SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0717-15T3

THOMAS CLAUSO,

Appellant,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS,

Respondent.

Telephonically Argued January 5, 2017 – Decided March 14, 2017

Before Judges Ostrer and Leone.

On appeal from the New Jersey Department of Corrections.

Thomas Clauso, appellant, argued the cause pro se.

Kevin J. Dronson, Deputy Attorney General, argued the cause for respondent (Christopher S. Porrino, Attorney General, attorney; Lisa A. Puglisi, Assistant Attorney General, of counsel; Mr. Dronson, on the brief).

PER CURIAM

Thomas Clauso, at relevant times a prisoner at East Jersey State Prison, appeals from a Department of Corrections

(Department) disciplinary decision. A hearing officer found that Clauso committed prohibited act *.005, "threatening another with bodily harm or with any offense against his or her person or his or her property." N.J.A.C. 10A:4-4.1(a). The Administrator upheld the decision after an administrative appeal. We affirm.

Clauso disclosed the threat in a prison-monitored telephone conversation with his wife on April 7, 2015. The target was a member of the New Jersey Judiciary, who had been a prosecutor in an earlier case involving Clauso. Clauso provided context for the threat in his brief on appeal. In 1988, Clauso was sentenced to life in prison, with a twenty-five-year mandatory minimum term.[1] He alleged that the former prosecutor had links to the judge, now deceased, who presided over his trial and sentenced him. He contended the trial judge should have recused himself. In the recorded conversation, Clauso told his wife that he had written a threatening letter to a judge, apparently referring to the former prosecutor:

Wife: What happened?

[1] The record states the life sentence was imposed for criminal attempt, N.J.S.A. 2C:5-1, to violate an "uncoded chapter" of law. He was simultaneously sentenced to five years for possessing a weapon, N.J.S.A. 2C:39-5; ten years for doing so with an unlawful purpose, N.J.S.A. 2C:39-4; and five years for aggravated assault, N.J.S.A. 2C:12-1.

> Clauso: I mailed that S___[2]
>
> Wife: Do you think you are going to threaten an attorney?
>
> Clauso: I ain't threatening no attorney. I'm threatening the judge.

Clauso then stated he had written to the judge "on and off for the last four months." Using coarse language, he said he did not care "what none of you . . . out there, none of you, do." His threatening comments continued:

> Clauso: I ain't living on my knees no more. I ain't going to worry about this S___
>
> Wife: Do your paralegals agree with this
>
> Clauso: These MF don't want to admit they are wrong. You have to put fire under them.
>
> Wife: What are you saying to these people
>
> Clauso: I told you. I already wrote it. I told him flat out. This MF____ had no right hearing my case. I said you're not untouchable M_F_. Just like you don't give a F___ about me or my family, my children, grandchildren, nobody. I don't give a F___ about you or yours. Keep it the F__ up, Keep F---g with me. I said I told you Judge for the last G_D F____g time. I got people . . . I can call to come see your Punk A___. Yeah oh yeah. I don't give a F___ about a threatening charge

Clauso then told his wife that he expected he would be released by the summer, his sentence could not be extended for a

[2] The redactions are in the transcript.

threatening charge, and he could "handle this in lock up." His wife told him he was making things worse. Clauso replied it did not matter, because he already mailed the letter. His wife said, "You can't threaten people[.]" Clauso replied, "So what? They are lucky I ain't out and get a gun. If I had a gun I would kill them all." Later in the conversation, Clauso said, "NO one is untouchable. Everyone is touchable." He added, "I'll take the stupid M--F--r out and the other one will say Jesus Christ, he meant what he said. The State Police will come and I will tell them to their face, I'll have you F------g Whacked!"

A disciplinary report issued three days later alleged a violation of *.005. It stated, "As a result of monitoring inmate Clauso's telephone conversations, it was discovered that he has threatened a life" of the judge "numerous times during the 4-7-2015 conversations." Clauso pleaded not guilty. He requested a postponement at the first hearing date, which was granted. Clauso then went on a hunger strike and was hospitalized. As a result, the adjudicatory hearing was delayed until August 2015, when the facility staff determined he was medically and psychologically fit to attend.

