State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 24, 2014 517114

In the Matter of DERRICK OMARO,
Petitioner,
v MEMORANDUM AND JUDGMENT

BRIAN FISCHER, as Commissioner of Corrections and Community Supervision,
Respondent.

Calendar Date: June 9, 2014

Before: Peters, P.J., Stein, McCarthy, Devine and Clark, JJ.

Derrick Omaro, Attica, petitioner pro se.

Eric T. Schneiderman, Attorney General, Albany (Peter H. Schiff of counsel), for respondent.

Proceeding pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, entered in Albany County) to review a determination of respondent which found petitioner guilty of violating a prison disciplinary rule.

Petitioner, a prison inmate, was found guilty of making an unauthorized exchange of personal property when an anti-bullying manual he wrote was found in another inmate's cell. The correction officer who authored the report noted that petitioner had been instructed not to disseminate the manual, but did not discover whether petitioner had actually given the manual to the other inmate. Petitioner testified that he had not done so, and the record reflects that the manual is available to the general public and could have been obtained from other sources. The Hearing Officer then stated that he had learned off the record

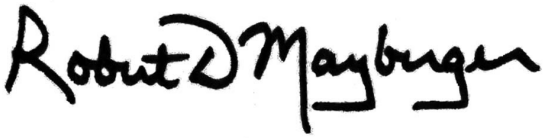
that petitioner had given the manual to another inmate, and relied upon petitioner's supposed "admission" as the basis for the determination of guilt. Even assuming that it was proper for the Hearing Officer to rely on the off-the-record alleged admission, that evidence did not establish whether the inmate who received the manual was the same inmate whose possession of the manual formed the basis for the misbehavior report (compare Matter of Harrison v Bertone, 51 AD3d 1350, 1350 [2008]). Therefore, substantial evidence does not exist to support petitioner's guilt of the charge alleged in the misbehavior report, and the determination must be annulled (see Matter of Campbell v Prack, 100 AD3d 1173, 1173 [2012]).

Petitioner's remaining contentions, including that the off-the-record alleged admission was improper to consider, are rendered academic by the foregoing.

Peters, P.J., Stein, McCarthy, Devine and Clark, JJ., concur.

ADJUDGED that the determination is annulled, without costs, petition granted, and respondent is directed to expunge all references to this matter from petitioner's institutional record.

ENTER:



Robert D. Mayberger
Clerk of the Court