STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
RICARDO RAMIREZ

Petitioner,

DECISION & JUDGMENT

for a Judgment Pursuant to Article 78
of the Civil Practice Law & Rules

-against-

ANTHONY J. ANNUCCI, Acting
Commissioner, New York State
Department of Correctional and
Community Supervision,

Respondent.

Index No. 2035-15
(RJI No. 01-15-ST6648)

APPEARANCES:

PRISONERS' LEGAL SERVICES
OF NEW YORK
Attorneys for Petitioner
(Betsy Hutchings, of counsel)
114 Prospect Street
Ithaca, New York 14850

ERIC T. SCHNEIDERMAN
ATTORNEY GENERAL
OF THE STATE OF NEW YORK
Attorneys for Respondent
(Melissa A. Latino, of counsel)
The Capitol
Albany, New York 12224

Hartman, J.

Petitioner Ricardo Ramirez brings this CPLR article 78 proceeding against respondent Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS), to challenge a Tier III disciplinary determination finding him guilty of drug use based on the results of a positive urinalysis test. While disavowing any substantial evidence challenge to the determination, petitioner claims that the determination must be annulled and references to it expunged from his record because the hearing officer improperly removed and excluded him from the hearing. For the reasons that follow, the petition is GRANTED.

Background

Petitioner, an inmate in DOCCS custody, was issued a misbehavior report on September 22, 2014, charging him with drug use. The misbehavior report was authored by Correction Officer (CO) Bleau, "a certified urinalysis tester," who obtained two urinalysis samples from petitioner at 8:24 a.m. on that date. The urinalysis was requested based on observations the day before of petitioner's suspicious activity in the yard, glassy eyes, and slurred speech. The first sample, tested at 2:17 p.m., was positive for THC with a value of .332; the second, tested at 3:15 p.m., was positive for THC with a value of .327.

Petitioner's Tier III hearing was commenced on September 25, 2014 and concluded on October 7, 2014. Petitioner waived his right to an assistant and

declined to request any specific witnesses. The hearing officer advised petitioner that he could request witnesses at any time during the hearing. Petitioner argued that the positive urinalysis tests were likely the result of the interactive effects of medication he was taking—indomethozine and ibuprofen. The hearing officer stated that he was going to consult with medical personnel, and petitioner suggested that he speak to Nurse Wagner. The hearing was then adjourned.

When the hearing resumed on October 7, 2014, the hearing officer called on CO Bleau to testify and advised petitioner that any questions he had for the CO Bleau should be directed to the hearing officer, who would determine their relevancy. The hearing officer proceeded to question CO Bleau about the urinalysis results and chain of custody, referencing the relevant documents in the record. The questioning of CO Bleau was interrupted by three separate colloquies between the hearing officer and petitioner about proper hearing conduct; the third one resulted in petitioner's removal from the hearing.

During the hearing officer's initial series of questions about the chain of custody, petitioner sought to interject a question several times, prefacing his remarks each time with "Excuse me." The hearing officer prevented petitioner from doing so, admonishing him, "If you keep this up you're not going to finish this hearing. You're going to be in your . . . ." Petitioner then asserted that the hearing officer was "being hostile" towards him "for no reason." The hearing

officer explained, the "reason [is] because you're interrupting." Petitioner disagreed, "I'm not being interrupting. I said excuse me." The hearing officer responded, "Okay," ending the first colloquy.

Almost immediately thereafter, when CO Bleau began to explain where the specimens were placed during the six-hour between collection and testing, petitioner again interrupted, asking a question directly to the CO, "Okay then why didn't you put that down on the chain of custody?" The CO responded that he did not have to. After petitioner and the CO engaged in some back-and-forth, the hearing officer ably ended the exchange. He admonished petitioner, "You are not asking the Officer any more questions you're addressing them through me." The CO continued his testimony. Petitioner then argued to the hearing officer that the CO had not properly accounted for the chain of custody during the six-hour interval. The hearing officer advised petitioner that he was now making statements and told him "I don't want statements." Petitioner responded, "Alright," ending the second colloquy

The hearing officer proceeded to ask CO Bleau a final series of questions, including queries about the possibility of false positives due to other medicines that petitioner was taking. Petitioner sat relatively silent during this final series of questions. When the hearing officer concluded his questioning, he attempted to excuse the CO, "Okay now listen, I don't have any more questions for ya [sic] and neither does he so we're good." At that point, petitioner

interjected, "Excuse me I do have other questions for him." The hearing officer repeated, "We're good." Petitioner again said he had questions. The hearing officer again repeated, "We're good." When petitioner began to speak a third time, the hearing officer said, "Listen, listen I told you, what you're doing is you're interrupting, you're getting out of line and I'm not going to deal with this." Petitioner responded, "I'm saying excuse me because you're not allowing me to present my defense." The hearing officer then ordered that petitioner be removed from the hearing room.

