

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

Decided and Entered: June 20, 2019

527980

In the Matter of MARK BAXTER,
Petitioner,

v

MEMORANDUM AND JUDGMENT

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

Calendar Date: May 24, 2019

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

Mark Baxter, Romulus, petitioner pro se.

Letitia James, Attorney General, Albany (Julie M. Sheridan
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.

Upon responding to a call for assistance in the facility's
lobby, a correction officer was pushed onto a bench by
petitioner and another inmate who were fighting. Although the
correction officer's initial attempts to restrain petitioner
were unsuccessful, the correction officer used a body hold to
restrain petitioner and then ultimately subdued him with the use
of mechanical restraints. As a result of this incident,

petitioner was charged in a misbehavior report with assaulting an inmate, engaging in violent conduct, fighting and refusing a direct order. Following a tier III disciplinary hearing, petitioner was found guilty of engaging in violent conduct, fighting and refusing a direct order.¹ On administrative appeal, the determination was modified by dismissing the fighting charge but otherwise affirmed. Petitioner then commenced this CPLR article 78 proceeding challenging the determination.

Initially, respondent concedes and we agree that substantial evidence does not support that part of the determination finding petitioner guilty of refusing a direct order (see Matter of Medina v Five Points Corr. Facility, 153 AD3d 1471, 1472 [2017]; Matter of Newman v Department of Corr. Servs., 110 AD3d 1309, 1310 [2013]; Matter of Pulecio v Fischer, 109 AD3d 1068, 1069 [2013], lv denied 22 NY3d 858 [2014]). However, inasmuch as no loss of good time was imposed and petitioner has already served the penalty, the matter need not be remitted for a reassessment of the penalty (see Matter of George v Annucci, 166 AD3d 1157, 1158 [2018]; Matter of Lewis v Annucci, 156 AD3d 1015, 1016 [2017]).

With regard to the remaining charge of engaging in violent conduct, the misbehavior report and testimony at the hearing, including the testimony from the correction officer who responded to the incident and authored the misbehavior report, provide substantial evidence to support the determination of guilt (see Matter of Townsend v Noeth, 170 AD3d 1353, 1353 [2019]; Matter of Tigner v Annucci, 147 AD3d 1138, 1139 [2017]; Matter of Francis v Prack, 107 AD3d 1192, 1192-1193 [2013]). The varying testimonial narratives of the incident from petitioner and his inmate witness presented credibility issues for the Hearing Officer to resolve (see Matter of Scott v Annucci, 164 AD3d 1553, 1553 [2018]; Matter of Ocasio v Bullis, 162 AD3d 1424, 1425 [2018]; Matter of Caraway v Annucci, 144 AD3d 1296, 1297 [2016], lv denied 29 NY3d 903 [2017]). Finally, inasmuch as the fighting charge was dismissed on administrative appeal, petitioner's claim that he was improperly denied the

¹ The record reflects that the charge of assaulting an inmate was dismissed at some point prior to the commencement of the hearing.

right to call as a witness the unidentified inmate that he was allegedly fighting to provide testimony with respect to that charge is moot (see Matter of Funches v State of New York Dept. of Corr. & Community Supervision, 163 AD3d 1390, 1391 [2018], lv dismissed 32 NY3d 1140 [2019]; Matter of Polite v Goord, 49 AD3d 944, 944 [2008]).

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

ADJUDGED that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of refusing a direct order; petition granted to that extent and respondent is directed to expunge all references to this charge from petitioner's institutional record; and, as so modified, confirmed.

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