

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

440

CA 18-01187

PRESENT: PERADOTTO, J.P., DEJOSEPH, NEMOYER, AND CURRAN, JJ.

IN THE MATTER OF TRAVIS J. CORNELL,
PETITIONER-APPELLANT,

V

MEMORANDUM AND ORDER

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

WYOMING COUNTY-ATTICA LEGAL AID BUREAU, WARSAW (ADAM W. KOCH OF
COUNSEL), FOR PETITIONER-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (JULIE M. SHERIDAN OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment of the Supreme Court, Wyoming County
(Michael M. Mohun, A.J.), entered May 24, 2018 in a CPLR article 78
proceeding. The judgment dismissed the amended petition.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: Petitioner appeals from a judgment dismissing his
amended CPLR article 78 petition to annul respondent's determination,
following a tier III hearing, that he violated various inmate rules.
We affirm.

Insofar as relevant here, 7 NYCRR 254.1 precludes a person who
"investigated the incident" from presiding at a tier III inmate
disciplinary hearing. Contrary to petitioner's contention, however,
the Hearing Officer in this case did not "investigate" the subject
incident within the meaning of 7 NYCRR 254.1. Rather, the Hearing
Officer merely authorized the removal of the suspected contraband from
an evidence box for testing, and it is well established that such
ministerial and "tangential" involvement in an investigation is not
disqualifying under 7 NYCRR 254.1 (*Matter of Grant v Coombe*, 255 AD2d
996, 996 [4th Dept 1998]; see *Matter of Barnes v Lee*, 153 AD3d 1543,
1543 [3d Dept 2017]; *Matter of Perkins v Fischer*, 78 AD3d 1355, 1356
[3d Dept 2010]). Contrary to petitioner's further contention, the
record does not establish any bias on the part of the Hearing Officer
or that his determination flowed from any alleged bias (see *Matter of
Caldara v Annucci*, 160 AD3d 1173, 1174 [3d Dept 2018]; *Matter of
Battle v Pignotti*, 155 AD3d 1213, 1213 [3d Dept 2017]).

Finally, petitioner contends in passing that he was "denied his minimal due process rights under . . . the Constitution . . . when the hearing officer intentionally omit[ted] his involvement in [the] investigation." Petitioner did not raise that " 'specific argument' " in his amended petition, and it is therefore unpreserved for appellate review (*U.S. Bank N.A. v DLJ Mtge. Capital, Inc.*, 33 NY3d 84, 89 [2019], quoting *Matter of New York City Asbestos Litig.*, 27 NY3d 1172, 1176 [2016]; see e.g. *Matter of Johnson v Annucci*, 161 AD3d 1471, 1472 [3d Dept 2018]; *Matter of Pigmentel v Selsky*, 19 AD3d 816, 817 [3d Dept 2005]). We have no discretionary authority to reach unpreserved contentions in proceedings to review administrative determinations pursuant to CPLR article 78 (see *Matter of Khan v New York State Dept. of Health*, 96 NY2d 879, 880 [2001]; *Matter of Barnes v Venettozzi*, 135 AD3d 1250, 1251 [3d Dept 2016]).

Entered: June 14, 2019

Mark W. Bennett
Clerk of the Court