

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

Decided and Entered: November 10, 2021

533355

In the Matter of TERRY DAUM,
Petitioner,

v

GARY SIPPLE, as Deputy
Superintendent of Security
at Sullivan Correctional
Facility,
Respondent.

MEMORANDUM AND JUDGMENT

Calendar Date: October 8, 2021

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

Terry Daum, Fallsburg, petitioner pro se.

Letitia James, Attorney General, Albany (Owen Demuth 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 Superintendent of
Sullivan Correctional Facility finding petitioner guilty of
violating certain prison disciplinary rules.

Petitioner was charged in a misbehavior report with
refusing a direct order, harassing an employee, interfering with
an employee, making threats and creating a disturbance.
According to the report, petitioner was outside his cell when he
was observed displaying his middle finger at a female correction

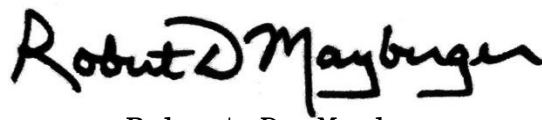
officer. The correction officer who observed petitioner's conduct ordered petitioner to lock in his cell. Petitioner became irate at that point, refusing to lock in and began verbally abusing the female correction officer. After he was again ordered to lock in, he went to the doorway of his cell but positioned himself so as to prevent the cell door from closing. Once petitioner was inside his cell, he continued yelling and verbally abusing the correction officer. Following a tier II hearing, petitioner was found not guilty of making threats but guilty of the remaining charges, and the determination was affirmed on administrative appeal. This CPLR article 78 proceeding ensued.

We confirm. The misbehavior report and hearing testimony provide substantial evidence supporting the determination of guilt (see Matter of Dove v Annucci, 190 AD3d 1181, 1181-1182 [2021], lv denied 37 NY3d 909 [2021]; Matter of Steele v Annucci, 178 AD3d 1226, 1226-1227 [2019]). The contrary testimony of petitioner and his witnesses presented a credibility issue for the Hearing Officer to resolve (see Matter of Snyder v Annucci, 188 AD3d 1346, 1347 [2020]; Matter of Beltre v Rodriguez, 185 AD3d 1370, 1370 [2020]). Contrary to petitioner's contention, the testimony of the sergeant who supervised the correction officers involved was not inconsistent with the guilty determinations. The sergeant admittedly did not witness the incident and, although he testified that he spoke to the reporting officer a couple of hours after the incident and the officer did not inform him that petitioner had made any threats during the altercation, the Hearing Officer was entitled to resolve this credibility issue by finding petitioner not guilty of making threats but guilty of the remaining charges (see Matter of Johnson v Goord, 300 AD2d 785, 786 [2002]; Matter of Maya v Goord, 272 AD2d 724, 725 [2000], lv denied 96 NY2d 704 [2001]).

Egan Jr., J.P., Lynch, Aarons, Pritzker and Reynolds
Fitzgerald, 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