

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

507

CA 22-01093

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, AND OGDEN, JJ.

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IN THE MATTER OF RONDUE GENTRY,  
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

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

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH L. ROSENBLUTH OF  
COUNSEL), FOR RESPONDENT-RESPONDENT.

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Appeal from a judgment of the Supreme Court, Wyoming County  
(Michael M. Mohun, A.J.), entered June 20, 2022, in a proceeding  
pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is  
unanimously vacated, the determination is confirmed without costs and  
the petition is dismissed.

Memorandum: In this proceeding pursuant to CPLR article 78,  
petitioner seeks to annul the determination, following a tier III  
disciplinary hearing, that he violated certain inmate rules.  
Petitioner appeals from a judgment that dismissed the petition.

We note at the outset that, because the petition raises the issue  
whether the determination following an evidentiary hearing is  
supported by substantial evidence, Supreme Court should have  
transferred the proceeding to this Court (*see* CPLR 7804 [g]). We now  
consider the matter *de novo*, as if it had been properly transferred to  
us (*see Matter of Medina v Graham*, 71 AD3d 1598, 1598 [4th Dept 2010];  
*Matter of Hosmer v New York State Off. of Children & Family Servs.*,  
289 AD2d 1042, 1042 [4th Dept 2001]).

Petitioner contends that the determination was not supported by  
substantial evidence and that he was denied a fair hearing because the  
Hearing Officer failed to call a retired sergeant and failed to obtain  
certain video footage of the underlying events. Contrary to  
petitioner's contention, the determination that petitioner violated  
inmate rules 113.10 (7 NYCRR 270.2 [B] [14] [i]), 113.23 (7 NYCRR  
270.2 [B] [14] [xiii]), and 114.10 (7 NYCRR 270.2 [B] [15] [i]) is

supported by substantial evidence (*see generally People ex rel. Vega v Smith*, 66 NY2d 130, 140 [1985]). Although petitioner contends that the witnesses' testimony was inconsistent, any inconsistencies in the testimony "created credibility issues for the Hearing Officer to resolve" (*Matter of Sherman v Annucci*, 142 AD3d 1196, 1197 [3d Dept 2016]).

Moreover, we conclude that the Hearing Officer did not violate petitioner's right to call witnesses. The Hearing Officer "made a meaningful effort to locate and produce" the retired sergeant whom petitioner requested (*Matter of Davies v Johnson*, 203 AD2d 970, 970 [4th Dept 1994]; *see Sherman*, 142 AD3d at 1197).

Finally, we reject petitioner's contention that the Hearing Officer improperly denied petitioner access to one of the video recordings of the underlying events. We note that the Hearing Officer "requested the recording and was advised by facility staff that the video did not exist" (*Matter of Wimberly v Annucci*, 185 AD3d 1364, 1365 [3d Dept 2020], *lv denied* 36 NY3d 903 [2020]).

We therefore vacate the judgment, confirm the determination, and dismiss the petition.