

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

Decided and Entered: November 10, 2021

532919

In the Matter of ALBERTO
GONZALEZ,

Petitioner,

v

MEMORANDUM AND JUDGMENT

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections
and Community Supervision,
Respondent.

Calendar Date: October 8, 2021

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

Prisoners' Legal Services of New York, Ithaca (Hallie E.
Mitnick of counsel), for petitioner.

Letitia James, Attorney General, Albany (Laura Etlinger 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 finding
petitioner guilty of violating certain prison disciplinary
rules.

Petitioner was charged in a misbehavior report with
attempted arson, refusing a direct order, assaulting staff,
violent conduct, possessing a weapon and committing an
unhygienic act. According to the report and other

documentation, petitioner became agitated after his cell was searched and he tied his cell gate shut with an electrical cord. Petitioner then refused an order to untie the cord and he tried to light a pile of papers and clothing on fire. A correction officer then attempted to remove the cord and petitioner tried to stab him with a pen. Petitioner was then pepper sprayed and he refused orders to allow himself to be restrained. Correction officers then entered the cell and petitioner stabbed one in the elbow with the pen. Force was used and mechanical restraints were eventually applied. While being escorted to the infirmary, petitioner spit bloody saliva on a correction officer. At the ensuing tier III disciplinary hearing, petitioner pleaded guilty to refusing a direct order and not guilty to the other charges. Following the hearing, petitioner was found not guilty of attempted arson but guilty of the remaining charges. That determination was affirmed on administrative appeal and this CPLR article 78 proceeding ensued.

We confirm. Initially, petitioner's guilty plea to refusing a direct order precludes him from challenging the evidentiary basis for that charge (see Matter of Lewis v State of N.Y. Dept. of Corr. & Community Supervision, 193 AD3d 1160, 1161 [2021]; Matter of Bouknight v Annucci, 181 AD3d 1079, 1079 [2020]). As to the remaining charges, the misbehavior report, hearing testimony and documentary evidence provide substantial evidence to support the determination of guilt (see Matter of DeJesus v Mayes, 196 AD3d 992, 992 [2021]; Matter of Spencer v Annucci, 190 AD3d 1247, 1248 [2021]). Petitioner's contrary version of the incident presented a credibility issue for the Hearing Officer to resolve (see Matter of McClary v Annucci, 189 AD3d 1812, 1813 [2020], lv denied 37 NY3d 905 [2021]; Matter of White v Annucci, 169 AD3d 1326, 1327 [2019], lv denied 33 NY3d 908 [2019], lv dismissed 33 NY3d 1048 [2019]). We further reject petitioner's contention that the finding of not guilty of attempted arson compelled a similar finding on the remaining charges (see Matter of Caraway v Annucci, 159 AD3d 1212, 1212 [2018]; Matter of Davis v Annucci, 137 AD3d 1437, 1438 [2016]; Matter of Coleman v Capra, 121 AD3d 979, 979 [2014]). Petitioner's remaining contentions, to the extent not addressed herein, have been considered and found to be without merit.

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

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

ENTER:

A handwritten signature in black ink, reading "Robert D. Mayberger". The signature is written in a cursive, flowing style with a large, stylized "R" and "M".

Robert D. Mayberger
Clerk of the Court