

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
THIRD DEPARTMENT

Dubois v. Bezio

67 A.D.3d 1111 (N.Y. App. Div. 3d Dep't 2009) · Decided November 5, 2009

SUMMARY

The court confirmed a prison disciplinary determination finding the petitioner guilty of possessing heroin and contraband after the substances were discovered in bags of rice under his bed. It held that the misbehavior report and supporting evidence constituted substantial evidence and rejected the petitioner’s challenge to the Hearing Officer’s participation, along with his remaining claims.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Third Department
WRITING FOR THE COURT	Cardona, P.J.; Rose, J.; Lahtinen, J.; McCarthy, J.; Garry, J.
JURISDICTION	New York
DECIDED	November 5, 2009
DISPOSITION	dismissed
PROCEDURAL POSTURE	Petitioner commenced a CPLR article 78 proceeding to review a determination of the Commissioner of Correctional Services finding him guilty of prison disciplinary violations. The proceeding was transferred to the Appellate Division by order of the Supreme Court, Albany County.
STANDARD OF REVIEW	Whether the administrative determination is supported by substantial evidence; whether the hearing officer was sufficiently impartial to preside over the disciplinary hearing.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Dubois v. Bezio

TOPICS

- judicial review of agency action
- agency adjudication
- standard of review
- appellate procedure

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether substantial evidence supported the determination that petitioner possessed a narcotic drug and contraband.
2. Whether the assigned hearing officer was disqualified from presiding because he knew about the cell search.
3. Whether petitioner's remaining contentions warranted relief despite lack of preservation or lack of merit.

HOLDINGS

1. The misbehavior report, the testimony of its authoring correction officer, and documentary evidence constituted substantial evidence supporting petitioner's guilt of possessing a narcotic drug and contraband.
2. The hearing officer was not shown to be disqualified merely because he knew about the cell search; disqualification requires evidence that he witnessed the incident or investigated it.
3. The remaining contentions did not warrant relief because they were either unpreserved for appellate review or lacked merit.

FACTUAL BACKGROUND

During a search of petitioner's prison cell, correction officials recovered 40 packets of a brownish substance that tested positive for heroin, concealed in bags of rice under petitioner's bed. Petitioner was charged with possessing a narcotic drug and contraband and was found guilty after a tier III disciplinary hearing. The administrative determination was later affirmed with a modified penalty.

PROCEDURAL HISTORY

Correction officials found heroin and contraband during a search of petitioner's cell. Following a tier III disciplinary hearing, petitioner was found guilty; the determination was affirmed on administrative appeal with a modified penalty. The Appellate Division confirmed the determination and dismissed the petition.

DISPOSITION

dismissed

CASES CITED

- Matter of Dozier v. Selsky, 54 A.D.3d 1074, 1075 (N.Y. App. Div. 2008)
- Matter of Diaz v. Goord, 26 A.D.3d 561, 562 (N.Y. App. Div. 2006)
- Matter of Sime v. Goord, 30 A.D.3d 887, 888 (N.Y. App. Div. 2006), leave denied, 7 N.Y.3d 717 (N.Y. 2006)

OPINION

PER CURIAM.

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 Correctional Services which found petitioner guilty of violating certain prison disciplinary rules. During a search of petitioner's cell, correction officials recovered 40 individual packets of a brownish substance that tested positive for heroin secreted in bags of rice located under petitioner's bed.

As a result, petitioner was charged in a misbehavior report with possessing a narcotic drug as well as contraband. Following a tier III disciplinary hearing, petitioner was found guilty of the charges. The determination was later affirmed on administrative appeal with a modified penalty and this CPLR article 78 proceeding ensued.

We confirm. The misbehavior report, testimony of the correction officer who authored it and documentary evidence provide substantial evidence supporting the determination of guilt (see *Matter of Dozier v Selsky*, 54 AD3d 1074, 1075 [2008]; *Matter of Diaz v Goord*, 26 AD3d 561, 562 [2006]). There is no merit to petitioner's claim that the assigned Hearing Officer should not have presided over the hearing.

Although the Hearing Officer knew about the search, there is no evidence establishing either that he witnessed the incident or that he investigated the same (see *Matter of Sime v Goord*, 30 AD3d 887, 888 [2006], lv denied 7 NY3d 717 [2006]). Petitioner's remaining contentions have either not been preserved for our review or are lacking in merit. Cardona, P.J., Rose, Lahtinen, McCarthy and Garry, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petition dismissed.