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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3879-19**

BASHON SIMON, a/k/a
RASHAWN SIMMS, SHAWN
SIMON, RASHON SIMON,
BASHON SIMONN, RASHAWN
SIMS, SHAWN SIMS, GORDON
TAHI, LAMONT THOMAS,
ANDRE WILLIAMS, and ANDRE
WILSON,

Appellant,

v.

NEW JERSEY DEPARTMENT
OF CORRECTIONS,

Respondent.

Submitted March 30, 2022 – Decided May 5, 2022

Before Judges Hoffman and Whipple.

On appeal from New Jersey Department of Corrections.

Bashon Simon, appellant pro se.

Matthew J. Platkin, Acting Attorney General, attorney
for respondent (Jane C. Schuster, Assistant Attorney

General, of counsel; Beonica A. McClanahan, Deputy Attorney General, on the brief).

PER CURIAM

Inmate Bashon Simon appeals from a final agency decision of the Department of Corrections (DOC), upholding a hearing officer's determination that he committed prohibited act *.252, encouraging others to riot, N.J.A.C. 10A:4-4.1(a)(1)(xii),¹ and imposing disciplinary sanctions. We reverse because the finding of guilt was not supported by substantial credible evidence.

I.

The charge against Simon arose out of a disturbance that occurred at Southern State Correctional Facility (Southern State) in April 2020, during the COVID-19 pandemic. At that time, Simon was an inmate at Southern State. He was housed in Housing Unit 2-Right (Unit 2R), consisting of several wings and a common day-space area (the common area). Unit 2R had been designated as a "quarantine unit" for inmates exposed to other inmates or staff, who had symptoms of COVID-19.

¹ Subsequent to its final decision in this matter, the DOC adopted a regulation consolidating prohibited act *.252, encouraging others to riot, into prohibited act *.251, rioting. Thus, the current regulation no longer includes prohibited act *.252, and prohibited act *.251 is now defined as "rioting or encouraging others to riot." See N.J.A.C. 10A:4-4.1(a)(1)(xx) (2021); 53 N.J.R. 923(a) (May 17, 2021). The change does not effect the disposition of this appeal.

On the morning of April 9, 2020, there were forty inmates housed in Unit 2R. That day, DOC staff began moving thirty-five additional inmates from other housing units to Unit 2R. After the staff transferred twenty-three of those inmates, the inmates already in Unit 2R began objecting to the transfer of the remaining twelve inmates to Unit 2R. Sometime after 9 p.m., as the twelve remaining inmates were being processed into Unit 2R, some inmates entered the common area of Unit 2R, yelling, cursing, and demanding that no additional inmates be moved into Unit 2R. DOC staff called a "lock-up" that required all inmates to return to their bunks in their wings for a head count.

Some inmates in Unit 2R ignored the "lock-up" direction and remained in the common area. At approximately 9:40 p.m., several inmates pushed a table against the gate leading to Unit 2R, attempting to block anyone from entering Unit 2R. A DOC officer repeatedly instructed all inmates in Unit 2R to return to their bunks, but the inmates already in the common area remained there. DOC officers monitoring the Unit via surveillance cameras did not observe any inmates leave the common area and return to their bunks.

In response to the situation, the DOC's Special Operations Group and a K-9 unit arrived at Unit 2R to restore order. By 3:30 a.m. on April 10, 2020, all sixty-three inmates in Unit 2R had been identified, processed, and transported

to a quarantine unit at South Woods State Prison. No DOC staff or inmates sustained any injuries during the incident.

On April 11, 2020, a DOC officer served Simon with a Disciplinary Report, charging him with committing prohibited act *.252, encouraging others to riot. The report alleged that on April 9, 2020, Simon and the sixty-two other inmates assigned to Unit 2R "yell[ed], curs[ed], and demand[ed] that no other inmates be housed in [Unit 2R]" and then "pushed [a] large unit table in front of the tier entrance gate to block entrance to the wing." The report further alleged that "[t]he inmates protest[ed] [and] then shouted threats of violence against the officers and new inmates"

A hearing was conducted over several days between April 13, 2020, and April 29, 2020. The evidence presented at the hearing included seven hours of video footage from the incident at Unit 2R on April 9 and 10, 2020, witness statements, and staff reports. The evidence was used against all sixty-three inmates alleged to have participated in the disturbance.

Due to the COVID-19 pandemic, live testimony was not presented; instead, witnesses submitted written statements and Simon, and the other inmates charged, had the right to submit written questions to those witnesses. In response to the charge, Simon requested a polygraph examination to prove

his innocence, which the DOC denied. Simon submitted a statement in which he denied participating in any disruptive behavior, and claimed, "I stood by, [at] the end of my wing."

Regarding the disruptive and threatening behavior that occurred on Unit 2R, DOC officers could not identify any specific inmates because they wore surgical masks or other facial coverings due to COVID-19. After reviewing the evidence, the hearing officer found Simon guilty of violating *.252. In rejecting Simon's claim that he was in his wing during the incident, the hearing officer stated "standing out on the wing, is not being on your bunk for count, which is adding to the overall chaos and rioting behavior." The hearing officer further reasoned that:

[E]very inmate had ample time to obey staff orders and should have followed direction. While it is not known what each inmate's specific role was in the disturbance, the evidence supports that:

1. The inmate was part of a group that received orders.
2. The orders were of such a nature that any reasonable person would have understood the orders (inmates were given several orders from officers & [a] lieutenant to go down [to] their wings).
3. The orders were loud enough that the entire group could have heard the orders.

4. The inmate had ample time to comply with the order.
5. No inmate, after receiving warnings, complied with staff orders, (video shows inmates did not disperse).
6. This inmate was part of the group as evidenced by the escort reports.

Based on these findings, the hearing officer concluded that Simon "encouraged inmates to riot," and imposed the following sanctions: 210 days' administrative segregation, 90 days' loss of commutation time, and 10 days' loss of recreation privileges.

Simon administratively appealed the hearing officer's decision. On May 6, 2020, DOC Associate Administrator Michael Ridgeway upheld the hearing officer's guilty finding and the sanctions imposed. This appeal followed, with Simon presenting the following argument:

THE DISCIPLINARY HEARING OFFICER'S
FINDING OF GUILT ON THE CHARGE OF RIOT
WAS NOT SUPPORTED BY SUBSTANTIAL
EVIDENCE AND THEREFORE IT MUST BE
REVERSED.

II.

Our scope of review of an agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011); Malacow v. N.J. Dep't of Corr., 457 N.J. Super. 87,

93 (App. Div. 2018). Reviewing courts presume the validity of the "administrative agency's exercise of its statutorily delegated responsibilities." Lavezzi v. State, 219 N.J. 163, 171 (2014). "We defer to an agency decision and do not reverse unless it is arbitrary, capricious[,] or unreasonable or not supported by substantial credible evidence in the record." Jenkins v. N.J. Dep't of Corr., 412 N.J. Super. 243, 259 (App. Div. 2010).

In determining whether an agency's action is arbitrary, capricious, or unreasonable, we consider in part "whether the record contains substantial evidence to support the findings on which the agency based its action." Allstars Auto. Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citation omitted). "'Substantial evidence' means 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 192 (App. Div. 2010) (quoting In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961)). The term has also been defined as "evidence furnishing a reasonable basis for the agency's action." McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 562 (2002).

A reviewing court "may not substitute its own judgment for the agency's, even though the court might have reached a different result." Stallworth, 208 N.J. at 194 (quoting In re Carter, 191 N.J. 474, 482 (2007)). "This is particularly

true when the issue under review is directed to the agency's special 'expertise and superior knowledge of a particular field.'" Id. at 195 (quoting In re Herrmann, 192 N.J. 19, 28 (2007)).

However, our review of a final agency decision is not "perfunctory," nor is it "our function . . . merely [to] rubberstamp an agency's decision[.]" Figueroa, 414 N.J. Super. at 191 (citation omitted). We are required "to engage in a careful and principled consideration of the agency record and findings." Ibid. (quoting Williams v. Dep't of Corr., 330 N.J. Super. 197, 204 (App. Div. 2000)). An agency's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Simon argues the hearing officer's determination, which the DOC adopted, was not supported by substantial evidence establishing that he encouraged others to riot. We are satisfied this argument has merit. While the evidence clearly established that a riotous disturbance occurred in Unit 2R, and that many inmates failed to comply with repeated orders to leave the day-space and return to their wings and to their bunks for a head count, the record lacks any evidence that Simon participated in the disturbance or engaged in any conduct that encouraged others to riot.

The hearing officer recognized the lack of evidence against Simon, expressly finding that "it is not known what each inmate's specific role was in the disturbance," and that video recordings of the disturbance do not allow for the identification of any individual inmate. Thus, even the hearing officer recognized there is no evidence Simon was in the day-space where the disturbance and blockage of the gate occurred, or that he was one of the inmates who refused to disperse.

In sum, the DOC failed to present any evidence that Simon took any action, or failed to take any action, that encouraged others to riot. Instead, the hearing officer more generically determined that all the inmates on Unit 2R failed to comply with the orders and, by implication, found that Simon committed the prohibited act charged.

Here, the determinations of the hearing officer and the DOC that Simon encouraged others to riot are untethered to any evidence in the record. Because "disciplinary actions against inmates must be based on more than a subjective hunch, conjecture[,], or surmise of the factfinder," Figueroa, 414 N.J. Super. at 191, we reverse.

Reversed.

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


CLERK OF THE APPELLATE DIVISION