

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

Decided and Entered: April 27, 2017

523698

In the Matter of JOSEPH
KILLIMAYER,
Petitioner,
v

MEMORANDUM AND JUDGMENT

DONALD VENETTOZZI, as Acting
Director of Special Housing
and Inmate Disciplinary
Programs,
Respondent.

Calendar Date: February 28, 2017

Before: McCarthy, J.P., Garry, Egan Jr., Rose and Devine, JJ.

Joseph Killimayer, Wallkill, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Frank Brady
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 the Commissioner of Corrections and
Community Supervision finding petitioner guilty of violating
certain prison disciplinary rules.

During a search of petitioner's cell, an envelope was found
that was mailed to petitioner from his sister containing numerous
handwritten flyers advertising that, if inmates send photographs
along with \$16 and two stamps to petitioner's nephew, his nephew
would send back the original photograph to the inmates and
distribute 10 copies to a family member or friend. As a result,
petitioner was charged in a misbehavior report with solicitation,

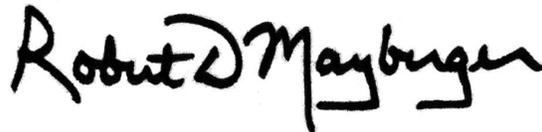
possessing contraband and violating facility correspondence procedures, specifically Department of Corrections and Community Supervision Directive No. 4422, which prohibits an inmate from conducting a mail order business from a correctional facility (see 7 NYCRR 720.3 [k]). Following a tier III disciplinary hearing, petitioner was found guilty as charged. This determination was affirmed on administrative appeal and this CPLR article 78 proceeding ensued.

We confirm. The misbehavior report, related documentary evidence and the hearing testimony provide substantial evidence to support the determination of guilt (see Matter of Medina v Prack, 144 AD3d 1273, 1274 [2016]; Matter of Sawyer v Annucci, 140 AD3d 1499, 1500 [2016]). The testimony of petitioner and his witness that he did not request to be sent the flyers and did not intend to solicit business created a credibility issue for the Hearing Officer to resolve (see Matter of Simmons v LaValley, 130 AD3d 1126, 1127 [2015]; Matter of McCall v Annucci, 123 AD3d 1267, 1268 [2014]). Moreover, as "[i]nmates involved in attempts or conspiracies to violate institutional rules of conduct . . . will be punishable to the same degree as violators of such rules" (7 NYCRR 270.3 [b]), we reject petitioner's contention that the charges cannot be sustained because there was no proof presented that petitioner had actually solicited any inmates to submit photographs to his nephew (see Matter of Gomez v Fischer, 89 AD3d 1341, 1341 [2011]). Although petitioner argues that the mail room had reviewed the flyers and found them to be unobjectionable, "this would not alter the fact that the material is nonetheless prohibited by the prison disciplinary rule" (Matter of Madison v Fischer, 108 AD3d 959, 960 [2013] [internal quotation marks and citation omitted]; accord Matter of Jay v Fischer, 120 AD3d 1466, 1466 [2014], lv denied 24 NY3d 909 [2014]). Petitioner's remaining claims have been considered and found to be without merit.

McCarthy, J.P., Garry, Egan Jr., Rose and Devine, 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