

**Matter of Olibencia v State of N.Y. Dept. of
Corrections & Community Supervision**

2014 NY Slip Op 33482(U)

December 17, 2014

Supreme Court, Albany County

Docket Number: 2515-14

Judge: Jr., George B. Ceresia

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In The Matter of GILBERTO OLIBENCIA,

Petitioner,

-against-

STATE OF NEW YORK DEPARTMENT
OF CORRECTIONS AND COMMUNITY
SUPERVISION,

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 # 01-14-ST5791 Index No. 2515-14

Appearances: Gilberto Olibencia
 Inmate No. 02-A-1614
 Petitioner, Pro Se
 Shawangunk Correctional Facility
 P.O. Box 700
 Wallkill, NY 12589

Eric T. Schneiderman
Attorney General
State of New York
Attorney For Respondent
The Capitol
Albany, New York 12224
(Melissa A. Latino,
Assistant Attorney General
of Counsel)

DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Shawangunk Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a disciplinary determination dated October 29,

2013 in which he was found guilty of violating prison rules. Specifically, he was found guilty of violating Rule 113.10, possession of weapon¹.

Because it does not appear that the petitioner raised an issue of whether or not the determination was supported by substantial evidence (see CPLR 7803 [4]), the Court finds that it should retain the proceeding for disposition, rather than transferring it to the Appellate Division pursuant to CPLR 7804 (g) (see Matter of Taylor v Fischer, 80 AD3d 1037 [3d Dept., 2011]). The Court will, accordingly, review the questions of law raised by the petitioner under the provisions of CPLR 7803 (3).

The misbehavior report dated October 22, 2013 recites as follows:

“On the above date and approximate time while conducting a random and routine cell search of cell # C1-120 on C-1 housing where inmate Olibencia din #02A1614 is housed I Officer T. Gritman confiscated one concealed shank sharpened to a point. I found the shank in the cell locker above the top locker door secured to the locker with masking tape colored the same color as the interior of the cell locker. Area Sergeant notified and responded, continued with cell search and no additional contraband found. Contraband receipt issued and shank placed in dangerous contraband locker as per directive 4910-A.”

The petitioner claims that the weapon was the same color as the cell locker by reason that the weapon had been painted over at the time the cell-locker had been painted. He maintains that the cell locker was painted prior to when he commenced being housed there.²

¹Rule 113.10 recites: “An inmate shall not make, possess, sell or exchange any item that may be classified as a weapon or dangerous instrument by description, use or appearance. A dangerous instrument is any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing bodily harm.” (see 7 NYCRR § 270.2)

²Petitioner indicates that he had been housed in the cell for approximately eight or nine months prior to the incident; and that the locker had not been painted during the interim.

He requested records with regard to the date when the cell was last painted; and documents to show when, and how many times the cell had been searched between the time it was painted and the time the weapon was recovered. He argues that the request for such documents was improperly denied. He indicates that the Hearing Officer stated that such documents did not exist. This, in petitioner's view, serves as evidence that the Hearing Officer "must have" improperly conducted an investigation of the incident which, he claims, was a violation of regulatory guidelines (see 7 NYCRR 253.1 [b]). The petitioner also maintains that because he is five feet five inches in height, he was not tall enough to have secreted the weapon in the top of the eight foot high locker.

The Court has reviewed the transcript of the hearing. Of particular significance here, the petitioner appeared through an employee-interpreter by reason that the petitioner does not speak English. Through his interpreter, he mentioned "[t]hey didn't have paperwork to see when is the last time they painted. He's been 9 months in the cell and they had no paperwork and he never asked to get any paint, painted the cell that color". Near the end of the hearing, the following colloquy took place:

[Hearing Officer]: Alright thank you Officer Griffin. Do you have any further testimony, documentary evidence to get before we continue to the next hearing"

[Interpreter]: He's saying that when he was living on Alpha block he said he was living there for 6 years he never had any issues with anybody he never did anything wrong and when he me [sic] moved to the other block Charlie block he said he was in a double bunk cell and he said never double bunk cell [sic]. So when somebody leave they put them in a single cell which was that one he said the person that was in there in that cell must have been he guess must have been 6 feet tall or something he said that

guy was big when he left the jail. He can't understand why I would put something like that in the cell. He just said that he imagine that it was his but he says because I am in the cell and I'm in there I get the blame for having that in there.

[Hearing Officer]: Do you have any procedural objections? ([Interpreter] speaks Spanish)

[Interpreter]: No, no objections

[Hearing Officer]: I will now close the testimony at this point. The time is 9:58 am I am gonna stop the tape and made a written disposition. I will then restart the tape and read it into the record ([Interpreter] speaks Spanish)."

It is well settled that an objection is waived if not raised in a timely manner (see Matter of Fulmore v Prack, 116 AD3d 1281, 1282 [3d Dept., 2014]; Matter of Elliott v Fischer, 94 AD3d 1326, 1327 [3d Dept., 2012]; Matter of Green v Bradt, 91 AD3d 1235, 1237 [3d Dept., 2012], lv denied 19 NY3d 802 [2012]). Although the Court recognizes that the petitioner was testifying through an interpreter, the Court is bound by the record before it. The Court finds that the objection with regard to the alleged failure to produce documentary evidence was waived when the petitioner responded in the negative at the end of the hearing when asked if he had any objections (Matter of Fulmore v Prack, supra); Matter of Elliott v Fischer, supra; Matter of Green v Bradt, supra).

There is no evidence to support petitioner's contention that the Hearing Officer improperly conducted an investigation, in violation of 7 NYCRR 253.1 (b). The question with regard to whether or not the petitioner was physically able to secrete the weapon in the

locker was a factual issue for the Hearing Officer to decide².

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

The Court finds that the determination was not made in violation of lawful procedure, is not affected by an error of law, and is not irrational, arbitrary and capricious, or an abuse of discretion. The Court concludes that the petition must be dismissed.

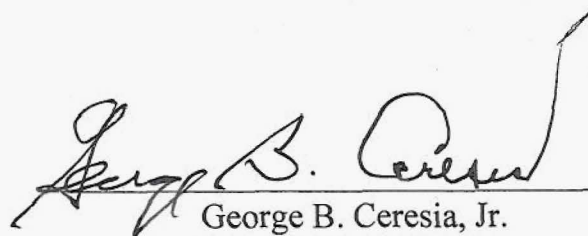
Accordingly it is

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 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: December 17, 2014
Troy, New York


George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated Ma6 16, 2014, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated July 22, 2014, Supporting Papers and Exhibits
3. Petitioner's Verified Reply dated July 30, 2014

²The Court observes that C.O. Griffin testified that he was able to dislodge the weapon in the top of the locker by standing on a trash can found in the cell, which he turned upside down.