

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

1049

TP 18-00478

PRESENT: CENTRA, J.P., CARNI, NEMOYER, TROUTMAN, AND WINSLOW, JJ.

IN THE MATTER OF MICHAEL YARBOROUGH, PETITIONER,

V

MEMORANDUM AND ORDER

ANTHONY ANNUCCI, ACTING COMMISSIONER, NEW YORK
STATE DEPARTMENT OF CORRECTIONS AND COMMUNITY
SUPERVISION, RESPONDENT.

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (LEAH R. NOWOTARSKI OF
COUNSEL), FOR PETITIONER.

BARBARA D. UNDERWOOD, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF
COUNSEL), FOR RESPONDENT.

Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Fourth Judicial Department by order of the Supreme Court, Wyoming County [Michael M. Mohun, A.J.], entered March 19, 2018) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various inmate rules.

It is hereby ORDERED that the determination is unanimously confirmed without costs and the amended petition is dismissed.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated various inmate rules. Contrary to petitioner's contention, the determination is supported by substantial evidence (*see Matter of Adams v Annucci*, 158 AD3d 1091, 1091 [4th Dept 2018]; *see generally People ex rel. Vega v Smith*, 66 NY2d 130, 139 [1985]).

Petitioner further contends that the Hearing Officer improperly denied his request to call a certain inmate as a witness at the hearing because the Hearing Officer failed to ascertain the reason for the inmate's refusal to testify. We reject that contention. The record establishes that the inmate had initially agreed to testify as a witness for petitioner but ultimately refused to do so, despite the Hearing Officer's personal efforts to secure his testimony and to ascertain the reason for the refusal. "[W]hen the [H]earing [O]fficer conducts a personal interview but is unable to elicit a genuine reason from the refusing witness, the charged inmate's right to call witnesses will have been adequately protected" (*Matter of Hill v Selsky*, 19 AD3d 64, 67 [3d Dept 2005]; *see Matter of Blades v Annucci*,

153 AD3d 1502, 1503-1504 [3d Dept 2017])). In any event, we note that the inmate's testimony would have been properly excluded by the Hearing Officer as redundant to the testimony of another inmate who testified at petitioner's hearing (*see Matter of Inesti v Rizzo*, 155 AD3d 1581, 1582 [4th Dept 2017])).

Finally, petitioner contends that the Hearing Officer erred in failing to assess the credibility and reliability of the informants who provided confidential testimony. Petitioner failed to raise that contention in his administrative appeal and thus failed to exhaust his administrative remedies with respect to it, and this Court lacks the discretionary authority to consider that contention (*see Matter of Polanco v Annucci*, 136 AD3d 1325, 1325 [4th Dept 2016])).