STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In The Matter of ANTONIO BERTOLINI,

Petitioner,

-against-

BRIAN FISCHER, COMM.,

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-ST4165 Index No. 6022-12

Appearances: Antonio Bertolini
Inmate No. 00-A-0543
Petitioner, Pro Se
Upstate Correctional Facility
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P.O. Box 2001
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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner, an inmate at Upstate Correctional Facility, has commenced the instant CPLR Article 78 proceeding to review a Tier III disciplinary determination which involved three separate misbehavior reports, all dated March 30, 2012. The first misbehavior report

charged him with possession of a weapon, a violation of Rule 113.10 of the Rules of the Department of Corrections and Supervision[1] ("DOCCS"), and smuggling, a violation of Rule 114.10. The misbehavior report recited:

> "While escorting inmate Bertolini, 00A0543 out of A&B Yard I CO W Owen observed inmate Bertolini reach into his front left pants pocket and pull out a black object approximately 2 1/4" long and drop it on the ground. I immediately recovered the object and brought it into B&C corridor where I discovered it was a scalpel type weapon. The weapon is a 1 3/4" long x 3/8" wide metal scalpel with a black electrical tape handle on one end with a black pen cap sheath wrapped in black electrical tape. The weapon was given to CO Tokarz for photographs and secured in the contraband lock box."

The second misbehavior report charged the petitioner with a violation of Rule 113.25, possession of drugs and Rule 114.10, smuggling. The misbehavior report recited:

> "On the above date and approximate time while working at B:C corridor inmate Bertolini A 00 A-543 was brought into B:C corridor from A:B yard. I CO C. Stack while doing a pat frisk I felt an unknown object in his front groin area. I ordered him to remove the object with his left hand and drop it on the bench. Inmate Bertolini 00A0543 removed the object from his front groin and dropped it on the bench. The object was a white cotton bag which contained 29 small bags of a green leafy substance, I brought the cotton bag containing the 29 small bags up to the situation room to be tested, CO J Tokarz, a certified Nik tester. CO Tokarz tested the substance for a positive of marijuana 6.5 grams using Nik test kit-E. The contraband was then put into the contraband drop box."

The third misbehavior report charged the petitioner with a violation of Rule 113.25, possession of a controlled substance. The misbehavior report recited:

> "On the above date and above approximate time I, C.O. V Cruz conducted a special cell search on inmate Bertolini, A

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[1]See 7 NYCRR 270.2.

> #00A0543. While searching inmate Bertolini's cell I found five bags of a green leafy substance which appears to be marijuana hidden in a rice box. I then took the green leafy substance to officer J. Tokarz who is a NIK certified tester to be tested using a NIK test kit (E). Substance was tested positive for marijuana and weight sixty grams. Marijuana was taken by Officer J. Tokarz and secure in a contraband lock box."

The petitioner was found guilty of all charges. The Hearing Officer imposed the following penalties, all to run for 18 months: confinement in the special housing unit; loss of packages; loss of commissary; loss of telephone privileges; and loss of good time. The petitioner maintains that the penalties are excessive, and the Hearing Officer failed to assign a separate penalty for each charge. He maintains that during the hearing, the Hearing Officer would not disclose information from a confidential informant. He asserts that the first misbehavior report was defective in that it was not endorsed by two other corrections officers, who were involved in the incident. He also argues that he was denied his right to call a witness.

"Judicial review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law" (Matter of Kelly v Safir, 96 NY2d 32, 38 [2001], mot for reargument denied 96 NY2d 854, citing Matter of Featherstone v Franco, 95 NY2d 550, 554, and CPLR 7803 [3]). The penalty imposed by an administrative agency must be upheld unless it is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" (Matter of Pell v Board of Educ., 34 NY2d 222, 233 [1974], citations omitted; Matter of Featherstone v Franco, supra; Matter of Torrance v Stout, 9 NY3d 1022, 1023 [2008]; Matter of Turzik v Van Blarcum, 100 AD3d 1338, 1339 [3d Dept., 2012]; Matter

of Bottari v Saratoga Springs City School District, 3 AD3d 832, 833 [3d Dept., 2004]; Matter of Martindale v Novello, 13 AD3d 761, 763-764 [3d Dept., 2004]; Matter of Waldren v Town of Islip, 6 NY3d 735, 736-737 [2005]; Matter of Liguori v Beloten, 76 AD3d 1156, 1157-1158 [3rd Dept., 2010]; Matter of Eisenberg v Daines, 99 AD3d 1117, 1120 [3d Dept., 2012]).

In support of his argument the petitioner cites a Guideline Range published by DOCCS in 1999. Although it has not been established whether the Guideline Range is still in use, it is just that, a guide - not mandatory, and not a substitute for the application of the sound discretion by the Hearing Officer. Moreover, applying the upper limit found in the Guideline Range applicable to the weapons possession charge (12 months) and the two drug possession charges (3 months for a first offense) would result in a penalty of 18 months confinement and loss of good time, without considering the penalty applicable to the two smuggling charges. The Court finds that the penalty imposed was not an abuse of discretion.

The Court notes that information obtained from a confidential informant is properly admissible, so long as the hearing officer makes an independent determination with regard to the informant's reliability (see Matter of Williams v Fischer, 18 NY3d 888, 890 [2012]). In this instance the Hearing Officer verified the reliability of the confidential informant by questioning (*in camera*) the individual who originally obtained the confidential information, and obtaining detailed testimony to establish the reliability of the confidential information (see Matter of Janis v Prack, 106 AD3d 1297, 1297 [3d Dept., 2013], citing Matter of White v Prack, 94 AD3d 1299 [2012]). In addition, the Hearing Officer adequately explained during the hearing why the confidential testimony was taken out of petitioner's presence (see

id.).

As noted, the petitioner argues that the first misbehavior report (signed by C.O. Owen) is defective in that it is not signed by Officer Fuller or an Officer Ozinkowski, both of whom, he maintains, were also present in the yard at the time of the incident. It appears that Officer Fuller and an Officer Dzikoski testified at the hearing. The petitioner fails to demonstrate how, or in what respect he has been prejudiced by failure of other officers to sign the misbehavior report (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.

With regard to petitioner's claim that the Hearing Officer improperly denied his right to call the yard tower guard, it is well settled that an inmate has a conditional right to call witnesses at a disciplinary hearing (see Matter of Morris-Hill v Fischer, 104 AD3d 978 [3d Dept., 2013]). It is also well settled that a hearing officer may properly deny witnesses who would provide testimony which is merely cumulative and redundant to that given by prior witnesses (see Matter of Gomez v Fischer, 74 AD3d 1399, 1400 [3d Dept., 2010]; Matter of McLean v Fischer, 63 AD3d 1468, 1469 [3d Dept., 2009]; Matter of Igartua v Selsky, 41 AD3d 717 [3d Dept, 2007])). In this instance the Hearing Officer properly denied the request by reason that the testimony of the yard tower guard would be duplicative of the testimony of three correction officers who were positioned within a few feet of the petitioner.

With regard to petitioner's request for a videotape of the incident, the Hearing Officer indicated that he had inquired about the existence of a video tape but informed that no video tape existed.

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: July 10, 2013
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Order To Show Cause dated November 14, 2012, Petition, Supporting Papers and Exhibits
2. Respondent's Answer Dated February 25, 2013, Supporting Papers and Exhibits