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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5186-15T2

RASUL JENKINS, a/k/a RASOOL
JACOBS, RASUL JACOBS, RASOOL
JENKINS, MONEY BAGS, and
ROY SIMMINS,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS,

Respondent.

Submitted December 18, 2017 – Decided March 2, 2018

Before Judges Accurso and Vernoia.

On appeal from the New Jersey Department of
Corrections.

Rasul Jenkins, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Melissa Dutton
Schaffer, Assistant Attorney General, of
counsel; Erica R. Heyer, Deputy Attorney
General, on the brief).

PER CURIAM

Rasul Jenkins appeals from the New Jersey Department of Corrections's (DOC) final agency decision finding him guilty of committing four prohibited acts while an inmate at East Jersey State Prison. We affirm.

I.

Jenkins is serving a sentence for carjacking, robbery and violating parole. On May 2, 2016, Jenkins was served with disciplinary charges alleging he committed the following prohibited acts: *.002, assaulting any person; *.256, refusing to obey an order of any staff member; *005, threatening another with bodily harm or with any offense against his or her person or property; and *.306, conduct that disrupts or interferes with the security or orderly running of the correctional facility.¹ See N.J.A.C. 10A:4-4.1(a). The *.005 charge was amended to allege prohibited act *.304, using abusive or obscene language toward a staff member. See N.J.A.C. 10A:4-4.1(a). Jenkins pleaded not guilty to the charges, and his request for a counsel substitute was granted.

¹ In his brief, Jenkins claims he was also charged with prohibited act *.402, being in an unauthorized area. See N.J.A.C. 10A:4-4.1(a). There is no evidence in the record supporting Jenkins's assertion. In any event, we limit our discussion to the charges for which defendant was found guilty.

Prior to the hearing on the charges, Jenkins requested a polygraph examination. The prison Administrator denied the request, finding that any credibility determinations related to the charges could be "addressed through staff confrontation at the time of the hearing" Jenkins also requested confrontation with six prison staff members: Officers Solomon, Tagliareni, Ramirez and Tyminski, and Sergeants Soto and Hamlet.

The DOC's evidence at the hearing showed that on April 28, 2016, Tagliareni gave Jenkins three orders to leave the kiosk room and return to his cell. Jenkins disobeyed the orders, told the officer, "get out of my way," and then threatened him. Tagliareni requested assistance from a sergeant and two other officers, who escorted Jenkins from the area. As a result of Jenkins's refusal to obey Tagliareni's orders and the concomitant involvement of the assisting officers, distribution of medication to other inmates in the kiosk room was delayed for approximately fifteen minutes.

The DOC's evidence further showed that while Jenkins was escorted from the area, he was combative, refused multiple orders to stop resisting, and bit Solomon on the right arm. Medical staff subsequently examined Solomon, observed a red bite mark on his right arm and photographed it.

Jenkins presented two written statements in his defense. He asserted he was never in an unauthorized area and did not disobey

any orders. He claimed the officers acted against him in retaliation for his prior filing of numerous administrative complaints against three corrections officers, including Ramirez. He asserted he was not combative and that, because the officers had placed him in handcuffs while escorting him from his cell area, it was not physically possible for him to bite Solomon.

At Jenkins's request, the DOC obtained statements from three other inmates. Two of the inmates' statements did not disclose any information related to the alleged offenses. The third inmate's statement supported Jenkins's version of the events. The inmate stated that Jenkins asked Tagliareni² if he could use the kiosk and, in response, Tagliareni told Jenkins to return to his cell. The inmate explained that Tagliareni "got mad" because Jenkins, who was using crutches at the time due to an injury, "wasn't moving fast enough." The inmate said Tagliareni called for other officers who arrived and "roughed up [Jenkins] a little bit, even though[] [Jenkins] wasn't resisting." The inmate offered no information concerning what occurred after Jenkins was escorted from his cell.

In advance of the hearing, Jenkins submitted separate sets of written questions for the hearing officer (HO) to ask the six

² The inmate referred to the officer as "Tag."

officers for whom he requested confrontation and cross-examination. During the hearing, the confrontation and cross-examination of Officers Tyminski and Tagliareni proceeded without incident. Jenkins's confrontation and cross-examination of the remaining officers, however, did not occur.

In a report filed by the HO, she explained Jenkins challenged her decision not to ask certain questions he requested she pose to the officers. The HO reported that Jenkins failed to permit her to explain why his request to pose certain questions was denied, and he would not permit her to provide instructions for recasting the questions so they would be proper. According to the HO, Jenkins's continuing challenge to her authority to disallow questions, N.J.A.C. 10A:4-9.13(c) and -9.14(d), prevented her from asking the other questions requested by Jenkins that she deemed proper. Jenkins also "continually challenged the validity of the rules and regulations regarding confrontation." The HO asked Jenkins to modify his behavior to permit the confrontation and cross-examination of the witnesses, but Jenkins did not relent. He "refused to alter his behavior and continued to behave in a manner that" prevented any attempt at the confrontation and cross-examination to which he was otherwise entitled.

