

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

Decided and Entered: December 23, 2010

509956

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In the Matter of CHRISTOPHER  
MERCED,  
Petitioner,

v

MEMORANDUM AND JUDGMENT

BRIAN FISCHER, as Commissioner  
of Correctional Services,  
Respondent.

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Calendar Date: November 3, 2010

Before: Cardona, P.J., Mercure, Rose, Stein and McCarthy, JJ.

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Christopher Merced, Dannemora, petitioner pro se.

Andrew M. Cuomo, Attorney General, Albany (Marcus J. Mastracco of counsel), for respondent.

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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 certain prison disciplinary rules.

While petitioner and approximately 35 other prison inmates were being escorted down a corridor to the prison yard, a fight broke out between two inmates, and correction officers ordered all of the inmates to face the wall. None of the inmates complied and, instead, formed a wall to prevent the officers from responding to the fight. Petitioner was, thereafter, served with a misbehavior report charging him with refusing a direct order, interfering with an employee, participating in an organized stoppage and failing to follow staff direction related to movement in the facility. He was found guilty of all charges

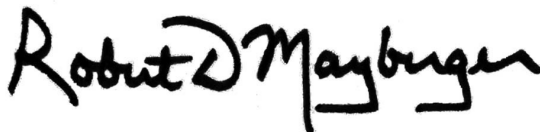
after a tier III disciplinary hearing and that determination was affirmed on administrative appeal. Petitioner then commenced this CPLR article 78 proceeding.

We confirm. The detailed misbehavior report, supported by the testimony of the correction officer who was present at the incident and authored the report, provide substantial evidence to support the determination of guilt (see Matter of Padilla v Fischer, 76 AD3d 742 [2010], lv denied \_\_\_ NY3d \_\_\_ [Nov. 23, 2010]; Matter of Lamage v Bezio, 74 AD3d 1676, 1676 [2010]). Petitioner's testimony that he followed the order to face the wall presented an issue of credibility to be resolved by the Hearing Officer (see Matter of Morusma v Fischer, 74 AD3d 1675, 1675 [2010]; Matter of Haynes v Bezio, 73 AD3d 1295, 1296 [2010]). Finally, petitioner's contentions with regard to the insufficiency of the misbehavior report are unpreserved for our review by his failure to raise an objection to the report at the hearing (see Matter of Hamilton v Bezio, 76 AD3d 1125 [2010]; Matter of Benston v Fischer, 67 AD3d 1139, 1140 [2009]).

Cardona, P.J., Mercure, Rose, Stein 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