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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-2134-20**

KENNETH HINES,

Appellant,

v.

**NEW JERSEY DEPARTMENT
OF CORRECTIONS,**

Respondent.

Submitted September 28, 2022 – Decided November 14, 2022

Before Judges Currier and Bishop-Thompson.

On appeal from the New Jersey Department of Corrections.

Kenneth Hines, appellant pro se.

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

PER CURIAM

Kenneth Hines, an inmate currently confined in South Woods State Prison, appeals from a final determination of the Department of Corrections (DOC), which upheld a guilty finding and sanctions for committing the institutional disciplinary offense *.204,¹ use of a controlled dangerous substance (CDS) such as drugs, intoxicants, or related paraphernalia not prescribed for the inmate by the medical or dental staff, N.J.A.C. 10A:4-4.1(a)(2). We affirm.

We discern the following facts from the record. On March 3, 2021, during a routine search of a cell occupied by Hines and Hakeem Allen, Officer Peterson found the following: "zip lock bag, folded papers, small gridded square papers, tea bag, silent knight packing with ashes, steel wool, small rolled paper with an unknown substance that appeared to [be] burned and smoke[d], a half of a yellow pill which was identified as Remeron by medical, batteries and stripped wire" These items were all found on Allen's bed, who claimed ownership. Two additional officers were called to complete the search of the cell.

Because the items were not found in a locked locker, both inmates were ordered to provide urine samples for testing. Hines's on-site testing returned a

¹ An asterisk offense is "considered the most serious and result[s] in the most severe sanctions." N.J.A.C. 10A:4-4.1(a).

positive result for K3,² and ETG³. As a result of these initial testing results and pursuant to protocol, the DOC sent Hines's urine specimen to two separate labs for confirmatory testing. The New Jersey DOC Laboratory (DOC Lab) confirmed a positive result for K3. The Atlantic Diagnostic Laboratory (ADL) concluded that Hines's sample was negative for ETG.

As a result of the positive K3 test, Hines was charged with committing prohibited act *.204 on March 9, 2021. After Sergeant Matish completed an investigation, the charge was referred to the hearing officer for further action.

The matter proceeded to a disciplinary hearing on March 11, 2021. Hines pled not guilty. He requested, and was granted, the assistance of a counsel substitute. Hines did not call any witnesses on his behalf.

Hines challenged the lab testing and results establishing the positive K3 results. Hines submitted a document identified as Defense in Support, which stated his request to call unidentified witnesses and set forth four written questions:

1. Why wasn't this sample sent for independent laboratory confirmation?

² K3 is a synthetic cannabinoid, and synthetic cannabinoids are often sprayed onto another material which is then smoked. National Institute on Drug Abuse, Synthetic Cannabinoids (K2/Spice). <https://nida.nih.gov/research-topics/synthetic-cannabinoids-k2spice>. Accessed October 26, 2022.

³ ETG is a byproduct of drinking alcohol.

2. Is this test proved to be scientifically reliable? By what organization?
3. What is the percentage of false positive results?
4. Provide a list of all the prescription drugs that are known to produce false positive results with this test.

Hines claims during the hearing he was "indirectly" provided with an answer to question four when the hearing officer called the medical department to confirm medications prescribed to Hines could not result in a false positive. The hearing record does not reference a telephone call made to the medical department.

The hearing officer considered the following evidence: (1) an initial test which was positive for K3 and ETG; (2) confirmatory laboratory tests which were positive for K3 but negative for ETG; (3) disciplinary reports, (4) an investigative report; (5) a preliminary incident report related to the search of Hines's cell; and (6) an email from a DOC nurse and DOC laboratory chemist asserting they were unaware of any medications Hines was taking which would have caused false positive results for K3. Hines acknowledged the evidence presented and considered at the disciplinary hearing in paragraph fifteen of the adjudication of disciplinary charge.

On completion of the hearing, the hearing officer determined Hines guilty of committing the prohibited act. The hearing officer imposed sanctions of 120 days' in the Restorative Housing Unit, ninety days' loss of commutation time, permanent loss of contact visits. With the exception of the contact visits, the hearing officer suspended the other sanctions for sixty days' based upon Hines's acceptance of assignment to the Department's Drug Diversion Program.

Hines filed an administrative appeal challenging: (1) the failure of the DOC to provide answers to questions regarding the reliability of the test used to detect K3; (2) the scientific acceptance, reliability, and accuracy of the urine testing used by the DOC; (3) statements made by the medical department regarding the medication taken by Hines which would create a false positive.

In a written decision, the assistant administrator upheld the guilty finding and the sanctions imposed. The assistant administrator found "The DOC [was] in compliance with procedural safeguards."

