

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

Decided and Entered: November 27, 2024

CV-24-1042

In the Matter of JASON CATO,
Petitioner,

v

DANIEL F. MARTUSCELLO III, as
Commissioner of Corrections
and Community Supervision,
et al.,
Respondents.

MEMORANDUM AND JUDGMENT

Calendar Date: November 8, 2024

Before: Clark, J.P., Lynch, Reynolds Fitzgerald, Fisher and Mackey, JJ.

Jason Cato, Albion, petitioner pro se.

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

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 Commissioner of Corrections and Community Supervision finding petitioner guilty of violating certain prison disciplinary rules.

Petitioner was charged in a misbehavior report with engaging in conduct involving the threat of violence, encouraging others to engage in a demonstration, creating a disturbance, interfering with an employee and refusing a direct order. According to the misbehavior report, the charges stemmed from petitioner becoming loud and disruptive when being interviewed by a correction officer and expressing his dissatisfaction with

how he was being treated. Petitioner initially did not comply with the correction officer's directive to report back to his group program until a second order was issued. When petitioner returned to his group program, he stood at his desk and yelled to the other incarcerated individuals, "[T]his is all bullshit how we get treated and we need to stop dealing with this shit[. T]his needs to stop [and] we all need to do something about this." Petitioner did not comply with orders to stop yelling and to sit down. Other incarcerated individuals then started trying to talk and intervene, whereupon petitioner was placed in mechanical restraints.

Following a tier III disciplinary hearing at which petitioner pleaded guilty to refusing a direct order, petitioner was found guilty of all charges, except for interfering with an employee. Upon administrative appeal, the charge of creating a disturbance was also dismissed but the remainder of the determination finding petitioner guilty of refusing a direct order, urging others to demonstrate and engaging in conduct involving the threat of violence was affirmed. This CPLR article 78 proceeding ensued.

Initially, we are unpersuaded by petitioner's contention that the misbehavior report was not sufficiently detailed to notify him of the charges in order for him to prepare a defense (*see* 7 NYCRR 251-3.1 [c]; *Matter of Knight v Rodriguez*, 217 AD3d 1300, 1301 [3d Dept 2023]; *Matter of Headley v Annucci*, 205 AD3d 1189, 1190 [3d Dept 2022]). Notwithstanding petitioner's denial that he engaged in conduct involving the threat of violence or urged others to engage in a demonstration, the misbehavior report and hearing testimony provide substantial evidence to support the determination of guilt as to such conduct (*see Matter of Headley v Annucci*, 205 AD3d at 1189; *Matter of Frye v Commissioner of the Dept. of Corr. & Community Supervision*, 175 AD3d 1690, 1690 [3d Dept 2019]).¹ The determination is not undermined by the fact that the author of the misbehavior report did not testify, as such testimony is not required (*see Matter of Donato v Goord*, 278 AD2d 641, 641 [3d Dept 2000], *lv denied* 96 NY2d 711 [2001]). Moreover, in the absence of petitioner requesting such witness, the Hearing Officer was under no obligation to procure the author's testimony (*see Matter of Hills v Annucci*, 225 AD3d 1008, 1009 [3d Dept 2024]; *Matter of Ballester-Perez v Reardon*, 203 AD3d 1372, 1373 [3d Dept 2022]). To the extent that petitioner claims that the misbehavior report was written in retaliation for him asking the correction officer for a grievance form, this

¹ Petitioner's plea of guilty precludes any challenge to whether substantial evidence supports the charge of refusing a direct order (*see Matter of Doolittle v Kirkpatrick*, 153 AD3d 1490, 1490-1491 [3d Dept 2017]; *Matter of Headley v Annucci*, 150 AD3d 1513, 1513-1514 [3d Dept 2017]).

created a credibility issue for the Hearing Officer to resolve (*see Matter of Peters v Annucci*, 227 AD3d 1312, 1313 [3d Dept 2024]; *Matter of Fulton v Capra*, 199 AD3d 1139, 1140 [3d Dept 2021]). Petitioner' s remaining contentions have been reviewed and are either unpreserved for our review or without merit.

Clark, J.P., Lynch, Reynolds Fitzgerald, Fisher and Mackey, 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