The hearing officer received no other testimony or evidence. After stating on the record that petitioner "was being very uncooperative and acting up in this hearing and he was removed from the hearing," the hearing officer paused the tape to prepare a written disposition. Twelve minutes later, he restarted the tape and read his written disposition into the record. Based on the urinalysis results, the hearing officer found petitioner guilty of drug use and imposed a penalty of nine months in SHU with loss of privileges, along with a recommended three-month loss of good time. Petitioner's administrative appeal raised the issue of his allegedly improper removal from the hearing. The Commissioner affirmed the hearing officer's determination.

Analysis

"An inmate has a fundamental right to be present during a prison disciplinary proceeding unless he or she is excluded for reasons of institutional

safety or correctional goals" (*Matter of German v Fischer*, 108 AD3d 998, 999 [3d Dept 2013]; *Matter of Cornwall v Fischer*, 78 AD3d 1337, 1337 [3d Dept 2010]; *see* 7 NYCRR § 254.6 [a] [2] [DOCCS regulations providing for the right of an inmate to be present at hearing]). An inmate may be excluded from the hearing where his or her behavior is so disruptive or obstructive that his presence would be inimical to institutional safety and correctional goals (*Matter of Steward v Fischer*, 95 AD3d 1523, 1524 [3d Dept 2012]; *Matter of Lowrence v Mann*, 189 AD2d 1036, 1038 [3d Dept 1993]).

Here, petitioner's conduct did not rise to the level of disruption that warranted exclusion from the hearing (*see Matter of German*, 198 AD3d at 999; *Matter of Cornwall*, 78 AD2d at 1337; *Matter of Holmes v Drown*, 23 AD3d 793, 794 [3d Dept 2005]). Undoubtedly the hearing officer was frustrated by petitioner's attempt to interject his own questions, sometimes directing them to CO Bleau despite the hearing officer's admonishments against doing so. But the hearing officer was able to control petitioner's lapses and maintain order with relative ease. Indeed after the second colloquy, petitioner remained compliant during the hearing officer's final series of questions to CO Bleau. It was only when the hearing officer indicated that neither he nor petitioner had any further questions attempted to excuse CO Bleau that petitioner objected that he in fact did have questions. At that point, the hearing officer had not allowed petitioner to ask any questions of CO Bleau, despite having told

petitioner twice that he could ask questions but should direct them to the hearing officer. Because petitioner was improperly removed from the hearing, the determination should be annulled.

Ordinarily an inmate's right to be present at a disciplinary hearing is "fundamental," and improper removal warrants expungement (*see Matter of German*, 198 AD3d at 999; *Matter of Cornwall*, 78 AD2d at 1337). Here, however, the improper removal did not rise to constitutional proportions. After petitioner was removed, the hearing officer accepted no further testimony or evidence, but instead paused the tape to prepare a written disposition, which he then read into the record. Moreover, although the hearing officer had twice told petitioner he could ask questions of CO Blau if he posed them through the hearing officer, an inmate has no constitutional right to cross-examine witnesses (*see Abdur Raheem v Mann*, 85 NY2d 113, 119 [1995]; *Matter of Mastropietro, v New York State Dept of Corrections*, 52 A.D.3d 1125, 1125 [3d Dept 2008]). Under these circumstances, the appropriate remedy is remittal for a new hearing, not expungement (*see Matter of Rivera v Prack*, 122 AD3d 1226, 1227-1228 [3d Dept 2014]; *Matter of Texiera v Fischer*, 115 AD3d 1137, 1138 [2d Dept], *lv granted* 23 NY3d 908 [2014]).

Accordingly, it is

ORDERED that the petition is granted, the disciplinary determination is annulled, and the matter is remitted for further proceedings.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to petitioner's counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute entry or filing under CPLR 2220 or 5016 and counsel is not relieved from the applicable provisions of those rules respecting filing, entry, and service.

Dated: Albany, New York
July 27, 2015

Denise A. Hartman

Denise A. Hartman
Acting Supreme Court Justice

Papers Considered:

Notice of Petition, Verified Petition, and Exhibits A–G
Petitioner's Memorandum of Law
Verified Answer and Exhibits A–F
Respondent's Memorandum of Law and Exhibits A–F
Petitioner's Reply and Memorandum of Law