STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of JABASCA FOY,

Petitioner,

-against-

COMMISSIONER BRIAN S. FISCHER,

Respondents,

For A Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI # 01-12-ST4175 Index No. 6024-12

Appearances: Jabasca Foy
Inmate No. 02-A-2619
Petitioner, Pro Se
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Alden, New York 14004-1187

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Southport Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated June 26, 2012. The petitioner was found guilty of violating the following rules (see 7 NYCRR 270.2): Rule 105.13, engaging in gang activities; and Rule 180.11, facility correspondence violation.

Rule 105.13 recites:

> "An inmate shall not engage in or encourage others to engage in gang activities or meetings, or display, wear, possess, distribute or use gang insignia or materials including, but not limited to, printed or handwritten gang or gang related material.
>
> "Note: For purposes of this rule, a gang is a group of individuals, having a common identifying name, sign, symbol or colors, who have individually or collectively engaged in a pattern of lawlessness (e.g., violence, property destruction, threats of harm, intimidation, extortion, or drug smuggling) in one or more correctional facilities or that are generally recognized as having engaged in a pattern of lawlessness in the community as a whole. For purposes of this rule, printed or handwritten gang or gang related material is written material that, if observed in the inmate's possession, could result in an inference being drawn about the inmate's gang affiliation, but excludes published material that the inmate has obtained through the facility library or that has been approved for the inmate to possess through the media review process." (see 7 NYCRR 270.2)

Rule 180.11 recites: "An inmate shall comply with and follow the guidelines and instructions given by staff regarding facility correspondence procedures pursuant to requirements of departmental Directive Nos. 4422 and 4421 (7 NYCRR Parts 720 and 721)." (see 7 NYCRR 270.2)

The misbehavior report, dated June 7, 2012 and authored by Sergeant Vaillancourt, recites as follows:

> "On 5-30-12 a letter from J. Foy 02A2619 was stopped in the mailroom for review. The envelope was addressed to a Brandon Malloy of Brooklyn, N.Y. 11210. I show Foy the envelope on 6/5/12 asking him if he wrote the letter and was it from him. Foy replied "Yeah". I then removed the letter from the envelope and asking if this was also written by him. Foy replied "Im no denying it". The individual Brandon Malloy is a Parolee NYSID # 09722308J. While incarcerated inmate Foy is not allowed to

> correspond with individuals actively on parole. The material in the letter also contains numerous references to and language of the unauthorized gang known as "CRIP". The letter also asks for help establishing a "unit" and "sect" also "a communication system" "To get info push Kites to one another". I informed Foy that writing parolee and sending gang material are not permitted. Further investigation revealed Foy has been found guilty previously on 2/3/10 for gangs. Upon completion of my investigation this misbehavior report was written".

Initially, the petitioner argues that not all employees who might have knowledge of the letter signed the misbehavior report. The Court notes that it is signed by Sergeant Vaillancourt, the officer who conducted the investigation. In addition, the petitioner fails to demonstrate how, or in what respect he has been prejudiced by this circumstance (see Matter of Carter v Goord, 266 AD2d 623, 624 [3d Dept., 1999]; Matter of Jones v Fischer, 94 AD3d 1298 [3d Dept., 2012]; Matter of McGowan v Fischer, 88 AD3d 1038 [3d Dept., 2011]; Matter of McCoy v Goord, 277 AD2d 525, 526 [3d Dept., 2000]; Matter of Roman v Selsky, 270 AD2d 519, 519 [3d Dept., 2000]; Matter of Williams v Bennett, 273 AD2d 679, 679 [3d Dept., 2000]). The Court finds that the argument has no merit.

The petitioner points out that at the top of the misbehavior report, it recites that the date of the incident is June 5, 2012, while in the text of the misbehavior report, it indicates that the letter was stopped in the mail room on May 30, 2012. It has been held that date the investigation into petitioner's misconduct is completed may properly be used as the incident date in a misbehavior report (see Matter of Profitt v Goord, 34 AD3d 1136 [3d Dept., 2006]; see also Matter of Lamage v Selsky, 47 AD3d 1144, 1146 [3rd Dept., 2008]; Matter of Williams v Fischer, 93 AD3d 1051, 1052 [3d Dept., 2012]). The report provided sufficient notice of the acts with which he was charged. The Court finds that the argument has no

merit.

The petitioner next maintains that he was provided ineffective employee assistance. As part of his argument, he indicates hat one employee assistant (Sergeant Reed) initially visited him, but then a different employee assistant, Officer Bakowski made a follow-up visit. This matter was fully discussed at the hearing. Hearing Officer Sidari indicated that Sergeant Reed had taken a day off, and because it appeared that he had not yet turned in his paperwork, a second tier assistant was assigned. The petitioner declined the assistance of Officer Bakowski. There is nothing present here to suggest that the petitioner was harmed in any way. The Court finds that the argument has no merit.

