SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1059-21

PHILLIP DIXON,

Appellant,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS,

Respondent.

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Submitted March 21, 2023 – Decided May 16, 2023

Before Judges Sumners and Susswein.

On appeal from the New Jersey Department of Corrections.

Phillip Dixon, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Christopher C. Josephson, Deputy Attorney General, on the brief).

PER CURIAM

State Prison inmate Phillip A. Dixon appeals from a final disciplinary decision of the New Jersey Department of Corrections (DOC), which found he violated N.J.A.C. 10A:4-4.1(a)(4)(viii) (.709), failure to comply with a written rule or regulation of the correctional facility, by failing to wear a COVID-19 protective mask as directed. Dixon contends on appeal he was charged with violating a rule that does not exist, that any such rule was not properly promulgated, that he was not provided with the written rule or regulation, and that mask requirements should not apply when an inmate is in a single-occupancy bathroom using the toilet. After carefully reviewing the record in view of the governing legal principles, we affirm.

I.

On December 2, 2020, Corrections Officer Hampton ordered Dixon to "wear his mask correctly in accordance with institutional procedures," which required inmates to wear a protective mask whenever they were out of their cell. Officer Hampton asserted that Dixon refused the orders. Dixon claims the only time he did not have his mask on was when he was in a single-occupancy bathroom.

Dixon was initially charged with violating N.J.A.C. 10A:4-4.1(a)(2)(xvii) (*.256),[1] refusing to obey an order of any staff member. The matter was referred to a disciplinary hearing officer after which the charge was amended to prohibited act .709, failure to comply with a written rule or regulation of the correctional facility. Dixon was assigned a counsel substitute, and the hearing was convened on December 3, 2020. The hearing officer found Dixon guilty of the amended charge and imposed fifteen days loss of kiosk, fifteen days loss of recreation time, and thirty days loss of commutation time.

Dixon filed an administrative appeal in which he claimed that when Officer Hampton entered the bathroom and asked him why he was not wearing his mask, Dixon responded, "I'm using the toilet." Dixon also argued the DOC failed to promulgate any rules or regulations concerning the wearing of masks and that "there is no written rule or regulation requiring an inmate to wear a mask while using the toilet."

On April 22, 2021, Administrator Jonathan Gramp upheld the decision of the hearing officer, finding that "[t]here is no violation of standards. There is

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[1] This infraction is designated as an "asterisk offense." "Under the [DOC]'s regulations on inmate discipline, N.J.A.C. 10A:4-4.1, '[a]sterisk offenses' are prohibited acts considered to be the most serious violations, resulting in the most severe sanctions." Hetsberger v. N.J. Dep't of Corr., 395 N.J. Super. 548, 556 (App. Div. 2007).

no misinterpretation of facts." Gramp noted, "[t]hroughout the pandemic, the wearing of masks has been implemented and communicated to the population" and that there was no change in regulation because this was a "directive in compliance with the Governor[']s Executive Orders."

Dixon appealed the DOC's final decision and moved for summary reversal pursuant to Rule 2:8-3(b), arguing the DOC ruling was "patently in error." The motion for summary reversal was denied on March 16, 2022, and the appeal was dismissed on June 16, 2022 due to Dixon's failure to file a timely brief. Dixon's motion to reinstate the appeal was granted on August 5, 2022.

Dixon raises the following contention for our consideration:

> THE DECISION OF THE HEARING OFFICER WAS NOT BASED ON SUBSTANTIAL EVIDENCE, IN VIOLATION OF THE CODE.

II.

We begin our analysis by acknowledging that prison disciplinary hearings are not criminal prosecutions, and thus, the full spectrum of rights afforded to criminal defendants do not apply. Avant v. Clifford, 67 N.J. 496, 522 (1975) (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)). "[P]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment."

Blanchard v. N.J. Dep't of Corr., 461 N.J. Super. 231, 238 (App. Div. 2019) (quoting Russo v. N.J. Dep't of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999)). Prisoners are nonetheless entitled to certain procedural protections before being subjected to disciplinary sanctions. Id. at 237–39.

An adjudication of guilt of an infraction must be supported by "substantial evidence." N.J.A.C. 10A:4-9.15(a). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." Blanchard, 461 N.J. Super. at 238 (quoting Figueroa v. N.J. Dept of Corr., 414 N.J. Super. 186, 192 (App. Div. 2010)). The term has also been defined as "evidence furnishing a reasonable basis for the agency's action." Ibid.

The substantial evidence standard permits an agency to apply its expertise where the evidence supports more than one conclusion. Berta v. N.J. State Parole Bd., 473 N.J. Super. 284, 302 (App. Div. 2022) ("[W]here there is substantial evidence in the record to support more than one regulatory conclusion, it is the agency's choice which governs." (quoting Murray v. State Health Benefits Comm'n, 337 N.J. Super. 435, 442 (App. Div. 2001))). We therefore apply substantial deference in reviewing disciplinary adjudications. Blanchard, 461 N.J. Super. at 237–38.

We need only briefly address Dixon's challenge to the DOC's authority to enforce a rule requiring inmates to wear protective masks when out of their cells. That rule was not promulgated through administrative rulemaking under the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 to -31, but was instead implemented in accordance with an executive order issued by the Governor. Under both the Disaster Control Act, N.J.S.A. App. A:9-33 to -63, and the Emergency Health Powers Act, N.J.S.A. 26:13-1 to -36, the Governor was authorized to issue executive orders implementing policies to prevent or limit the transmission of COVID-19 in prisons, including by requiring incarcerated persons to wear masks. See N.J. State Policemen's Benev. Ass'n. v. Murphy, 470 N.J. Super. 568, 578–79 (App. Div. 2022).

The APA, it also bears noting, does not include "the office of the Governor" within its definition of "agency." Id. at 593. It is well-established that "the power to issue executive orders is 'an accepted tool of gubernatorial action' when the order 'flows out of the Governor's legislatively-delegated emergency powers to act on behalf of the safety and welfare . . . under the Disaster Control Act.'" Ibid. (omission in original) (quoting Commc'ns Workers of Am., AFL-CIO v. Christie, 413 N.J. Super. 229, 254, 259 (App. Div. 2010)).

We have repeatedly recognized, moreover, that administrative agencies' interpretation of statutes and regulations within their implementing and enforcing responsibility are ordinarily entitled to deference. See East Bay Drywall, LLC v. Dep't of Lab. and Workforce Dev., 251 N.J. 477, 493 (2022) (quoting In re Election L. Enf't Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)). An "agency's interpretation of the operative law is entitled to prevail, so long as it is not plainly unreasonable." Piatt v. Police and Firemen's Ret. Sys., 443 N.J. Super. 80, 100 (App. Div. 2015) (citation omitted).

Applying these principles, we accept the DOC's conclusion that an enforceable directive was in place that required inmates to wear protective masks when they were outside of their cells. We reject Dixon's argument that the rule does not apply to inmates while they are using a single-occupancy bathroom. As we have already noted, we defer to the DOC's interpretation of its own rules, regulations, policies, and directives. It is not our place to fashion any such exception to the directive that requires inmates to wear protective masks when outside their cells. Such facilities are used by multiple persons, in contrast to the toilet in an inmate's cell. Further, the DOC had a compelling interest in preventing the spread of a respiratory virus to others who

subsequently use the restroom. We also note that—as occurred in this case—a corrections officer may enter a bathroom that is occupied by an inmate.

We likewise reject Dixon's contention that his administrative conviction must be vacated because he was not provided a written copy of the rule. We accept the DOC's finding, as indicated in the Administrator's Disposition of Disciplinary Appeal, that the mask-wearing directive was communicated to all incarcerated persons.

We next address whether Dixon was properly found guilty of the disciplinary infraction. The record shows that he was afforded the full panoply of rights required by Avant. Dixon was afforded the assistance of a counsel substitute for the hearing, N.J.A.C. 10A:4-9.12. Dixon waived the twenty-four-hour notice requirement, as shown by counsel substitute's signature on the adjudication form. The hearing was conducted by a hearing officer, who, as a member of the Department's Central Office staff, constitutes an impartial tribunal. Dixon put on a defense at the hearing. He was offered, but declined, the opportunity to call witnesses on his behalf at the hearing. He also was offered, but declined, the opportunity to confront adverse witnesses.

Finally, we are satisfied there was substantial, credible evidence to support the finding of guilt. We note Dixon does not contest that he was not wearing his mask while he was outside his cell in the balcony restroom.

To the extent we have not specifically addressed them, any remaining arguments raised by Dixon lack sufficient merit to warrant discussion. R. 2:11-3(e)(2).

Affirmed.