

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

Decided and Entered: April 6, 2006

98888

In the Matter of BERNABE
ENCARNACION,
Petitioner,

v

MEMORANDUM AND JUDGMENT

GLENN S. GOORD, as Commissioner
of Correctional Services,
Respondent.

Calendar Date: March 6, 2006

Before: Cardona, P.J., Crew III, Carpinello, Rose and
Lahtinen, JJ.

Bernabe Encarnacion, Pine City, petitioner pro se.

Eliot Spitzer, Attorney General, Albany (Peter H. Schiff 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 which found petitioner
guilty of violating a prison disciplinary rule.

After receiving medication, petitioner failed to comply
with the nurse's direct order to lift his tongue as part of an
oral mouth check to confirm that the medication was swallowed.
As a result, petitioner was charged in a misbehavior report with
violating the prison disciplinary rule that prohibits disobeying
a direct order. At the ensuing disciplinary hearing, petitioner
refused to participate in the hearing in English, despite
correction facility documentation that he was proficient in
English. After being warned that he would be removed for his

uncooperative nature, petitioner continued to speak in Spanish. Petitioner then was removed from the hearing and the hearing continued in his absence. Petitioner was found guilty of the charge and the determination was affirmed on administrative appeal. Thereafter, petitioner commenced this CPLR article 78 proceeding raising an issue of substantial evidence. After noting that the matter should be transferred to this Court, Supreme Court imposed monetary sanctions for petitioner's repeated challenge to not being provided with a Spanish interpreter.

The records maintained by the Department of Correctional Services establish petitioner's proficiency in the English language and, indeed, petitioner's proficiency in this regard has been established in connection with prior disciplinary proceedings (see Matter of Encarnacion v Goord, 20 AD3d 787 [2005]; Matter of Encarnacion v Goord, 19 AD3d 906 [2005]; Matter of Encarnacion v Goord, 17 AD3d 749 [2005], lv denied 5 NY3d 705 [2005]; Matter of Encarnacion v Goord, 286 AD2d 828 [2001], appeal dismissed, lv denied 97 NY2d 653 [2001], lv denied 97 NY2d 606 [2001]). Accordingly, we find no error in not providing petitioner with an interpreter or in removing petitioner from the hearing due to his uncooperative behavior. Although petitioner claims that the information pertaining to his English proficiency contained in his prison record is incorrect, any dispute regarding the accuracy and reliability of such information is not properly challenged upon a review of a disciplinary matter but, rather, pursuant to the procedures set forth in 7 NYCRR part 5.

Turning to the merits, we find that the misbehavior report written by the correction facility nurse involved in the incident was sufficient, by itself, to provide substantial evidence to support the determination of guilt (see Matter of Dolan v Goord, 11 AD3d 849 [2004]). Petitioner's remaining contentions challenging the hearing procedures have not been preserved for our review (see Matter of Caroselli v Duncan, 290 AD2d 908, 909 [2002], lv denied 98 NY2d 604 [2002]).

Finally, to the extent that petitioner challenges the imposition of sanctions by Supreme Court pursuant to 22 NYCRR 130-1.3, once the court determined that there was an issue of

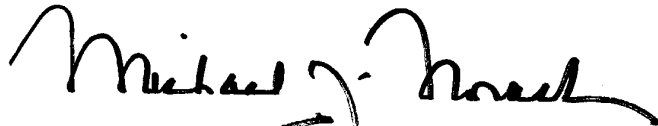
substantial evidence and that there were "no other issues which would dispose of the matter," the entire matter, including whether there were any frivolous issues, was transferred to this Court (see CPLR 7804 [g]; see also Matter of Wayering v County of St. Lawrence, 140 AD2d 838, 839 n; Matter of Hop-Wah v Coughlin, 118 AD2d 275, 276-277, revd on other grounds 69 NY2d 791). Accordingly, having transferred the matter, the court was without jurisdiction to impose sanctions and that part of the order of transfer must be reversed.

Cardona, P.J., Crew III, Carpinello, Rose and Lahtinen, JJ., concur.

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

ORDERED that the order of transfer is modified, on the law, without costs, by reversing so much thereof as imposed sanctions, and, as so modified, affirmed.

ENTER:

A handwritten signature in black ink, appearing to read "Michael J. Novack". The signature is fluid and cursive, with a large loop at the end.

Michael J. Novack
Clerk of the Court