

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

Decided and Entered: September 13, 2012

513567

In the Matter of MICHEL
TOLIVER,
Petitioner,

v

MEMORANDUM AND JUDGMENT

COMMISSIONER OF DEPARTMENT OF
CORRECTIONAL SERVICES
et al.,
Respondents.

Calendar Date: July 30, 2012

Before: Peters, P.J., Lahtinen, Malone Jr., Kavanagh and
McCarthy, JJ.

Michel Toliver, Wallkill, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Marcus J.
Mastracco of counsel), for respondents.

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 Superintendent of Shawangunk Correctional Facility which found petitioner guilty of violating certain prison disciplinary rules.

Petitioner was charged in a misbehavior report with disobeying a direct order and violating a movement regulation after he refused a correction officer's direction to go to the clinic to retrieve his mandatory medication. Following a tier II disciplinary hearing, petitioner was found guilty of both charges. The determination was affirmed on administrative appeal and this CPLR article 78 proceeding ensued.

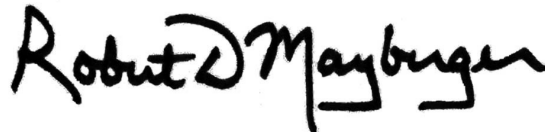
We confirm. The misbehavior report, together with the hearing testimony of the reporting officer, a facility nurse and petitioner's own admission that he did not report as directed, provide substantial evidence supporting the determination of guilt (see Matter of Lashway v Fischer, 91 AD3d 1239 [2012], lv denied 19 NY3d 805 [2012]; Matter of Crenshaw v Fischer, 87 AD3d 1189, 1190 [2011]). Although petitioner claimed that, due to pain, he was unable to leave his bed to comply with the directive, this created a credibility issue for the Hearing Officer to resolve (see Matter of Green v Bradt, 79 AD3d 1566, 1567 [2010], lv denied 16 NY3d 709 [2011]). Notably, a facility nurse testified that petitioner had reported for medication the previous five days and petitioner acknowledged that he was able to leave his bed and stand for the inmate "count" approximately 30 minutes before he was ordered to report to the clinic.

Finally, petitioner's constitutional claims and assertion that the misbehavior report was issued in retaliation for grievances he filed are all being raised for the first time and, therefore, they are unreserved for this Court's review (see Matter of Hamilton v Bezio, 76 AD3d 1125, 1126 [2010]; Matter of McCollum v Fischer, 61 AD3d 1194 [2009], lv denied 13 NY3d 703 [2009]).

Peters, P.J., Lahtinen, Malone Jr., Kavanagh and McCarthy, JJ., concur.

ADJUDGED that the determination is confirmed, without costs, and petition dismissed.

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