

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

Decided and Entered: April 1, 2021

532258

In the Matter of ASHRAF
ABDULLAH,
Petitioner,

v

DEPARTMENT OF CORRECTIONS AND
COMMUNITY SUPERVISION,
Respondent.

MEMORANDUM AND JUDGMENT

Calendar Date: March 5, 2021

Before: Egan Jr., J.P., Lynch, Aarons, Reynolds Fitzgerald and
Colangelo, JJ.

Ashraf Abdullah, Napanoch, petitioner pro se.

Letitia James, Attorney General, Albany (Kate H. Nepveu of
counsel), for respondent.

Proceeding pursuant to CPLR article 78 (transferred to
this Court by order of the Supreme Court, entered in Ulster
County) to review a determination of the Superintendent of
Eastern N.Y. Correctional Facility finding petitioner guilty of
violating certain prison disciplinary rules.

Petitioner was charged in three misbehavior reports with
violating various prison disciplinary rules. The first
misbehavior report charged him with harassment, failing to
comply with search and frisk procedures and refusing a direct
order. According to the report, petitioner was told by a
correction officer not to move during a pat frisk being

conducted by the officer. After petitioner kept lowering his head, the officer had to instruct petitioner multiple times to look at the wall before petitioner ultimately complied. The second misbehavior report charged petitioner with interfering with an employee and making a false report of an emergency after he was escorted to the facility infirmary for an emergency sick call later on in the day of the pat frisk. According to the report made by a facility nurse, the nurse had to stop an insulin run that he was on to respond to petitioner's emergency sick call regarding injuries to petitioner's head and testicles, an emergency that proved to be unfounded. Notably, the misbehavior report incorrectly referenced the rule number that corresponds with an inmate being out of place rather than the rule against making a false report. As a result, the charge of making a false report was ultimately dismissed and replaced with the charge of being out of place. The third misbehavior report, dated the same day as the other two reports, charged petitioner with possessing an altered item, possessing contraband and tampering with an electrical device, after a search of his cell uncovered a hot pot that had been altered to overheat. Following a combined tier II disciplinary hearing, petitioner was found not guilty of being out of place, but guilty of the remaining charges. The determination was affirmed on administrative appeal and this CPLR article 78 proceeding ensued.

Initially, the Attorney General concedes, and we agree, that substantial evidence does not support that part of the determination finding petitioner guilty of harassment and possessing contraband. Accordingly, we annul that part of the determination and, given that petitioner has already served the penalty, which did not include a loss of good time, the matter need not be remitted for a redetermination thereof (see Matter of Parker v Annucci, 175 AD3d 1682, 1682-1683 [2019]; Matter of Burroughs v Annucci, 164 AD3d 1558, 1559 [2018]).

Contrary to petitioner's contention, his conduct, as described in the first misbehavior report and testified to by its author and other witnesses, constituted substantial evidence that he refused a direct order and failed to comply with search

and frisk procedures (see Matter of Williams v Fischer, 102 AD3d 1044, 1044 [2013]; Matter of Barclay v New York State Dept. of Correctional Servs., 13 AD3d 743, 744 [2004], lv denied 4 NY3d 705 [2005]). The determination of guilt as to the charge of interfering with an employee contained in the second misbehavior report is also supported by substantial evidence, as the nurse reported that he had to stop his insulin run by petitioner's unfounded emergency sick call (see Matter of McKinley v Goord, 40 AD3d 1280, 1280 [2007], lv denied 9 NY3d 807 [2007]; Matter of Johnson v Artus, 32 AD3d 1146, 1147 [2006]). Finally, substantial evidence supports the determination of guilt regarding the remaining charges in the third misbehavior report, as the author of that report testified that the hot pot had been altered in a way that is commonly done to cause it to overheat (see Matter of Torres v Annucci, 167 AD3d 1191, 1192 [2018]; Matter of Green v Goord, 26 AD3d 562, 563 [2006]).

Egan Jr., J.P., Lynch, Aarons, Reynolds Fitzgerald and Colangelo, JJ., concur.

ADJUDGED that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of harassment and possessing contraband; petition granted to that extent and the Superintendent of Eastern N.Y. Correctional Facility is directed to expunge all references to these charges 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