In separate written decisions, the HO indicated that she considered the evidence submitted by the DOC and Jenkins,³ found Jenkins guilty of the charges, and imposed sanctions, including administration segregation, loss of recreation and telephone privileges and commutation time. Jenkins filed an administrative appeal. On July 8, 2016, the DOC issued its final agency decision upholding the HO's decision. This appeal followed.

On appeal, Jenkins presents the following arguments:

Point I

THE DECISION OF THE HEARING OFFICER VIOLATES DUE PROCESS AND THEREFORE, SHOULD BE VACATED.

(a) The Determination of the Departmental Agency Should be Reversed Because it was not Based Upon Substantial Credible Evidence and is Unreasonable.

(b) The Proceedings Violate Due Process and Therefore Should be Reversed Because the [HO] Suspended Appellant's Request for Cross-Examination Confrontation Without Legitimate Cause.

(c) The Failure of the Department to Produce the Video Recording of the East Jersey State Prison Tie-Two Area, Violated Due Process.

³ Because the record shows the HO considered Jenkins's statements and the statements of his witnesses, we infer from the HO's finding that Jenkins did not submit evidence contradicting the officers' versions of the events that Jenkins did not provide credible evidence contradicting the officers' versions. See State v. Locurto, 157 N.J. 463, 472-475 (1999) (finding it is unnecessary for a trial court to make express findings as to the basis for its credibility determinations).

(d) The Administrator's Denial of Appellant's Request for a Polygraph Examination, Under the Circumstances, Violated Appellant's Rights.

(e) The Hearing Officer was Biased and Merely Cataloged the Evidence, Failing to Give Appellant's Position Fair Consideration or Analysis.

II.

Our standard of review of agency determinations is limited. See In re Stallworth, 208 N.J. 182, 194 (2011); Brady v. Bd. of Review, 152 N.J. 197, 210 (1997); Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 190 (App. Div. 2010). We will not reverse the decision of an administrative agency unless it is "arbitrary, capricious, or unreasonable, or [] not supported by substantial credible evidence in the record as a whole." Stallworth, 208 N.J. at 194 (2011) (citation omitted); accord Jenkins v. N.J. Dep't of Corr., 412 N.J. Super. 243, 259 (App. Div. 2010). Nonetheless, we must "engage in a 'careful and principled consideration of the agency record and findings.'" Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000).

"Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply." Jenkins v. Fauver, 108 N.J. 239, 248-49 (1987) (quoting Wolff v. McDonnell, 418 U.S. 539, 556, (1974)). An inmate's more limited procedural rights, initially

set forth in Avant v. Clifford, 67 N.J. 496, 525-46 (1975), are codified in a comprehensive set of DOC regulations, N.J.A.C. 10A:4-9.1 to -9.28. The regulations "strike the proper balance between the security concerns of the prison, the need for swift and fair discipline, and the due-process rights of the inmates." Williams, 330 N.J. Super. at 203 (citing McDonald v. Pinchak, 139 N.J. 188, 202 (1995)).

We first address Jenkins's contention that his due process rights were violated because the HO deprived him of confrontation with, and cross-examination of, four witnesses. Where an inmate's disciplinary "matter turns on the credibility of the officer[s] or the inmate, the inmate, upon request, is entitled to confrontation and cross-examination of the officer, at least, in the absence of any reasons that justify an exception" Decker v. N.J. Dep't of Corr., 331 N.J. Super. 353, 359 (App. Div. 2000). An "opportunity for confrontation and cross-examination of the accuser(s) [or] . . . witnesses, if requested shall be provided to the inmate or counsel substitute in such instances where the . . . [h]earing [o]fficer . . . deems it necessary . . . , particularly when serious issues of credibility are involved." N.J.A.C. 10A:4-9.1(a); see also Avant, 67 N.J. at 529-30.

A hearing officer "has the discretion to keep the disciplinary hearing within reasonable limits," N.J.A.C. 10A:4-9.13, and may

refuse confrontation and cross-examination under various circumstances, N.J.A.C. 10A:4-9.14(b). An inmate has only a limited right to confront and cross-examine witnesses at a disciplinary hearing. Avant, 67 N.J. at 529-30; see also McDonald, 139 N.J. at 194 (finding inmate's due process right to call witnesses and present evidence may be "abridged to the extent necessary to accommodate the institutional needs and objectives of prisons"); Johnson v. N.J. Dept. of Corrections, 298 N.J. Super. 79, 83 (1997) (explaining that an inmate is entitled to call witnesses at a disciplinary hearing "unless the [DOC] specifies some justifiable reason for refusing to permit the testimony").

Where a hearing officer denies a request by an inmate or counsel substitute to call or cross-examine a witness, "the reasons for the denial shall be specifically set forth" on a designated disciplinary report form. N.J.A.C. 10A:4-9.14(f). The required records provide "prima facie evidence which will enable reviewing authorities . . . and if, necessary, the courts, to determine whether or not there has been a proper exercise of discretion." Avant, 67 N.J. at 532.

