

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

764

TP 23-00439

PRESENT: WHALEN, P.J., CURRAN, BANNISTER, OGDEN, AND DELCONTE, JJ.

IN THE MATTER OF ERNESTO DELGADO, PETITIONER,

V

MEMORANDUM AND ORDER

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

ERNESTO DELGADO, PETITIONER PRO SE.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KATE H. NEPVEU 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, Seneca County [Barry L. Porsch, A.J.], entered March 7, 2023) to review a determination of respondent. The determination found after a tier III hearing that petitioner had violated various incarcerated individual rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the amended petition is granted in part by annulling that part of the determination finding that petitioner violated incarcerated individual rules 104.11 (7 NYCRR 270.2 [B] [5] [ii]), 104.13 (7 NYCRR 270.2 [B] [5] [iv]), and 107.10 (7 NYCRR 270.2 [B] [8] [i]) and as modified the determination is confirmed without costs and respondent is directed to expunge from petitioner's institutional record all references to the violation of those incarcerated individual rules.

Memorandum: Petitioner commenced this CPLR article 78 proceeding seeking to annul the determination, following a tier III disciplinary hearing, that he violated incarcerated individual rules 102.10 (7 NYCRR 270.2 [B] [3] [i] [threats]), 104.11 (7 NYCRR 270.2 [B] [5] [ii] [violent conduct]), 104.13 (7 NYCRR 270.2 [B] [5] [iv] [creating a disturbance]), 106.10 (7 NYCRR 270.2 [B] [7] [i] [direct order]) and 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]). As respondent correctly concedes, the determination that petitioner violated rules 104.11, 104.13 and 107.10 is not supported by substantial evidence. We therefore modify the determination by granting the amended petition in part and annulling that part of the determination finding that petitioner violated those rules, and we direct respondent to expunge from petitioner's institutional record

all references thereto (see generally *Matter of Johnson v Eckert*, 197 AD3d 1011, 1011-1012 [4th Dept 2021]; *Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Contrary to petitioner's contention, however, the misbehavior report and hearing testimony constitute substantial evidence supporting the determination that he violated rules 102.10 and 106.10 (see generally *Matter of Thomas v Annucci*, 193 AD3d 1356, 1357 [4th Dept 2021]; *Matter of Williams v Annucci*, 162 AD3d 1530, 1531 [4th Dept 2018]). Any conflicting testimony from petitioner and the other incarcerated individual witnesses merely presented credibility issues for the Hearing Officer to resolve (see *Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]).

We have reviewed petitioner's remaining contentions and conclude that none warrants annulment or further modification of the determination.

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court