

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

Decided and Entered: April 4, 2019

526637

In the Matter of JAVON
GONZALEZ,
Appellant,

v

MEMORANDUM AND ORDER

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections
and Community Supervision,
Respondent.

Calendar Date: March 15, 2019

Before: Garry, P.J., Egan Jr., Clark, Devine and Rumsey, JJ.

Javon Gonzalez, Wallkill, appellant pro se.

Letitia James, Attorney General, Albany (Julie M. Sheridan
of counsel), for respondent.

Appeal from a judgment of the Supreme Court (Ceresia, J.),
entered June 24, 2018 in Albany County, which dismissed
petitioner's application, in a proceeding pursuant to CPLR
article 78, to review a determination of respondent finding
petitioner guilty of violating certain prison disciplinary
rules.

Following an altercation with another inmate, petitioner
was charged in a misbehavior report with fighting, engaging in
violent conduct and disobeying direct orders. At the conclusion
of a tier III disciplinary hearing, petitioner was found guilty
of all charges and a penalty was imposed. That determination

was affirmed upon petitioner's administrative appeal, prompting petitioner to commence this CPLR article 78 proceeding to challenge respondent's determination. Following joinder of issue, Supreme Court rejected petitioner's procedural challenges¹ and dismissed the petition. This appeal ensued.

Petitioner has expressly abandoned his challenge to the designation of the Hearing Officer and, by failing to address such issue in his brief (see e.g. Matter of Sudler v Annucci, 166 AD3d 1351, 1352 n [2018]), has similarly abandoned his argument that the hearing was not completed in a timely fashion. Additionally, petitioner's claim that the Hearing Officer failed to address petitioner's asserted mental health issues was not raised in the verified petition and, as such, is not properly before this Court (see e.g. Matter of Rodriguez v Central Off. Review Comm., 153 AD3d 1545, 1546 [2017]).

As to the balance of petitioner's claims, petitioner argues that he was prejudiced by the lack of a particular endorsement on the misbehavior report, that he was denied the right to present witnesses and that he was deprived of certain documentary evidence. Although respondent disagrees, we find that the significant gaps in the hearing transcript preclude meaningful appellate review of these issues (see Matter of Thompson v Annucci, 162 AD3d 1365, 1366 [2018]; Matter of Caldwell v Annucci, 140 AD3d 1248, 1248-1249 [2016]; Matter of Nance v Annucci, 132 AD3d 1198, 1198 [2015]). Additionally, given that petitioner already has served his period of confinement in the special housing unit and more than two years has elapsed since the incident, "the equitable remedy of annulment and expungement of the . . . disciplinary determination is warranted" (Matter of Vidal v Annucci, 149 AD3d 1366, 1368-1369 [2017], lv denied 30 NY3d 906 [2017]).

Garry, P.J., Egan Jr., Clark, Devine and Rumsey, JJ.,
concur.

¹ Petitioner did not raise a substantial evidence claim or otherwise substantively challenge the determination of guilt.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as dismissed that part of the petition seeking to annul respondent's determination; petition granted to that extent, said determination annulled and respondent is directed to expunge all references to this matter from petitioner's institutional record; and, as so modified, affirmed.

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