SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

787

TP 23-00818

PRESENT: SMITH, J.P., LINDLEY, MONTOUR, GREENWOOD, AND DELCONTE, JJ.

IN THE MATTER OF CHARLES BLANCHARD, 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 (NORMAN P. EFFMAN OF COUNSEL), FOR PETITIONER.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (KEVIN C. HU 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 May 4, 2023) to review a determination of respondent. The determination found after a tier II hearing that petitioner had violated various incarcerated individual rules.

It is hereby ORDERED that the determination is unanimously modified on the law and the petition is granted in part by annulling that part of the determination finding that petitioner violated incarcerated individual rule 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 that incarcerated individual rule.

Memorandum: Petitioner commenced this CPLR article 78 proceeding, transferred to this Court pursuant to CPLR 7804 (g), seeking to annul the determination, following a tier II disciplinary hearing, that he violated incarcerated individual rules 106.10 (7 NYCRR 270.2 [B] [7] [i] [refusing a direct order]), 107.10 (7 NYCRR 270.2 [B] [8] [i] [interference with employee]) and 107.11 (7 NYCRR 270.2 [B] [8] [ii] [harassment]). As respondent correctly concedes, the determination that petitioner violated incarcerated individual rule 107.10 is not supported by substantial evidence. We therefore modify the determination by granting the petition in part and annulling the part of the determination finding that petitioner violated rule 107.10, and we direct respondent to expunge from petitioner's institutional record all references thereto (*see generally Matter of Johnson v Eckert*, 197 AD3d 1011, 1012 [4th Dept

2021]; *Matter of Washington v Annucci*, 150 AD3d 1700, 1700-1701 [4th Dept 2017]). Inasmuch as petitioner has already served the penalty and there was no recommended loss of good time, there is no need to remit the matter to respondent for reconsideration of the penalty (*see Johnson*, 197 AD3d at 1012; *Washington*, 150 AD3d at 1701).

Contrary to petitioner's contention, the misbehavior report and hearing testimony constitute substantial evidence supporting the determination that he violated rules 106.10 and 107.11 (*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 individuals merely presented credibility issues for the hearing officer to resolve (*see Matter of Foster v Coughlin*, 76 NY2d 964, 966 [1990]). Finally, petitioner contends that incarcerated individual rule 107.11 cannot constitutionally prohibit the use of obscene language directed at correctional staff. That same contention, however, was considered and rejected by this Court in *Matter of Nicholas v Herbert* (195 AD2d 1083, 1084 [4th Dept 1993], *appeal dismissed & lv denied* 82 NY2d 821 [1993]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court