

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

Decided and Entered: February 28, 2019

526879

In the Matter of DARNELL
DAVISON,
Petitioner,

v

MEMORANDUM AND JUDGMENT

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

Calendar Date: February 8, 2019

Before: Egan Jr., J.P., Lynch, Clark, Mulvey and Pritzker, JJ.

Darnell Davison, Comstock, petitioner pro se.

Letitia James, Attorney General, Albany (Joseph M. Spadola
of counsel), for respondent.

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 finding
petitioner guilty of violating certain prison disciplinary
rules.

While a correction officer was escorting petitioner back
to his cell following a mental health interview, petitioner
indicated that he did not want to return and attempted to head
butt the officer in the face. The officer used physical force
to restrain petitioner and, while doing so, petitioner kicked
another officer in the knee and injured him. As a result of

this incident, petitioner was charged in a misbehavior report with assaulting staff, engaging in violent conduct and refusing a direct order. Following a tier III disciplinary hearing, he was found guilty of the first two charges, but not guilty of the last. The determination was later affirmed on administrative appeal, and this CPLR article 78 proceeding ensued.¹

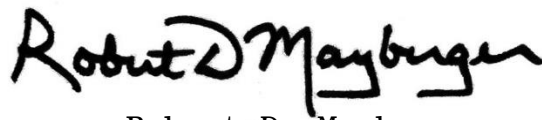
Petitioner contends, among other things, that he was improperly denied evidence consisting of a videotape taken around the time of the incident. Respondent concedes that the Hearing Officer erred in denying petitioner's request and urges that remittal, not expungement, is the proper remedy. Based upon our review of the record, we agree. Although petitioner apparently did not request his assistant to obtain the videotape, he made such request during the course of the hearing. The Hearing Officer denied the request and informed petitioner that because he did not ask his assistant to obtain it, it was unpreserved. Based upon this omission, the Hearing Officer considered the videotape to be "unavailable." However, there is nothing in the record to indicate that the videotape was, in fact, unavailable or that the Hearing Officer undertook any measures to ascertain if such videotape existed. In view of this, we conclude that petitioner's request was improperly denied (see Matter of Lewis v Rivera, 32 AD3d 1120, 1121 [2006]; Matter of Jenkins v Coughlin, 190 AD2d 937, 938 [1993], lv denied 82 NY2d 651 [1993]; compare Matter of Ocasio v Bullis, 162 AD3d 1424, 1425 [2018]; Matter of Blocker v Fischer, 107 AD3d 1285, 1286 [2013]). Under the circumstances presented, the appropriate remedy is remittal for a new hearing (see Matter of Lewis v Rivera, 32 AD3d at 1121; Matter of Jenkins v Coughlin, 190 AD2d at 938).

Egan Jr., J.P., Lynch, Clark, Mulvey and Pritzker, JJ.,
concur.

¹ Although the proceeding was properly transferred as the verified petition raised the issue of substantial evidence, petitioner has abandoned such issue by not addressing it in his brief (see Matter of Sudler v Annucci, 166 AD3d 1351, 1352 n [2018]).

ADJUDGED that the determination is annulled, without costs, and matter remitted to respondent for further proceedings not inconsistent with this Court's decision.

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