

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

Decided and Entered: September 22, 2022

534650

In the Matter of MANUEL RIVERA,
Petitioner,

v

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

MEMORANDUM AND JUDGMENT

Calendar Date: September 2, 2022

Before: Garry, P.J., Egan Jr., Reynolds Fitzgerald, Ceresia
and McShan, JJ.

Manuel Rivera, Alden, 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 Acting Commissioner of
Corrections and Community Supervision finding petitioner guilty
of violating certain prison disciplinary rules.

Petitioner, an incarcerated individual, was charged in a
misbehavior report with assaulting staff, forcible touching,
making threats, refusing a direct order and harassment.
According to the report, petitioner was being pat frisked and
was ordered by the correction officer to put his hands up and

into his body when he reached back and grabbed the officer's breasts. The officer then pushed petitioner's hands away from her before placing him back in his cell. As the officer was walking away from the cell, petitioner threatened to kill the officer and used other abusive and insolent language toward her. Following a tier III disciplinary hearing, petitioner was found guilty as charged. That determination was affirmed upon administrative appeal and this CPLR article 78 proceeding ensued.

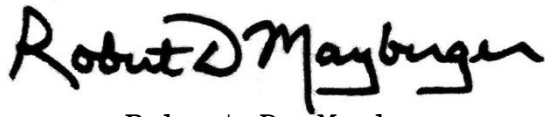
We confirm. Contrary to petitioner's contention, the misbehavior report, hearing testimony and video evidence provide substantial evidence to support the determination of guilt (*see Matter of Lundy v Annucci*, 203 AD3d 1364, 1365 [3d Dept 2022]; *Matter of Chung v Annucci*, 199 AD3d 1147, 1148 [3d Dept 2021]). Petitioner's testimony that the contact with the officer was unintended and incidental presented a credibility issue for the Hearing Officer to resolve (*see Matter of Dunbar v Annucci*, 173 AD3d 1598, 1599 [3d Dept 2019]; *Matter of Robinson v Lee*, 155 AD3d 1169, 1170 [3d Dept 2017]). Petitioner's assertion that he was improperly denied a witness is unpreserved for our review as this issue is admittedly raised for the first time before this Court (*see Matter of Wilson v Venettozzi*, 160 AD3d 1307, 1308 [3d Dept 2018]; *Matter of Bonnemere v Annucci*, 153 AD3d 983, 984 [3d Dept 2017]).¹

Garry, P.J., Egan Jr., Reynolds Fitzgerald, Ceresia and McShan, JJ., concur.

¹ Although petitioner requests that this Court reach this issue in the interest of justice, "there is no discretionary authority or interest of justice jurisdiction in proceedings to review administrative determinations pursuant to CPLR article 78" (*Matter of Barnes v Venettozzi*, 135 AD3d 1250, 1251 [3d Dept 2016] [internal quotation marks and citation omitted]; *see Matter of Russo v Annucci*, 130 AD3d 1124, 1124 [3d Dept 2015]).

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