Clauso refused to attend the August hearing. He told the officers who visited his cell to escort him to the hearing, "I'm not participating in nothing. I ain't got to say nothing to you.

Get out of here." The hearing officer considered a statement by Clauso in June 2015, "I am not saying I didn't make threats. They are going to let me go one way or another." The hearing officer also identified a confidential mental health evaluation, which cleared Clauso for the hearing. The items of evidence introduced against Clauso included an audio tape, which is not in the appellate record; the transcript of excerpts of Clauso's conversation with his wife, which we have quoted; various shift reports; and a record of the multiple postponements because of Clauso's hunger strike and medical monitoring. Also considered was a provocative March 24, 2015 letter Clauso wrote to a federal judge.[3]

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[3] The United States Marshal's report of the letter apparently preceded the monitoring of Clauso's telephone conversations. We gather the federal judge was presiding over an application by Clauso. Among other things, Clauso wrote:

> [D]o you want me to threaten to kill someone? or Blow something up so I can get a hearing?
>
> . . . .
>
> Are all of you Stupid? Nuts[?] [S]cared? [W]hat is it?
>
> . . . .
>
> Your Honor if you['re] scared tell me I['ll] send some solidures [sic] to protect your Honor.

The hearing officer upheld the charge, finding that Clauso "wrote a threatening letter to judges."[4] The hearing officer then referred at length to the quoted statements Clauso made to his wife. The officer noted that Clauso had "stated . . . 'I am not saying I didn't make threats.[']" Clauso's counsel substitute acknowledged on the adjudication form that Clauso declined the opportunity to call or confront witnesses.

The hearing officer imposed 365 days of administrative segregation; 365 days loss of commutation time; and fifteen days loss of recreation privileges. Clauso filed an administrative appeal. In a separate filing, a paralegal wrote that Clauso's conversation was "never intended to constitute a threat." However, Clauso maintained that he "did not consent to anyone doing anything for [him] appeals/representation/nothing."

> Judge stop this fucking around set me free if your Honor wants me to threaten someone or blow something up that way we can testify at a trial please advise me what to do. I can never do these things. So please figure out what you want me to say.

[4] The hearing officer's decision does not clearly state whether the letter to the federal judge, a copy of which is included in the record, violated *.005, or whether the adjudication was based solely on the letter Clauso referenced in his monitored conversation, which was apparently sent to the state judge. Notably, the initial disciplinary report's "description of alleged infraction" referred only to Clauso's telephone conversation.

Clauso argued in his administrative appeal that he did not receive a fair opportunity to attend the hearing. He alleged that on the hearing day, a sergeant, paralegals and the hearing officer crowded into his "observation cell," where he had been sleeping under his bed, to shield himself from the light that was on twenty-four hours a day. He contended he told them he had just awakened and had to wash his face and use the toilet. He claimed the hearing officer then left and, the next day, he received the hearing officer's decision. He asserted he was denied a hearing, his paralegal failed to present a defense, and he was deprived due process.

The Administrator upheld the decision, explaining that the decision was based on substantial evidence; there was procedural due process; and the hearing complied with guidelines. The Administrator reduced the administrative segregation sanction to time served.[5] All "other" sanctions were to be enforced.

On appeal, Clauso presents the following points for our consideration:

> THE STATEMENT BY APPELLA[NT] WERE MADE OUT OF FRUSTRATION AND NOT FOR THE PURPOSE TO HARM ANYONE OR TO CAUSE HARM.

[5] The disposition sheet stated, "Ad Seg sanction reduced to CTS."

POINT I

THE HEARING OFFICER'S DECISION FINDING APPELLANT GUILTY OF VIOLATING PRISON RULES WAS ARBITRARY AND CA[]PRICIOUS AND NOT BASED UPON SUBSTANTIAL EVIDENCE AS REQUIRED IN N.J.A.C. 10A:4-9.15(a).

POINT II

APPELLANT WAS PLACED IN 24 HOUR ISOLATION FOR 146 DAYS IN VIOLATION OF HIS 8TH AMENDMENT RIGHTS TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENT INFLICTED.

