

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

Decided and Entered: June 29, 2017

523758

In the Matter of LEONARD
HOLLAND,
Petitioner,
v

MEMORANDUM AND JUDGMENT

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

Calendar Date: May 9, 2017

Before: McCarthy, J.P., Lynch, Rose, Clark and Mulvey, JJ.

Leonard Holland, Stormville, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Marcus J. Mastracco of counsel), for respondent.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Sullivan County) to review a determination of the Commissioner of Corrections and Community Supervision finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner was charged in a misbehavior report with engaging in sexual conduct, violating visiting room procedures and disobeying a direct order after he was observed being touched in the groin area by his visitor. Following a tier III disciplinary hearing, petitioner was found guilty of all three charges. Other than a modification to the penalty imposed, that determination was affirmed upon administrative appeal. This CPLR

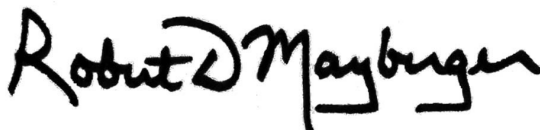
article 78 proceeding ensued.

Initially, respondent concedes, and our review of the record confirms, that the charge of disobeying a direct order is not supported by the record and, therefore, that part of the determination finding him guilty thereof must be annulled. As petitioner has already served the penalty and there was no loss of good time imposed, the matter need not be remitted for a reassessment of the penalty (see Matter of Kirby v Annucci, 147 AD3d 1134, 1134 [2017]). As to the remaining charges, the misbehavior report and testimony from the correction officers who observed the incident provide substantial evidence to support the determination of guilt (see Matter of Sanchez v Selsky, 8 AD3d 846, 846-847 [2004]). Petitioner's denial of the conduct presented a credibility issue for the Hearing Officer to resolve (see Matter of Retamozzo v New York State Dept. of Correctional Servs., 31 AD3d 1083, 1084 [2006]). To the extent that petitioner asserts that the Hearing Officer was biased, the record establishes that the determination resulted from the evidence presented and not from any alleged bias (see Matter of Green v Annucci, 148 AD3d 1443, 1444 [2017]; Matter of Marino v Racette, 144 AD3d 1277, 1278 [2016], lv dismissed ___ NY3d ___ [June 6, 2017]).

McCarthy, J.P., Lynch, Rose, Clark and Mulvey, JJ., concur.

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

ENTER:



Robert D. Mayberger
Clerk of the Court