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

1444
CA 08-01930
PRESENT: HURLBUTT, J.P., MARTOCHE, SMITH, CARNI, AND PINE, JJ.

IN THE MATTER OF ANDREW ROBINSON,
PETITIONER-APPELLANT,

V MEMORANDUM AND ORDER

BRIAN FISCHER, COMMISSIONER, NEW YORK STATE
DEPARTMENT OF CORRECTIONAL SERVICES,
RESPONDENT-RESPONDENT.

KAREN MURTAGH-MONKS, BUFFALO (KRIN FLAHERTY OF COUNSEL), FOR
PETITIONER-APPELLANT.

ANDREW M. CUOMO, ATTORNEY GENERAL, ALBANY (RAJIT S. DOSANJH OF
COUNSEL), FOR RESPONDENT-RESPONDENT.

Appeal from a judgment (denominated order) of the Supreme Court, Erie County (Shirley Troutman, A.J.), entered June 26, 2008 in a proceeding pursuant to CPLR article 78. The judgment dismissed the petition.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by granting the petition in part, annulling those parts of the determination finding that petitioner violated inmate rules 100.10 (7 NYCRR 270.2 [B] [1] [i]) and 104.11 (7 NYCRR 270.2 [B] [5] [ii]) and by vacating the recommended loss of good time and as modified the judgment is affirmed without costs, and the matter is remitted to respondent for further proceedings in accordance with the following Memorandum: Petitioner appeals from a judgment dismissing his petition in which he sought to annul the determination finding that he violated various inmate rules. We note at the outset that, at the commencement of the Tier III hearing, petitioner pleaded guilty to violating inmate rule 104.13, creating a disturbance (7 NYCRR 270.2 [B] [5] [iv]), and we therefore do not address that charge. Petitioner also was charged with violating inmate rule 100.10, assaulting an inmate (7 NYCRR 270.2 [B] [1] [i]); inmate rule 104.11, engaging in violent conduct (7 NYCRR 270.2 [B] [5] [ii]); and inmate rule 107.10, interfering with an employee (7 NYCRR 270.2 [B] [8] [i]). Before the hearing was conducted, petitioner had requested that the victim of the purported assault be called as a witness. Although the employee assistant form in the record before us indicates that the witness refused to testify, no witness refusal form was signed and no reason for the refusal to testify was set forth on the employee assistant form. At the hearing, petitioner again requested that the victim be called as a witness. At the request of the Hearing

Officer, a correction officer asked the witness whether he would testify. The correction officer reported to the Hearing Officer that the witness refused to testify, but the correction officer provided no reason for the refusal nor is there any indication in the record that the witness was asked why he refused to testify.

We agree with petitioner that the Hearing Officer's failure to make any attempt to ascertain the reason for the refusal of the witness to testify violated petitioner's rights under 7 NYCRR 254.5 (a) (*see e.g. Matter of Barnes v LeFevre*, 69 NY2d 649, 650; *Matter of Alvarez v Goord*, 30 AD3d 118; *Matter of Martinez v Goord*, 15 AD3d 737, 738). "Under the circumstances presented here, where petitioner does not dispute that the evidence in the record was sufficient to sustain the determination, the appropriate remedy is to remit the matter for a new hearing in which petitioner should be provided with the reason for the witness's refusal to testify" (*Martinez*, 15 AD3d at 738; *see Alvarez*, 30 AD3d at 120-121). As noted, petitioner pleaded guilty to the charge of creating a disturbance and we therefore confirm the determination with respect to that charge. We also confirm the determination with respect to the charge of interfering with an employee inasmuch as that conduct occurred after the assault, and we agree with respondent that the witness would not have had relevant testimony to offer on that charge. We therefore modify the judgment by granting the petition in part, annulling those parts of the determination finding that petitioner violated inmate rules 100.10 and 104.11 and by vacating the recommended loss of good time, and we remit the matter to respondent for a new hearing on the remaining two charges and for reconsideration of the recommended loss of good time.

Entered: December 30, 2009

Patricia L. Morgan
Clerk of the Court