

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

Decided and Entered: January 27, 2022

533260

In the Matter of CEDRIC S.
JAMES,
Petitioner,

v

MEMORANDUM AND JUDGMENT

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

Calendar Date: December 30, 2021

Before: Clark, J.P., Aarons, Pritzker, Reynolds Fitzgerald and
Colangelo, JJ.

Cedric S. James, Elmira, 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 Albany
County) to review a determination of the Commissioner of
Corrections and Community Supervision finding petitioner guilty
of violating certain prison disciplinary rules.

A correction officer stopped at petitioner's cell to
conduct an authorized cell search based on suspicion, and
petitioner, who was sitting on the toilet at the time, stated
that he was defecating and needed privacy to finish that

process, at which point he stood up and attempted to cover his cell and was told by the correction officer conducting the search to stop. When petitioner then grabbed unknown items from under his bed and shoved them in his toilet, the correction officer entered petitioner's cell, and petitioner became combative, requiring the use of force for petitioner to be subdued. As a result of the incident, petitioner was charged in a misbehavior report with refusing a direct order, engaging in violent conduct, refusing facility frisk procedures, obstructing visibility and assaulting staff.¹ Following a tier III disciplinary hearing, petitioner was found guilty of refusing a direct order, refusing facility frisk procedures, engaging in violent conduct and assaulting an officer and was found not guilty of obstructing visibility. Upon administrative review, that determination was modified by dismissing the charge of assaulting an officer but otherwise affirmed with no change to the penalty imposed. This CPLR article 78 proceeding ensued.

Initially, respondent concedes, and our review of the record confirms, that the part of the determination finding petitioner guilty of refusing a direct order is not supported by substantial evidence and must be annulled. Because the penalty has been served and no loss of good time was imposed, the matter does not need to be remitted for a redetermination of the penalty imposed on the remaining charges (see Matter of Daum v Sipple, 197 AD3d 1461, 1462 [2021]; Matter of Nix v Venettozzi, 196 AD3d 933, 933 [2021]). As for the remaining charges, we find that the misbehavior report, related documentation and hearing testimony provide substantial evidence to support that part of the determination finding petitioner guilty of engaging in violent conduct and refusing facility frisk procedures (see Matter of Estrada v Annucci, 199 AD3d 1145, 1145-1146 [2021]; Matter of Sherman v Annucci, 142 AD3d 1196, 1197 [2016]; Matter of Ocasio v Bullis, 162 AD3d 1424, 1425 [2018]).

¹ In a second misbehavior report, petitioner was charged with wasting food and possessing excessive tobacco, flammable materials and gang materials; those charges, however, were ultimately dismissed by the Hearing Officer and/or upon administrative review.

We reject petitioner's contention that he was improperly denied certain documentary evidence. As to petitioner's contention that he was denied documentary evidence consisting of the unusual incident report, the record reflects that the preliminary unusual incident report was read into the record (see Matter of Malloy v Rodriguez, ___ AD3d ___, ___, 2021 NY Slip Op 07049, *1 [2021]; Matter of Harris v Venettozzi, 167 AD3d 1127, 1127-1128 [2018]). Petitioner's remaining procedural contentions, including his claims that he was denied certain witnesses and that certain directives were violated by facility staff during the incident, are either unpreserved or have been considered and found to be without merit.

Clark, J.P., Aarons, Pritzker, Reynolds Fitzgerald and Colangelo, JJ., concur.

ADJUDGED that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of refusing 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:

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