In connection with the foregoing argument, the petitioner maintains that his employee assistance was inadequate in that he did not receive requested documents, including to/from reports, unusual incident reports and an employee manual. During the hearing, Hearing Officer Sidari reviewed with the petitioner his request for production of documents. Hearing Officer Sidari indicated that there were no to/from reports and no unusual incident reports. The petitioner was provided a page from the employee manual. He never requested employee's statements on his Assistant Form. With respect to petitioner's request for a video tape, the petitioner never requested a video tape on his inmate assistance form. In addition, Hearing Officer Sidari indicated that video tapes were only preserved for seven days. Thus, even if it could be said that petitioner was not provided with "meaningful assistance" (see, Matter of Serrano v Coughlin, 152 AD2d 790), petitioner failed to establish any prejudice resulting therefrom (see Matter of Turner v Fischer, 93 AD3d 987, 988 [3d Dept., March 8, 2012]; Kelly v Selsky, 54 AD3d 1118, 1119 [3rd Dept., 2008]; Matter of Coleman v Goord,

39 AD3d 1048 [3rd Dept., 2007]; Matter of Claudio v Selsky, 4 AD3d 702, 703 [2004]; Russell v Selsky, 305 AD2d 844, 844 [3d Dept., 2003]). In addition, it is well settled that there is no requirement to produce documents or videotapes which do not exist (see Matter of West v Bezio, 63 AD3d 1464, 1465 [3rd Dept., 2009]; Matter of Mullen v Superintendent of Southport Correctional Facility, 29 AD3d 1244, 1244 [3rd Dept., 2006]; Matter of Spirles v Goord, 308 AD2d 610, 611 [3d Dept., 2003]; Matter of Dennis v Bezio, 82 AD3d 1398, 1399 [3d Dept., 2011]).

The petitioner maintains that the hearing was not timely commenced and/or continued in compliance with DOCCS rules (see 7 NYCRR 251-5.1). Because the misbehavior report is dated June 7, 2012, and because the petitioner was confined, the hearing was required to commence on or before June 14, 2012 (see 7 NYCRR 251-5.1 [a]). However, pursuant to an extension granted on June 13, 2012, the commencement date was extended to June 18, 2012. The hearing was commenced on June 15, 2012. The hearing was required to be completed on or before June 21 ,2012 (see 7 NYCRR 251-5.1 [b]). On June 20, 2012 an extension was granted to complete the hearing on or before June 26, 2012, which was done. The Court finds that the hearing was commenced and completed pursuant to valid extensions. Apart from the foregoing, it has been held that the time limits set forth in § 251-5.1 of the Rules of DOCCS are directory, not mandatory (see, Matter of Collins v Bellnier,79 AD3d 1520, 1521 [3rd Dept., 2010]; Matter of Rodriguez v Fischer, supra; Matter of Foster v Bezio, 62 AD3d 1222, 1223 [3rd Dept., 2009]; Matter of Bilbrew v Goord, 33 AD3d 1107 [3rd Dept., 2006]), and where (as here) no substantial prejudice has been shown, the delay does not warrant annulment (see Matter of Van Gorder v New York State Dept., of Correctional

Services,42 AD3d 834, 835[3rd Dept., 2007]; Matter of Taylor v Coughlin, supra; Matter of Edmonds v Coombe, 239 AD2d 798 [3rd Dept., 1997]; Matter of Chappelle v Coombe, 234 AD2d 779, 780 [3rd Dept., 1996]).

With regard to petitioner's claim of hearing officer bias, the Court has reviewed the hearing transcript. There is nothing in the record to support petitioner' contention that the Hearing Officer was biased, or that the determination of guilt flowed from any alleged bias (see Matter of Lamage v Bezio, 74 AD3d 1676 [3rd Dept., 2010]; Matter of Cruz v Bezio, 79AD3d 1509, 1510 [3rd Dept., 2010]). The mere fact that credibility determinations or other rulings were resolved adversely to petitioner does not establish bias on the part of the hearing officer and/or that the outcome of the hearing flowed from alleged bias (see Matter of Nieves v Goord, 39 AD3d 1104, 1105 [3rd Dept., 2007]; Matter of Yancey v Conway, 46 AD3d 1042, [3rd Dept., 2007]; Matter of Morgan v Goord, 10 AD3d 792, 793 [3d Dept., 2004]; Matter of Sweet v Woods, 60 AD3d 1183, 1183 [3rd Dept., 2009]; Matter of Lopez v Fischer, 60 AD3d 1180, 1180 [3rd Dept., 2009]). From a review of the entire record, it appears that the determination of guilt flowed from the evidence presented and not from any alleged bias on the part of the Hearing Officer (Matter of Cruz v Bezio, 79 AD3d 1509, 1510 [3rd Dept., 2010], citing Matter of Lamphear v Fischer, 76 AD3d 1166 [2010] and Matter of Hamilton v Bezio, 76 AD3d 1125, 1126 [2010]).

The petitioner maintains that the Hearing Officer was not qualified to perform his own handwriting analysis of the subject letter. It is well established however, that "the Hearing Officer, as trier of fact, made an independent assessment of the handwriting samples and noted the similarity on the record" (Matter of Lumpkin v Fischer, 93 AD3d 1011, 1012 [3d

Dept., 2012], citing Matter of Collins v Fischer, 89 AD3d 1355, 1355 [2011], and Matter of Mills v Fischer, 65 AD3d 1427, 1427 [2009]).

Lastly, the Court finds that the Hearing Officer's decision adequately sets forth the evidence relied upon and the reasons for the determination (see Matter of Profitt v Goord, 34AD3d 1136, 1137 [3rd Dept., 2006]; Matter of Soto-Rodriguez v Goord, 252 AD2d 782, 783 [3d Dept., 1998]).

The Court has reviewed and considered petitioner's remaining arguments and contentions and finds them to be without merit.

The Court observes that certain records of a confidential nature relating to the petitioner were submitted to the Court as a part of the record. The Court, by separate order, is sealing all records submitted for *in camera* review.

Accordingly it is

ORDERED and ADJUDGED, that the petition be and hereby is dismissed.

This shall constitute the decision, order and judgment of the Court. The original decision/order/judgment is returned to the attorney for the respondents. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this decision/order/judgment and delivery of this decision/order/judgment does not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER

Dated: July 1, 2013
Troy, New York

Supreme Court Justice
George B. Ceresia, Jr.

Papers Considered:

1. Order To Show Cause dated November 14, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer dated March 1, 2013, Supporting Papers and Exhibits