Jenkins argues the HO violated his due process rights by depriving him of confrontation and cross-examination of Officers Ramirez and Solomon and Sergeants Soto and Hamlet. He contends the HO refused to permit him to confront and cross-examine the

witnesses after he questioned her markings on the written questions he submitted. He claims that after making the inquiry, the HO became "angry [and] verbally abusive" and terminated the proceedings.

The HO prepared a written report, N.J.A.C. 10A:4-9.14(f), explaining the reasons she denied Jenkins's request to confront and cross-examine the four witnesses. The report shows that denial of the requested confrontation was based solely on Jenkins's disruptive conduct. Jenkins prevented the HO from explaining her reasons for disallowing some of his questions, rejected her efforts to assist him in recasting the questions, and prevented her from asking the questions she deemed proper. Jenkins continually challenged the rules concerning confrontation and consistently ignored the HO's requests to modify his behavior to allow confrontation and cross-examination of the witnesses. It was Jenkins's conduct, and not the HO's decision, that prevented the confrontation and cross-examination to which he was otherwise entitled.

Jenkins was not deprived of his right to confrontation and cross-examination. To the contrary, he was afforded the right, but chose to become so disruptive that his behavior did not permit the confrontation and cross-examination he now contends he was wrongfully denied. We find no abuse of discretion in the HO's

denial of confrontation and cross-examination based on the circumstances presented. See State v. Budis, 125 N.J. 519, 532 (1991) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986), for the proposition that a trial court may limit cross-examination based on concerns about harassment and witness safety).

We also find no merit in Jenkins's assertion that his due process rights were violated because the DOC failed to provide a video recording of the "Tie-Two Area" of the prison. The DOC represented there is no video recording equipment covering the area, and Jenkins presented no evidence to the contrary. The DOC did not deny Jenkins's rights by failing to provide a video recording that does not exist.

Jenkins next argues he was denied due process because the DOC rejected his request for a polygraph test. N.J.A.C. 10A:3-7.1(b) provides that the Administrator of a prison may request a polygraph test for "use[] to assist in an investigation when appropriate." The "regulation's principal impetus is as an investigative tool of the administrator when serious disciplinary infractions are alleged against an inmate as opposed to an affirmative right granted to the inmate himself." Ramirez v. Dep't of Corr., 382 N.J. Super. 18, 23 (App. Div. 2005).

Jenkins "does not have a right to a polygraph test," Johnson, 298 N.J. Super. at 83, and "[a]n inmate's request for a polygraph

examination shall not be sufficient cause for granting the request," N.J.A.C. 10A:3-7.1(c). "This administrative code section is designed to prevent the routine administration of polygraphs, and a polygraph is clearly not required on every occasion that an inmate denies a disciplinary charge against him." Ibid. Thus, "a prison administrator's determination not to give a prisoner a polygraph examination is discretionary and may be reversed only when that determination is 'arbitrary, capricious or unreasonable.'" Id. at 24.

An inmate's request for a polygraph must be granted only if denial "would impair the fundamental fairness of the disciplinary process." Id. at 23-24. Here, Jenkins provided two detailed statements on his own behalf and provided the statements of witnesses he contended supported his version of events. He was afforded the opportunity for confrontation and cross-examination of the officers who provided statements supporting the charges. Moreover, there was corroborating evidence, in the form of a photograph, showing the injury to Solomon's arm. See id. at 25 (finding that "a polygraph examination is not required when corroborating evidence . . . exist[s]"). We discern no basis to conclude that "denial of [Jenkins's] request for a polygraph negated the fundamental fairness of the disciplinary proceeding

which would compel the granting of his request for a polygraph."
Id. at 26.

We last address Jenkins's contention the DOC's decision is not supported by substantial credible evidence. There must be "substantial evidence" to sustain a finding of guilt of a prisoner at a disciplinary hearing. Jacobs v. Stephens, 139 N.J. 212, 222 (1995); Avant, 67 N.J. at 530; N.J.A.C. 10A:4-9.15(a). "'Substantial evidence' means 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Figueroa, 414 N.J. Super. at 192. "Where there is substantial evidence in the record to support more than one regulatory conclusion, 'it is the agency's choice which governs.'" In re Vineland Chem. Co., 243 N.J. Super. 285, 307 (App. Div. 1990) (quoting De Vitis v. N.J. Racing Comm'n, 202 N.J. Super. 484, 491 (App. Div. 1985)).

Jenkins's arguments concerning the purported lack of evidence are based on his claims the DOC did not accept his version of the events and failed to weigh the evidence in his favor. It is not our function to determine the credibility of witnesses or weigh the evidence once that function has been completed by the agency. Close v. Kordulak Bros., 44 N.J. 589, 599 (1965). Having carefully reviewed the record, including the officers' reports, Jenkins's statements, and the statements of his witnesses, we are satisfied

there is substantial evidence supporting the DOC's determination of guilt on each of the charges.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION