

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court."
Although it is posted on the internet, this opinion is binding only on the
parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5360-15T4

HAKEEM ALLEN,

Appellant,

v.

NEW JERSEY DEPARTMENT OF
CORRECTIONS,

Respondent.

Submitted October 25, 2017 – Decided November 14, 2017

Before Judges Currier and Geiger.

On appeal from the New Jersey Department of
Corrections.

Hakeem Allen, appellant pro se.

Christopher S. Porrino, Attorney General,
attorney for respondent (Lisa A. Puglisi,
Assistant Attorney General, of counsel; Randy
M. Miller, Deputy Attorney General, on the
brief).

PER CURIAM

Hakeem Allen, a State prisoner who at all times relevant to
this appeal was an inmate at East Jersey State Prison, appeals

from the final administrative decision of the Department of Corrections (DOC) that upheld a hearing officer's decision finding him guilty of prohibited acts *.005, threatening another with bodily harm, N.J.A.C. 10A:4-4.1(a)(2)(ii); *.306, conduct which disrupts or interferes with the security or orderly running of the correctional institution, N.J.A.C. 10A:4-4.1(a)(2)(xxix); and imposed sanctions. Allen was found not guilty of prohibit act *.803/*.002, attempting to assault any person, N.J.A.C. 10A:4-4.1(a)(1)(ii); -4.1(a)(2)(xxxvii). Allen's charges resulted from an incident with corrections officers during which he became aggressive and confrontational and had to be subdued. We affirm.

On May 8, 2016, while conducting medication watch, Senior Correction Officers Pyzik and Santana observed Allen arrive to obtain his medication from the infirmary. Allen was acting belligerently. When Pyzik questioned him about his behavior, Allen responded by walking toward the officers aggressively with raised closed fists, and retorted, "Why, what are you going to do about it?" The officers, reacting to what they reasonably viewed to be a threatening situation, secured Allen to the ground and called in a Code 33 for additional staff to respond to the area for security reasons. Responding officers handcuffed Allen, who was then escorted to the infirmary where he was medically cleared

before being placed in prehearing detention. Two officers suffered minor injuries during the incident.

On May 9, 2016, Sergeant Rodriguez served Allen with the disciplinary charges and conducted an investigation. Finding that the charges had merit, Rodriguez referred the charges to a hearing officer to conduct a disciplinary hearing. Allen pled not guilty to the charges and was granted the assistance of counsel substitute.

The disciplinary hearing commenced on May 11, 2016, and concluded on May 19, 2016. On May 16, 2016, Allen requested a polygraph examination claiming the charges were serious and that there were issues of credibility. The request for a polygraph examination was denied in writing by Administrator Patrick Nogan that same day. In his denial letter the Administrator stated:

I note that there is no new evidence being presented that would necessitate a credibility review beyond what occurred at the hearing.

After reviewing the disciplinary package, I fail to see how a polygraph would add to what is on record.

Allen requested witness statements from numerous inmates. His request was granted. In addition, Allen requested confrontation of Pyzik and Santana, which was also granted. Confrontation is undertaken by having the inmate propound written

questions to be answered by the witnesses. The questions submitted by Allen can be fairly described as inartfully drafted and largely objectionable as to form. The officers attempted to answer the questions to the extent they were answerable. Allen was afforded the opportunity to submit supplemental questions but declined to do so.

During the hearing, Allen stated, "I never said anything. The [corrections officer] asked me if I had a problem with his boy [Lyon]. I'm stressed out about this. This was a bad day that just got worse."

Based on her review of the evidence, which included a disciplinary report, preliminary incident reports, special custody reports, use of force report, authorization for temporary close custody, authorization for prehearing disciplinary housing placement, medical reports, witness statements, polygraph request, cross-examination questions and responses, and confidential mental health report, Hearing Officer Nolley found Allen guilty of the *.005 charge, stating:

Inmate stated he did not do anything. Inmate requested confrontation with 2 officers. The confrontation was completed. The polygraph request was declined by administration based upon the reports and decision that the hearing could be completed [without] a polygraph. The confrontation did not prove that the inmate was not engaged in a confrontation incident with staff. Based upon reports, inmate's

behavior was confrontational and resulted in the inmate being subdued and removed[.] [C]harge is upheld.

