at one end – was found concealed in a pillow case between two lockers that were stacked on top of each other and held together by a strap, which had been cut and altered. Petitioner's locker was on top, and the bottom locker, upon which the pillow case was located, belonged to another inmate who occupied the cube. Petitioner was one of six inmates who had access to this area and exercised control over it. Also, the locker upon which the weapon was located did not belong to petitioner, but to another inmate who occupied the cube. In that regard, we note that no evidence was introduced eliminating this inmate – or any of the other inmates who occupied the cube – from being responsible for the possession of this contraband. As a result, we do not believe that a reasonable inference can be made that petitioner possessed this contraband simply because he had access to the area where the contraband was found and that it, to some extent, was under his control (see Matter of Alache v Fischer, 91 AD3d 1240, 1241 [2012]; Matter of Crook v Fischer, 91 AD3d 1076, 1076-1077 [2012]; Matter of Hayes v Fischer, 70 AD3d 1085, 1086 [2010]; Matter of Muller v Fischer, 62 AD3d 1191, 1191 [2009]; Matter of Ganz v Selsky, 34 AD3d 879, 880 [2006]). As a result, the determination was not supported by substantial evidence and must be annulled.

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

ADJUDGED that the determination is annulled, without costs, petition granted and the Commissioner of Corrections and Community Supervision is directed to expunge all references to this matter 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