POINT III

THE DEPARTMENT OF CORRECTION'S FINDINGS, UPHOLDING INMATE DISCIPLINARY DECISION WAS INADEQUATE, AND CONTRARY TO ITS DECISION IN BLACKWELL V. DEPT. OF CORRECTIONS, 348 N.J. SUPER. 117 (APP. DIV. 2002).

Our standard of review is well-settled. We will disturb the Department's disciplinary decision "only if it is arbitrary, capricious or unreasonable[,]" or unsupported "by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980); see also Jenkins v. N.J. Dep't of Corr., 412 N.J. Super. 243, 259 (App. Div. 2010). In determining whether an agency action is arbitrary, capricious, or unreasonable, we consider whether: (1) the agency followed the law; (2) substantial evidence supports the findings; and (3) the agency "clearly erred" in applying the "legislative policies to the facts." In re Carter, 191 N.J. 474, 482-83 (2007) (quoting

Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)). Although our review is not perfunctory, Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 191 (App. Div. 2010), we "may not substitute [our] own judgment for the agency's, even though [we] might have reached a different result." In re Stallworth, 208 N.J. 182, 194 (2011) (internal quotation marks and citation omitted). "Prisons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment." Russo v. N.J. Dep't of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999).

On the other hand, interpreting DOC regulations is a purely legal matter, which we consider de novo. Klawitter v. City of Trenton, 395 N.J. Super. 302, 318 (App. Div. 2007). "An appellate tribunal is . . . in no way bound by the agency's . . . determination of a strictly legal issue." Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 93 (1973).

Applying these principles, we discern no merit to Clauso's challenge to the Administrator's decision that affirmed the hearing officer's finding of a *.005 infraction. Clauso contends his statements were borne out of frustration, not meant as threats, and he did not intend to hurt anyone. But his subjective intent does not matter. An inmate charged with a *.005 violation is guilty if, "on the basis of an objective analysis[,] . . . the

remark conveys a basis for fear." Jacobs v. Stephens, 139 N.J. 212, 222 (1995). Jacobs held that an inmate's statement to an officer "'to get the fuck out of [my] face' during a 'heated' discussion," was sufficient, on its own, to find that a threat had been made. Id. at 223. The Department also considered evidence of additional menacing statements in support of its finding. Id. at 223-24.

It also is of no moment that the target of Clauso's threat was not a party to the monitored conversation. The monitored conversation was significant because Clauso admitted he sent a threatening letter to the judge and he described what he wrote, which conveyed a threat and basis for fear. It also was not essential for the Department to call the letter's recipient as a witness. Clauso's own admissions sufficed to prove he conveyed the threats.[6]

We also reject Clauso's contention that the hearing process deprived him of his due process rights. Prisoners are afforded an array of procedural rights, albeit not as extensive as those granted to a defendant in a criminal prosecution. See Jenkins v. Fauver, 108 N.J. 239, 248-49 (1987); Avant v. Clifford, 67 N.J.

[6] We need not address whether a *.005 violation may consist solely of conveying to one person the threat to harm another, without directing the listener to pass the threat along.

496, 525-47 (1975); N.J.A.C. 10A:4-9.1 to -9.28. Here, there was sufficient evidence in the record — although disputed — to establish that Clauso was offered a fair opportunity to attend the hearing, and to present and confront witnesses. See N.J.A.C. 10A:4-9.11(a) (allowing in absentia hearings "if the inmate refuses to appear at the hearing"); N.J.A.C. 10A:4-9.14 (discussing the right to present and confront witnesses). Additionally, the decisions of the hearing officer and Administrator did not lack essential detail. See N.J.A.C. 10A:4-9.24 (outlining components of hearing officer decision); N.J.A.C. 10A:4-11.5 (discussing an Administrator's review of an appeal).

Finally, we do not address Clauso's contention that the Department's decision to place him in twenty-four-hour isolation for 146 days, apparently in advance of the August 2015 hearing, constituted cruel and unusual punishment. The issue of the conditions of Clauso's confinement is not properly before us in his appeal from the Administrator's decision.

Affirmed.