The hearing officer sanctioned Allen to 180 days' administrative segregation, 180 days' loss of commutation time, and ten days' loss of television and radio privileges.

Hearing Officer Nolley also found Allen guilty of the *.306 charge, stating:

Inmate stated he didn't do anything. Inmate requested confrontation with 2 officers[.] They came in [and] completed the confrontation [without] any hesitation or reservation. The confrontation did not help the inmate prove that he was not involved in an incident with the officers[.] Inmate requested a polygraph. The Administration declined the polygraph based upon the reports [and] that the charges could be decided on during the hearing. The inmate got into a confrontation with the [corrections officer] at the medication window [and] had to be taken down [and] removed. This disrupted the evening schedule. Charge is upheld.

On this charge the hearing officer sanctioned Allen to an additional 180 days' administrative segregation, 180 days' loss of commutation time, and twenty days' loss of recreation privileges.

The hearing officer found Allen not guilty of the remaining charge, *.803/*.002, attempting to assault any person.

On May 20, 2016, Allen filed an administrative appeal. That same day, Assistant Superintendent Rose upheld the decision of the hearing officer. This appeal followed.

On appeal, Allen raises the following issues: (1) the hearing officer deprived Allen of due process during confrontation and cross-examination by failing to require Pyzik and Santana to answer questions; (2) the administrator's denial of Allen's polygraph request was arbitrary, capricious, and unreasonable; and (3) the findings of guilt were unsupported by substantial credible evidence in the record. Allen does not argue that the sanctions imposed were excessive.

We preface our analysis by recognizing our review of the DOC's decision is limited. Reversal is appropriate only when the agency's decision 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 In re Taylor, 158 N.J. 644, 657 (1999) (holding that a court must uphold an agency's findings, even if it would have reached a different result, so long as sufficient credible evidence in the record exists to support the agency's conclusions). However, "'although the determination of an administrative agency is entitled to deference, our appellate obligation requires more than a perfunctory review.'" Figueroa v. N.J. Dep't of Corr., 414

N.J. Super. 186, 191 (App. Div. 2010) (quoting Blackwell v. Dep't of Corr., 348 N.J. Super. 117, 123 (App. Div. 2002)).

I.

An incarcerated inmate is not entitled to the full panoply of rights in a disciplinary proceeding afforded a defendant in a criminal prosecution. Avant v. Clifford, 67 N.J. 496, 522 (1975). An inmate is entitled to written notice of the charges at least twenty-four hours prior to the hearing; an impartial tribunal; a limited right to call witnesses and present documentary evidence; a limited right to confront and cross-examine adverse witnesses; a right to a written statement of the evidence relied upon and the reasons for the sanctions imposed; and, where the charges are complex, the inmate is permitted the assistance of a counsel substitute. Id. at 525-33.

The procedural protections articulated in Avant and the DOC's regulations were reaffirmed in Jacobs v. Stephens, 139 N.J. 212 (1995) and McDonald v. Pinchak, 139 N.J. 188, 202 (1995). These and other procedural requirements for disciplinary charges have been codified in N.J.A.C. 10A:4-9. The Court found that the current 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." McDonald,

supra, 139 N.J. at 202. It is undisputed that Allen was afforded these procedural safeguards.

Allen contends that his right to confront the witnesses was abridged because the hearing officer did not require the witnesses to responsively answer his written questions. We disagree. The witnesses appeared to have attempted to answer his poorly drafted questions to the extent they were answerable. Allen declined the opportunity to submit supplemental questions.

Allen requested to take a polygraph examination after the disciplinary hearing had already started. "A polygraph examination may be requested by the Administrator or designee . . . [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). To be sure, the prohibited acts that Allen was found guilty of committing are asterisk offenses, which are "considered the most serious." N.J.A.C. 10A:4-4.1(a).

