

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

Matter of Holland v. Venettozzi

2017 NY Slip Op 05294 (N.Y. Ct. App. 2017) · No. 523758 · Decided June 29, 2017

SUMMARY

The New York Appellate Division, Third Department reviewed a CPLR article 78 challenge to a prison disciplinary determination. The court annulled the finding that Leonard Holland disobeyed a direct order and directed expungement of that charge, while confirming the findings on the remaining charges.

CASE DETAILS

COURT	Appellate Division of the Supreme Court of the State of New York, Third Department
WRITING FOR THE COURT	McCarthy, J.P.; Lynch, J.; Rose, J.; Clark, J.; Mulvey, J.
JURISDICTION	New York
DECIDED	June 29, 2017
DOCKET	523758
DISPOSITION	other
PROCEDURAL POSTURE	CPLR article 78 proceeding transferred to the Appellate Division 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 in the record.
PRECEDENTIAL VALUE	Published New York Appellate Division opinion
PARTIES	Leonard Holland v. Donald Venettozzi, as Acting Director of Special Housing and Inmate Disciplinary Programs

TOPICS

judicial review of agency action

agency adjudication

administrative law

standard of review

appellate procedure

PRACTICE AREAS

administrative law

prison disciplinary proceedings

appellate procedure

QUESTIONS PRESENTED

1. Whether substantial evidence supported the findings that petitioner engaged in sexual conduct and violated visiting room procedures.
2. Whether the record supported the finding that petitioner disobeyed a direct order.
3. Whether the Hearing Officer's alleged bias required annulment of the disciplinary determination.
4. Whether the matter had to be remitted for reassessment of the penalty after one charge was annulled.

HOLDINGS

1. The record did not support the charge of disobeying a direct order, so that portion of the disciplinary determination had to be annulled.
2. The misbehavior report and testimony of the correction officers who observed the incident constituted substantial evidence supporting the findings of guilt on the charges of engaging in sexual conduct and violating visiting room procedures.
3. Petitioner's denial presented a credibility issue for the Hearing Officer to resolve and did not require annulment of the findings.
4. The alleged bias did not warrant annulment because the record showed that the determination resulted from the evidence presented rather than bias.
5. Remand for reassessment of the penalty was unnecessary because petitioner had already served the penalty and no loss of good time had been imposed.

KEY QUOTATIONS

*“As petitioner has already served the penalty and there was no loss of good time imposed, the matter need not be remitted for a reassessment of the penalty” ([*1])*

*“the record establishes that the determination resulted from the evidence presented and not from any alleged bias” ([*2])*

FACTUAL BACKGROUND

A correction officer observed petitioner being touched in the groin area by his visitor, leading to charges of engaging in sexual conduct, violating visiting room procedures, and disobeying a direct order. After a tier III disciplinary hearing, petitioner was found guilty of all three charges. Petitioner denied the conduct and also asserted that the Hearing Officer was biased.

PROCEDURAL HISTORY

Petitioner was found guilty after a tier III disciplinary hearing of engaging in sexual conduct, violating visiting room procedures, and disobeying a direct order. The determination, as modified with respect to the penalty, was

affirmed on administrative appeal. In this CPLR article 78 proceeding, respondent conceded that the disobeying-a-direct-order charge was unsupported by the record; the court annulled that portion of the determination and confirmed the remainder.

DISPOSITION

other

REMAND INSTRUCTIONS

No remand for penalty reassessment was required. The Commissioner of Corrections and Community Supervision was directed to expunge all references to the disobeying-a-direct-order charge from petitioner's institutional record.

CASES CITED

- Matter of Kirby v Annucci, 147 AD3d 1134, 1134 (2017)
- Matter of Sanchez v Selsky, 8 AD3d 846, 846-847 (2004)
- Matter of Retamozzo v New York State Dept. of Correctional Servs., 31 AD3d 1083, 1084 (2006)
- Matter of Green v Annucci, 148 AD3d 1443, 1444 (2017)
- Matter of Marino v Racette, 144 AD3d 1277, 1278 (2016), lv dismissed ____ NY3d ____ (June 6, 2017)

OPINION

PER CURIAM.

Matter of Holland v Venettozzi (2017 NY Slip Op 05294) Matter of Holland v Venettozzi 2017 NY Slip Op 05294 Decided on June 29, 2017 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: June 29, 2017 523758 [*1]In the Matter of LEONARD HOLLAND, Petitioner, vDONALD VENETTOZZI, as Acting Director of Special Housing and Inmate Disciplinary Programs, Respondent.

Calendar Date: May 9, 2017 Before: McCarthy, J.P., Lynch, Rose, Clark and Mulvey, JJ. Leonard Holland, Stormville, petitioner pro se. Eric T. Schneiderman, Attorney General, Albany (Marcus J. Mastracco of counsel), for respondent. MEMORANDUM AND JUDGMENT Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Sullivan 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 a misbehavior report with engaging in sexual conduct, violating visiting room procedures and disobeying a direct order after he was observed being touched in the groin area by his visitor. Following a tier III disciplinary hearing, petitioner was found guilty of all three

charges. Other than a modification to the penalty imposed, that determination was affirmed upon administrative appeal.

This CPLR article 78 proceeding ensued. Initially, respondent concedes, and our review of the record confirms, that the charge of disobeying a direct order is not supported by the record and, therefore, that part of the determination finding him guilty thereof must be annulled.

As petitioner has already served the penalty and there was no loss of good time imposed, the matter need not be remitted for a reassessment of the penalty (see *Matter of Kirby v Annucci*, 147 AD3d 1134, 1134 [2017]).

As to the remaining charges, the misbehavior report and testimony from the correction officers who observed the incident provide substantial evidence to support the determination of guilt (see *Matter of Sanchez v Selsky*, 8 AD3d 846, 846-847 [2004]). Petitioner's denial of the conduct presented a credibility issue for the Hearing Officer to resolve (see *Matter of Retamozzo v New York State Dept. of Correctional Servs.*, 31 AD3d 1083, 1084 [2006]).

To the extent that petitioner asserts that the Hearing Officer was biased, the record establishes that the [*2]determination resulted from the evidence presented and not from any alleged bias (see *Matter of Green v Annucci*, 148 AD3d 1443, 1444 [2017]; *Matter of Marino v Racette*, 144 AD3d 1277, 1278 [2016], lv dismissed ___ NY3d ___ [June 6, 2017]). McCarthy, J.P., Lynch, Rose, Clark and Mulvey, JJ., concur.

ADJUDGED that the determination is modified, without costs, by annulling so much thereof as found petitioner guilty of disobeying a direct order; petition granted to that extent and the Commissioner of Corrections and Community Supervision is directed to expunge all references to that charge from petitioner's institutional record; and, as so modified, confirmed.