

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

Matter of Joseph v. Polizzi

2018 NY Slip Op 8605 (N.Y. Ct. App. 2018) · No. 526585 · Decided December 13, 2018

SUMMARY

The New York Appellate Division, Third Department, reviewed a CPLR article 78 challenge to a prison disciplinary determination finding the petitioner guilty of multiple violations, including possessing marihuana and a weapon and engaging in violent conduct. The court held that substantial evidence supported the determination, the chain of custody was adequately established, and the petitioner was not improperly removed from the hearing or denied relevant witnesses. The court confirmed the determination and dismissed the proceeding.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                                    |
|-----------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Appellate Division of the Supreme Court of the State of New York, Third Department                                                                                                                                                                                 |
| WRITING FOR THE COURT | McCarthy, J.P.; Devine, J.; Aarons, J.; Rumsey, J.; Pritzker, J.                                                                                                                                                                                                   |
| JURISDICTION          | New York                                                                                                                                                                                                                                                           |
| DECIDED               | December 13, 2018                                                                                                                                                                                                                                                  |
| DOCKET                | 526585                                                                                                                                                                                                                                                             |
| DISPOSITION           | dismissed                                                                                                                                                                                                                                                          |
| PROCEDURAL POSTURE    | CPLR article 78 proceeding transferred to the Appellate Division by order of the Supreme Court, Albany County, to review a determination of the Commissioner of Corrections and Community Supervision finding petitioner guilty of prison disciplinary violations. |
| STANDARD OF REVIEW    | Whether the administrative determination is supported by substantial evidence; the court also reviewed alleged procedural errors for legal sufficiency and preservation.                                                                                           |
| PRECEDENTIAL VALUE    | Published New York Appellate Division opinion                                                                                                                                                                                                                      |
| PARTIES               | Jeffrey Joseph v. Anthony Polizzi, as Inmate Disciplinary Hearing Officer, et al.                                                                                                                                                                                  |

TOPICS

judicial review of agency action

agency adjudication

evidence

preservation of error

appellate procedure

## PRACTICE AREAS

administrative law

prison disciplinary proceedings

appellate procedure

evidence

## QUESTIONS PRESENTED

1. Whether substantial evidence supported the determination finding petitioner guilty of the charged prison disciplinary violations.
2. Whether the chain of custody for the contraband was sufficiently established despite notations on the forms not being personally written by each correction officer.
3. Whether petitioner was improperly removed from the disciplinary hearing because of disruptive conduct.
4. Whether petitioner was denied the right to call witnesses and whether that claim was preserved.
5. Whether the Hearing Officer properly excluded testimony from a deputy director of security concerning another inmate's disciplinary hearing.
6. Whether the Hearing Officer was biased.

## HOLDINGS

1. The misbehavior reports, related documentation, correction-officer testimony, and complete video recording provided substantial evidence supporting the determination of guilt.
2. The chain of custody was sufficiently established where the chain-of-custody forms, misbehavior report, and related documentary evidence demonstrated a secure and unbroken chain.
3. Petitioner's removal from the hearing was proper because he continued interrupting and arguing with the Hearing Officer after repeated warnings that disruptive conduct could result in removal.
4. Petitioner failed to preserve his claim that he was denied the right to call witnesses because he did not identify the witnesses he wanted called.
5. The Hearing Officer properly denied as irrelevant testimony from the deputy director of security concerning the results of another inmate's disciplinary hearing.
6. The record did not establish Hearing Officer bias; the determination of guilt resulted from the evidence presented rather than alleged bias.

## KEY QUOTATIONS

*“Although the record reflects that petitioner made a general request during the hearing that “each and every officer” be called as a witness, petitioner was removed from the hearing for his disruptive behavior before the witnesses or the relevance of their testimony could be ascertained in order for the Hearing Officer to determine whether such witnesses were relevant or if the testimony would be redundant.” (\*2)*

## FACTUAL BACKGROUND

Correction officers discovered a green leafy substance, later identified as marihuana, and a scalpel wrapped in tape hidden in the seam of petitioner's boxer shorts. Petitioner lunged at a correction officer and snatched the boxer shorts away, leading to a struggle. The disciplinary hearing record included misbehavior reports, related documentation, correction-officer testimony, chain-of-custody forms, and a complete video recording of the incident.

#### PROCEDURAL HISTORY

Petitioner was charged in two misbehavior reports with multiple prison disciplinary violations arising from the discovery of marihuana and a scalpel hidden in his boxer shorts and a subsequent struggle with correction officers. After a tier III disciplinary hearing, he was found guilty of all charges except assaulting staff and refusing a direct order. The administrative appeal modified the penalty but otherwise affirmed the determination. Petitioner then commenced this CPLR article 78 proceeding, which was transferred to the Appellate Division.

#### DISPOSITION

dismissed

#### CASES CITED

- Matter of Young v. Rodriguez, 165 A.D.3d 1338, 1338 (N.Y. App. Div. 2018)
- Matter of Mitchell v. Venettozzi, 148 A.D.3d 1406, 1407 (N.Y. App. Div. 2017)
- Matter of Perez v. Polizzi, 160 A.D.3d 1319, 1319-1320 (N.Y. App. Div. 2018)
- Matter of Rosario v. Selsky, 5 A.D.3d 896, 897 (N.Y. App. Div. 2004)
- Matter of Oms v. Goord, 36 A.D.3d 1105, 1106 (N.Y. App. Div. 2007), leave to appeal denied, 8 N.Y.3d 811 (2007)
- Matter of McMaster v. Rodriguez, 159 A.D.3d 1173, 1174 (N.Y. App. Div. 2018)
- Matter of Micolo v. Annucci, 140 A.D.3d 1442, 1443 (N.Y. App. Div. 2016)
- Matter of Barnes v. Venettozzi, 135 A.D.3d 1250, 1251 (N.Y. App. Div. 2016)
- Matter of Foster v. Prack, 144 A.D.3d 1287, 1288 (N.Y. App. Div. 2016)
- Matter of Horton v. Annucci, 163 A.D.3d 1385, 1386 (N.Y. App. Div. 2018)

#### OPINION

##### PER CURIAM.

Matter of Joseph v Polizzi (2018 NY Slip Op 08605) Matter of Joseph v Polizzi 2018 NY Slip Op 08605 Decided on December 13, 2018 Appellate Division, Third Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided and Entered: December 13, 2018 526585 [\*1]In the Matter of JEFFREY JOSEPH, Petitioner, vANTHONY POLIZZI, as Inmate Disciplinary Hearing Officer, et al., Respondents.

Calendar Date: October 26, 2018 Before: McCarthy, J.P., Devine, Aarons, Rumsey and Pritzker, JJ. Jeffrey Joseph, Dannemora, petitioner pro se. Barbara D. Underwood, Attorney General, Albany (Frank Brady of counsel), for respondents. MEMORANDUM AND JUDGMENT 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.

Petitioner was charged in two misbehavior reports with assaulting staff, refusing a direct order, engaging in violent conduct, refusing a strip search, possessing a weapon, possessing drugs and tampering with property.

The charges stem from the discovery of a green leafy substance — later identified as marihuana — and a scalpel wrapped in tape hidden in the seam of petitioner's boxer shorts and an ensuing struggle between petitioner and correction officers after petitioner lunged at a correction officer and snatched away the boxer shorts. Following a tier III disciplinary hearing, petitioner was found guilty of all charges, with the exception of assaulting staff and refusing a direct order.

Upon administrative appeal, the penalty imposed was modified but the determination was otherwise affirmed. Petitioner then commenced this CPLR article 78 proceeding. We confirm. Contrary to petitioner's contention, the misbehavior report, related documentation, testimony from correction officers present during the incident and a complete video recording of the incident provide substantial evidence to support the determination of guilt (see *Matter of Young v Rodriguez*, 165 AD3d 1338, 1338 [2018]; *Matter of Mitchell v Venettozzi*, 148 AD3d 1406, 1407 [2017]).

Petitioner's contention that proper procedures were not followed with regard to the chain of custody of the contraband is without merit. The chain of custody forms, as well as the misbehavior report and related documentary evidence, establish a secure and unbroken chain of custody (see *Matter of Perez v Polizzi*, 160 AD3d 1319, 1319-1320 [\*2][2018]; *Matter of Rosario v Selsky*, 5 AD3d 896, 897 [2004]).

The fact that the notations on the forms may not have been personally written by each correction officer does not render the chain of custody unreliable (see *Matter of Oms v Goord*, 36 AD3d 1105, 1106 [2007], lv denied 8 NY3d 811 [2007]).

We are also not persuaded by petitioner's contention that he was improperly removed from the hearing, as the record reflects that petitioner continued to interrupt and be argumentative with the Hearing Officer despite repeated warning that such conduct could lead to petitioner's removal from the hearing (see *Matter of McMaster v Rodriguez*, 159 AD3d 1173, 1174 [2018]; *Matter of Micolo v Annucci*, 140 AD3d 1442, 1443 [2016]).

To the extent that petitioner asserts that he was denied the right to call various witnesses, we find his contention to be without merit. We note that petitioner did not identify any potential witnesses on his inmate assistance form.

Although the record reflects that petitioner made a general request during the hearing that "each and every officer" be called as a witness, petitioner was removed from the hearing for his disruptive behavior before the witnesses or the relevance of their testimony could be ascertained in order for the Hearing Officer to determine whether such witnesses were relevant or if the testimony would be redundant.

Furthermore, the record reflects that petitioner was aware of the identity of numerous correction officers present during the incident, as they were identified either in the misbehavior reports, in related documentation or during the hearing. Nevertheless, petitioner failed to indicate which of the correction officers he wished to be called as witnesses.

Under these circumstances, we find that petitioner failed to preserve this claim (see *Matter of Barnes v Venettozzi*, 135 AD3d 1250, 1251 [2016]). Further, we find no error in the Hearing Officer denying as irrelevant testimony from the deputy director of security regarding the results of another inmate's disciplinary hearing (see *Matter of Foster v Prack*, 144 AD3d 1287, 1288 [2016]).

Finally, petitioner's contention that the Hearing Officer was biased is belied by the record, which reflects that the determination of guilt resulted from the evidence presented and not from any alleged bias on the part of the Hearing Officer (see *Matter of Horton v Annucci*, 163 AD3d 1385, 1386 [2018]). Petitioner's remaining contentions have been reviewed and found to be without merit.

McCarthy, J.P., Devine, Aarons, Rumsey and Pritzker, JJ., concur. ADJUDGED that the determination is confirmed, without costs, and petition dismissed.