"The polygraph shall not be used in place of a thorough investigation, but shall be used to assist an investigation when appropriate." N.J.A.C. 10A:3-7.1(b). "The code regulation's principal impetus is 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. N.J. Dep't of Corr., 382 N.J. Super. 18, 23 (App. Div. 2005).

An inmate does not have the right to a polygraph test. Johnson v. N.J. Dep't of Corr., 298 N.J. Super. 79, 83 (App. Div. 1997) (citing N.J.A.C. 10A:3-7.1(c) ("An inmate's request for a polygraph examination shall not be sufficient cause for granting the request.")). Instead, N.J.A.C. 10A:31-7.1 "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." Ramirez, supra, 382 N.J. Super. at 23-24. "[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. "[A]n inmate's right to a polygraph is conditional and the request should be granted when there is a serious question of credibility and the denial of the examination would compromise the fundamental fairness of the disciplinary process." Id. at 20.

Impairment [of fundamental fairness] may be evidenced by inconsistencies in the [senior corrections officer's] statements or some other extrinsic evidence involving credibility, whether documentary or testimonial, such as a statement by another inmate or staff member on the inmate's behalf. Conversely, fundamental fairness will not be effected when there is sufficient

corroborating evidence presented to negate any serious question of credibility.

[Id. at 24.]

Here, the threat made by Allen was witnessed by two officers. It resulted in a disruptive altercation that injured two officers. The record contained adequate evidence for the hearing officer to determine credibility. Because adequate corroborating evidence was presented to confirm the officers' credibility, Allen "has failed to demonstrate that the denial of his 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 are satisfied that the administrator did not abuse his discretion by denying the request for a polygraph examination.

Allen also contends that the assistant administrator failed to provide adequate findings of fact to sustain the decision. We disagree. "[I]n prison disciplinary matters we have not traditionally required elaborate written decisions." Blackwell, supra, 348 N.J. Super. at 123. The disciplinary proceeding was heard by the hearing officer, who acted as the fact-finder. The hearing officer issued a written decision setting forth her factual findings and a reasoned explanation for finding Allen guilty of prohibited acts *.005 and *.306, which included references to the

evidence she relied on. See id. at 122-23. The administrator was entitled to rely upon and adopt the hearing officer's findings of fact and reasoning without expressly setting forth his own summary of the evidence and reasons for sustaining the charges. By referring to the hearing officer's decision, the administrator has satisfied the requirements of the adjudicatory process.

We are thus satisfied that Allen received all due process protections afforded to him.

II.

We next consider whether there was adequate evidence to find Allen guilty of threatening another with bodily harm and conduct which disrupts or interferes with the security or orderly running of the correctional institution.

"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). "Substantial evidence" is "'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Figueroa, supra, 414 N.J. Super. at 192 (quoting In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961)). In other words, it is "'evidence furnishing a reasonable basis for the agency's action.'" Ibid. (quoting McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 562 (2002)). "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.) (citation omitted), certif. denied, 127 N.J. 323 (1990).

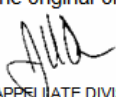
The record demonstrates there was substantial credible evidence to find Allen guilty of prohibited acts *.005, threatening another with bodily harm, and *.306, conduct which disrupts or interferes with the security or orderly running of the correctional institution. Pyzik and Santana observed Allen acting belligerently, and when asked what he was doing, Allen responded by walking towards the officers aggressively with raised closed fists, saying, "Why, what are you going to do about it?" Allen's behavior was confrontational and menacing. He confronted Pyzik in an objectively threatening manner. Given the context in which it occurred, Allen's conduct created an objective basis for fear and constituted a threat.

Because the guilty findings were supported by substantial credible evidence, the determination that Allen committed prohibited acts *.005 and *.306 was not arbitrary, capricious, or unreasonable.

Allen's remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(2).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION