SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0632-21

TERRANCE SCOTT,

Appellant,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS,

Respondent.

Submitted January 19, 2023 – Decided February 1, 2023

Before Judges Vernoia and Firko.

On appeal from the New Jersey Department of Corrections.

Terrance Scott, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; William C. Booth, Deputy Attorney General, on the brief).

PER CURIAM

Terrance Scott, an inmate in the custody of the New Jersey Department of Corrections (DOC), appeals from a DOC final agency decision upholding a hearing officer's determination Scott committed prohibited act *.204, use of prohibited substances, such as drugs, intoxicants, or related paraphernalia not prescribed by the medical or dental staff, N.J.A.C. 10A:4-4.1(a)(3)(vii). Scott argues the decision should be reversed because DOC staff failed to maintain a record of the chain of custody of Scott's urine specimen, which tested positive for synthetic marijuana, and the hearing officer deprived Scott of his due process rights by sustaining the DOC's objections to questions posed by Scott to a DOC witness. Unpersuaded by Scott's claims, we affirm.

On September 19, 2021, DOC staff served Scott with a disciplinary report charging he committed prohibited act *.204. The charge was founded on a September 18, 2021 DOC laboratory report confirming a September 10, 2021 urine specimen from Scott tested positive for K-3, which the DOC identifies as synthetic marijuana. The disciplinary report also noted that when served with the charge, Scott said "he may have been exposed to a drug by secondhand smoke." The charge was referred to a hearing officer.

Scott pleaded not guilty to the charge and was assigned a counsel substitute. Scott declined the opportunity to testify at the September 29, 2021

hearing on the charge, but his counsel substitute submitted a written statement on Scott's behalf seeking the charge's dismissal. Counsel substitute argued the DOC failed to properly maintain the chain of custody of the urine specimen in accordance with N.J.A.C. 10A:3-5.1(f)(3),(4), and (8). The hearing officer denied Scott's dismissal request.

The hearing record included a DOC continuity of evidence report, which was completed in part by DOC officer A. Lloyd who collected the urine specimen from Scott.[1] The continuity of evidence report showed a DOC sergeant requested Scott's urine test "for cause," and Lloyd collected the urine sample from Scott at 12:12 p.m. on September 10, 2021. The report further showed Lloyd then "[c]losed, [s]ealed[,] and labeled" the sample in Scott's presence. A separate confidential DOC log documenting the placement of various inmates' urine specimens in the evidence refrigerator included an entry made by Lloyd confirming his placement of Scott's specimen in the refrigerator on September 10, 2021.

The continuity of evidence report also states that at 7:00 a.m. on September 13, 2021, another DOC employee, Mark Watkins, removed Scott's urine specimen from the "evidence refrigerator." Three hours later, Scott's

[1] DOC officer Lloyd's first name is not included in the record.

"[s]pecimen [was] received and [its] seals checked" by an employee at the DOC laboratory where the test of the specimen took place. A separate report from the DOC laboratory states a September 13, 2021 test confirmed the specimen was "[p]ositive for K-3 ([s]ynthetic [m]arijuana)."

The hearing officer granted Scott's request for confrontation of Lloyd. Scott submitted twenty-eight questions to Lloyd, the responses to which established that Lloyd recalled obtaining the urine sample from Scott, "sealing the test[ ]cup in" Scott's presence, and "having . . . Scott sign the seal on the test cup." Lloyd further stated he left the area where he had obtained the specimen and sealed the test cup, put the sealed test cup "aside," and then, "[a]t some point in time[,] [he] personally delivered the specimen to the evidence refrigerator for storage." He also "personally place[d] the specimen in the evidence refrigerator" and locked the refrigerator. Lloyd denied walking out of the area where he obtained the specimen with the test cup unsealed and returning later "to sign [and] seal it with . . . Scott."