On appeal, Hines argues the guilty finding was not supported by substantial, credible, and reliable evidence and the hearing officer violated due process by failing to provide confrontation and examination of witnesses at the disciplinary hearing.

We are unpersuaded by these arguments and affirm because the record contains substantial credible evidence that Hines's urine sample was tested in

accordance with the relevant regulations. Our standard of review of a final agency decision is limited. Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 190 (App. Div. 2010). Reversal is appropriate only when the agency's decision is unsupported by substantial credible evidence in the record as a whole. Ramirez v. Dep't of Corr., 382 N.J. Super. 18, 23 (App. Div. 2005) (quoting 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 supports the agency's conclusions").

A disciplinary hearing officer's decision that an inmate is guilty of a prohibited act must be based on substantial evidence in the record. Figueroa, 414 N.J. Super. at 191. "Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 192 (internal quotation marks omitted).

The burden rests on the challenging party to show the administrative agency decision was arbitrary, capricious, or unreasonable. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002) (citing Barone v. Dep't of Human Servs., Div. of Med. Asst., 210 N.J. Super. 276, 285 (App. Div. 1986)). We do not perform a perfunctory review of the agency findings but engage in a careful and principled examination. Williams v. Dep't of Corr., 330

N.J. Super. 197, 203-04 (App. Div. 2000) (quoting Mayflower Sec. v. Bureau of Sec., 64 N.J. 85, 93 (1973)).

The limited due process rights to which inmates in our prisons charged with disciplinary infractions are entitled were first enumerated by our Supreme Court in Avant v. Clifford, 67 N.J. 496, 525-33 (1975), and are codified in DOC regulations, N.J.A.C. 10A:4-9.1 to -9.28. In a disciplinary proceeding, an inmate is not entitled to "the full panoply of rights" afforded to a defendant in a criminal prosecution. Avant, 67 N.J. at 522 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)). 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.

We are satisfied from our review of the record Hines was afforded each of the procedural due process rights expressed in Avant. Despite Hines's assertions to the contrary, the hearing officer considered all evidence presented at the hearing. Specifically, the hearing officer relied upon the disciplinary report completed by Sergeant Matish stating Hines "voided urine positive for

K3/ETG," "the second [urine] test supports positive findings," an email from the medical department staff stating, "no medications to cause positive urine," and "DOC lab results have been found credible."

The hearing officer accepted counsel substitute's statement in defense, which included a request for confrontation, as well as a list of four confronting questions. Hines declined to call witnesses. The adjudication report also noted the statements from the DOC lab chemist and medical staff.

Not only does Hines challenge the scientific acceptance, reliability and accuracy of the DOC lab test for K3, he also argues the DOC was not an independent lab — as compared to the test for ETG which was sent to ADL. Because no lab has such a test, Hines infers that "the DOC's test is patently unreliable and unproven." We find Hines's arguments unconvincing and unsupported by case law.

Hines's reliance on Blanchard v. Dep't. of Corr., 461 N.J. Super. 231 (App. Div. 2019), is misplaced. In Blanchard, the "sole issue [was] whether, in a case with a single positive field test of unproved reliability, and no other corroborating evidence, procedural fairness compels a second, confirmatory test, to assure that the field test did not produce a false positive." Id. at 241. We held that when a single field test of a CDS is not scientifically proven to be reliable, then the DOC must order confirmatory testing. Id. at 246. Unlike the

inmate in Blanchard, Hines was charged with use of a CDS, rather than possession. The test therefore was not a field test of a possible CDS substance, but an initial test of Hines's urine specimen.

Moreover, in compliance with the administrative regulations, the DOC ordered a confirmation test and did not rely on the initial test. As correctly noted by the assistant administrator, the DOC complied with the "procedural safeguards." Here, substantial evidence in the form of the officers' statements, the contraband and both lab results supported the hearing officer's finding, which in turn supported the assistant administrator's decision.

Lastly, Hines questions the email from the medical staff stating no medication prescribed to Hines would cause a false positive result for K3. We similarly reject Hines's claim that psychotropic and blood pressure medications prescribed to him, "are known reactants with drug tests, and have been shown to produce positive results." Again, Hines offers nothing more than bare assertions. The medical department and the DOC lab chemist confirmed they were unaware of any prescription medications which would cause a false positive K3 result.

There is no evidence in the record to contest the findings by the DOC or support a conclusion that the final decision was arbitrary, capricious, or

unreasonable. Having considered the record and the case law, we conclude the administrative decision was supported by sufficient credible evidence.

To the extent we have not specifically addressed any remaining arguments, it is because we consider them sufficiently without merit to require discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



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