NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2936-13T1
A-3210-13T1[1]

VAMBAH SHERIFF,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS,

Respondent.

Submitted January 13, 2016 – Decided April 19, 2017

Before Judges Kennedy and Gilson.

On appeal from the New Jersey Department of Corrections.

Vambah Sheriff, appellant pro se.

John J. Hoffman, Acting Attorney General, attorney for respondent (Lisa A. Puglisi, Assistant Attorney General, of counsel; Gregory R. Bueno, Deputy Attorney General, on the brief in A-2936-13; Christopher C. Josephson, Deputy Attorney General, on the brief in A-3210-13).

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[1] We have consolidated these appeals for the purposes of this opinion because both appeals involve the same parties and concern common questions of law and fact.

PER CURIAM

Appellant Vambah Sheriff, an inmate at the Northern State Prison, appeals from two separate final agency actions of the New Jersey Department of Corrections (Department) imposing disciplinary sanctions on him for committing prohibited acts. The first appeal arises from an incident that occurred on December 21, 2013, and resulted in a finding that he committed two prohibited acts: (1) .013, unauthorized physical contact with another person, and (2) *.306, conduct which disrupts or interferes with the security or orderly running of the correctional facility. The second appeal arises from an incident on January 19, 2014, and resulted in a finding that Sheriff committed prohibited act *.004, fighting with another person. On appeal, Sheriff argues that each finding was not support by evidence, and that he was deprived of a due process right to undergo a polygraph examination and to cross-examine witnesses. We disagree and affirm.[2]

Sheriff is serving an eighteen-year sentence for assault, weapons offenses, and eluding arrest. On December 21, 2013, two corrections officers saw Sheriff fighting with another inmate while they were in the recreational yard. They called in a

[2] We also deny the Department's motion to strike the brief and appendix of Sheriff, as well as Sheriff's motion to supplement the record.

"Code 33," which required all available correctional officers to respond. The officers filed reports describing the incident.

Sheriff initially was charged with *.004, fighting with another person, and *.306, disrupting the orderly running of the institution. An investigator determined the charges had merit and referred the matter to a disciplinary hearing officer. A hearing was conducted and the Department submitted the reports of the officers. Sheriff pled not guilty and claimed he and the other inmate were not fighting. Counsel substitute argued that the other inmate was simply showing him karate moves. Relying on the reports, the hearing officer found Sheriff guilty of prohibited act .013, amended from fighting, and prohibited act *.306.

Sheriff was sanctioned to fifteen days detention, sixty days loss of commutation time, and fifteen days loss of recreation privileges on the .013 charge. He also was sanctioned to fifteen days detention, ninety days administrative segregation, ninety days loss of commutation, and fifteen days loss of recreation privileges on the *.306 charge. Sheriff filed an administrative appeal to the Department, which upheld the sentence.

On January 19, 2014, a corrections officer observed Sheriff "throw closed[-]fist punches" at another inmate while they were

in their cell. A medical examination of the other inmate showed that he had suffered abrasions and contusions to his face, chest, and the back of his neck. The inmate also had a black eye. Sheriff claimed the other inmate had assaulted him and he was simply defending himself.

Sheriff was charged with fighting, a violation of *.004, and the matter was referred for a disciplinary hearing. At the hearing, the Department submitted the officer's reports, and Sheriff testified that "[t]he officers are trying to put the blame on me. The guy was trying to kill me and they kept the guy in the room with me."

Relying upon "clear" reports, the hearing officer found Sheriff guilty of prohibited act *.004. Sheriff was sanctioned to sixty days loss of commutation and ninety days administrative segregation. Sheriff filed an administrative appeal to the Department, which upheld the sentence.

On both appeals, Sheriff argues that the charges are not supported by substantial credible evidence, and that he was not afforded an opportunity to undergo a polygraph examination or to present evidence and cross-examine the officers. We find no merit in these arguments.

Our review of an agency determination is limited. George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994).

"An appellate court ordinarily will reverse the decision of an administrative agency only when the agency's decision is 'arbitrary, capricious or unreasonable or [] is not supported by substantial credible evidence in the record as a whole.'" Ramirez v. N.J. Dep't of Corr., 382 N.J. Super. 18, 23 (App. Div. 2005) (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980)). In applying that standard of review, "[a] reviewing court 'may not substitute its own judgment for the agency's, even though the court might have reached a different result.'" In re Stallworth, 208 N.J. 182, 194 (2011) (quoting In re Carter, 191 N.J. 474, 483 (2007)). Rather, the court's inquiry is limited to:

> (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [Ibid. (quoting Carter, supra, 191 N.J. at 482-83).]

We review a decision of the Department in a prisoner disciplinary proceeding to determine whether the record contains substantial evidence that the inmate has committed the prohibited act(s) and whether, in making its decision, the

Department followed the regulations adopted to afford inmates procedural due process. McDonald v. Pinchak, 139 N.J. 188, 194-95 (1995).

With respect to due process protections, we note that while inmates are not afforded the same protections that are provided to a criminal defendant, they are nonetheless entitled to certain limited protections. See McDonald, supra, 139 N.J. at 196-98, 202; Avant v. Clifford, 67 N.J. 496, 522-33 (1975). These protections include calling fact witnesses, N.J.A.C. 10A:4-9.13(a), and confronting and cross-examining adverse witnesses, if "deem[ed] it necessary for an adequate presentation of the evidence[.]" N.J.A.C. 10A:4-9.14(a). These rights, however, may be waived. Jones v. N.J. Dep't of Corr., 359 N.J. Super. 70, 75 (App. Div. 2003).

We have carefully reviewed the record and conclude Sheriff's due process contentions are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). Sheriff was provided with adequate due process protections in the processing and hearing of the charges filed against him. The record reveals that Sheriff was explicitly advised of these rights in each disciplinary hearing, but elected in each hearing not to call any witnesses, and did not seek to exercise his

right to cross-examine the officers. Cf. Jones, supra, 359 N.J. Super. at 75.

Sheriff also argues that he was not provided the opportunity to take a polygraph examination. This argument is without merit. A polygraph examination may be used "[w]hen there are issues of credibility regarding serious incidents or allegations which may result in a disciplinary charge[.]" N.J.A.C. 10A:3-7.1(a)(1). An inmate may request a polygraph examination, but a request is not sufficient unless there are credibility issues of credibility. Johnson v. N.J. Dep't of Corr., 298 N.J. Super. 79, 83 (App. Div. 1997). Here, the record does not establish any credibility issues. Furthermore, Sheriff elected not to call witnesses or to confront the officers.

Lastly, we turn to Sheriff's argument that the charges against him were not supported by substantial credible evidence. The threshold to sustain guilt of an infraction is "such evidence [that] a reasonable mind might accept as adequate to support a conclusion." In re Pub. Serv. Elec. & Gas, 35 N.J. 358, 376 (1961) (quoting In re Hackensack Water Co., 41 N.J. Super. 408, 418 (App. Div. 1956)). In other words, the focus is whether the record contains "evidence furnishing a reasonable basis for the agency's action." Figueroa v. N.J. Dep't of

Corr., 414 N.J. Super. 186, 192 (App. Div. 2010) (quoting McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 562 (App. Div. 2002)). The regulations governing inmate disciplinary proceedings state: "[a] finding of guilt at a disciplinary hearing shall be based upon substantial evidence that the inmate has committed a prohibited act." N.J.A.C. 10A:4-9.15(a).

Here, the record contains substantial evidence to support the Department's determinations that Sheriff committed the prohibited acts. See Jones, supra, 359 N.J. Super. at 77. In A-3210-13, the record provides consistent reports relied upon by the hearing officer. These reports established physical conduct between Sheriff and the other inmate, and substantiate the finding that a "Code 33" was called. Sheriff had the opportunity to call and confront witnesses but did not do so. In A-2936-13, the hearing officer once again relied upon the report of the correction officer, who witnessed Sheriff "throwing closed[-]fist punches" at another inmate. This observation is supported by the subsequent medical reports. Sheriff stated he was not fighting. However, Sheriff did not produce any additional evidence or call and confront witnesses to support this assertion. Accordingly, there was substantial evidence in the record to support the determinations of the Department and the hearing officers in both instances.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION