

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

Decided and Entered: December 5, 2024

CV-23-2256

In the Matter of ANTHONY
ADAMS,

Appellant,

v

MEMORANDUM AND ORDER

DEPARTMENT OF CORRECTIONS,
Respondent.

Calendar Date: November 8, 2024

Before: Aarons, J.P., Lynch, Ceresia, McShan and Powers, JJ.

Anthony Adams, Stormville, appellant pro se.

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

Appeal from a judgment of the Supreme Court (Christina L. Ryba, J.), entered November 14, 2023 in Albany County, which, in a proceeding pursuant to CPLR article 78, partially granted respondent's motion to annul respondent's determination and remit the matter for a rehearing.

Petitioner, an incarcerated individual, was found guilty following a hearing of violating certain prison disciplinary rules; namely, two counts of smuggling, possessing contraband and possessing a weapon. The determination of guilt was affirmed upon administrative appeal. Petitioner thereafter commenced the underlying CPLR article 78 proceeding, challenging the determination. In response, respondent moved to annul the challenged determination and remit the matter for a rehearing based upon the Hearing Officer's concededly improper – albeit good faith – denial of a witness. Supreme Court

granted respondent's motion, annulling the determination and remitting the matter for a new hearing. Following the rehearing, one of the counts of smuggling was dismissed, and petitioner was found guilty of the remaining counts. Petitioner appeals from Supreme Court's order remitting the matter for a rehearing.

We affirm. We are unpersuaded by petitioner's argument that Supreme Court erred in remitting the matter for a rehearing in lieu of expungement. Although the record reflects that the Hearing Officer's denial of petitioner's witness request was improper (*see* 7 NYCRR 254.5; *Matter of Baxton v Annucci*, 142 AD3d 1235, 1236 [3d Dept 2016]), we do not find that the denial was made in bad faith and, thus, remittal rather than expungement was appropriate (*see Matter of Getfield v Annucci*, 173 AD3d 1318, 1319 [3d Dept 2019]; *Matter of Paddyfote v Annucci*, 154 AD3d 1224, 1225 [3d Dept 2017]; *Matter of Harriott v Koenigsmann*, 149 AD3d 1440, 1442 [3d Dept 2017]; *Matter of Payton v Annucci*, 139 AD3d 1223, 1223-1224 [3d Dept 2016]). To the extent that petitioner argues that expungement was nevertheless warranted based upon the absence of certain video evidence, his claim in this regard is unpreserved for our review as he failed to raise this issue in his petition (*see Matter of Kelly v Annucci*, 193 AD3d 1169, 1171 [3d Dept 2021]; *Matter of Infinger v Venettozzi*, 164 AD3d 1578, 1579 [3d Dept 2018]). Petitioner's substantial evidence claim has been rendered moot, as it concerns the annulled determination of guilt (*see Matter of Anselmo v Annucci*, 173 AD3d 1583, 1583-1584 [3d Dept 2019]; *see also Matter of Fernandez v Annucci*, 161 AD3d 1431, 1432 [3d Dept 2018]). To the extent that petitioner challenges the determination of guilt following the rehearing, his claim in this regard is properly the subject of a separate CPLR article 78 proceeding (*see Matter of Mathie v Selsky*, 45 AD3d 1169, 1170 [3d Dept 2007]; *Matter of Brown v Goord*, 290 AD2d 901, 902 [3d Dept 2002]).

Aarons, J.P., Lynch, Ceresia, McShan and Powers, JJ., concur.

ORDERED that the judgment is affirmed, without costs.

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