The hearing officer determined Scott committed prohibited act *.204 based on the positive K-3 test of his urine specimen. The hearing officer found the specimen was sealed and placed in the evidence refrigerator on September 10, 2021. The hearing officer noted Lloyd did not complete the portion of the

continuity of evidence report related to the time the specimen was placed in the evidence refrigerator. In any event, the hearing officer accepted Lloyd's statements, made in response to Scott's questions, that he placed the specimen in the refrigerator, and the hearing officer cited the DOC's confidential evidence refrigerator log as confirmation Lloyd placed the specimen in the refrigerator on September 10, 2021.[2] The hearing officer further found the DOC laboratory independently confirmed the specimen was sealed when it arrived, and the testing of the specimen established Scott's use of K-3.

Scott appealed from the hearing officer's determination. The DOC subsequently issued its final decision, upholding the hearing officer's findings, determination, and imposition of sanctions. This appeal followed.

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

[2] Part III of the continuity of evidence form allows DOC staff to record information related to the collection and handling of a urine or saliva specimen. Part III of the form allows DOC staff to record the date and time a specimen is placed and removed from the evidence refrigerator. Lloyd did not complete that portion of the form.

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 (App. Div. 2002).

Scott claims the hearing officer erred by denying his motion to dismiss the charges because Lloyd did not comply with the requirements of N.J.A.C. 10A:3-5.11(f)(3), (4), and (8). Those regulations pertain to the DOC's collection, storage, and analysis of specimens obtained from inmates. They provide as follows:

> (f) If testing is conducted through urinalysis, specimens taken from inmates shall be voided directly into an

> approved specimen container and immediately labeled in the presence of the inmate and at least one custody staff member or other authorized staff member of the same gender as the inmate.
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> . . . .
>
> 3. For initial on-site and confirmatory on-site testing of a urine specimen, the labeled specimen shall be tested and handled in accordance with the instructions/standards provided by the manufacturer of the on-site test. Chain of custody of the specimen shall be maintained.
>
> 4. For initial laboratory and confirmatory laboratory testing of a urine specimen, the labeled specimen shall immediately be closed and sealed in the presence of the inmate by the custody staff member or other authorized staff member. Chain of custody of the specimen shall be maintained.
>
> . . . .
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> 8. The custody staff member or other authorized staff member who receives custody of the urine specimen shall record on the continuity of evidence form the date and time the specimen was received, the name of the staff member from whom it was received, and the date and time of specimen placement into the evidence locker and/or locked refrigerator.
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> . . . .
>
> [N.J.A.C. 10A:3-5.11(f)(3), (4), and (8).]

Contrary to Scott's contentions, the evidence presented to the hearing officer — including the continuity of evidence report and Lloyd's responses to

Scott's questions — established Scott voided the urine specimen into the test cup, which was immediately labeled, sealed, and signed by him and Lloyd as required by N.J.A.C. 10A:3-5.11(f) and (f)(4). And, although Scott cites to subsection (f)(3), which pertains to "on-site" testing of the sample, as a basis for his claim the DOC erred in maintaining the continuity of evidence, he did not offer any evidence concerning on-site testing of his urine specimen, and his brief on appeal is bereft of any argument the DOC did not correctly perform on-site testing in accordance with N.J.A.C. 10A:3-5.11(f)(3). See generally Drinker Biddle & Reath LLP v. N.J. Dept. of Law & Pub. Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (explaining an issue not addressed in a party's merits brief is deemed abandoned).

Scott also argues the DOC failed to comply with N.J.A.C. 10A:3-5.11(f)(8)'s requirement that the person who receives the urine specimen "record on the continuity of evidence form the date and time the specimen was received, the name of the staff member from whom it was received, and the date and time of specimen placement into the evidence locker and/or locked refrigerator." His argument ignores Lloyd completed a portion of the continuity of evidence form, stating he received the urine specimen and listing the date and time he received it. Thus, the only information otherwise required under N.J.A.C. 10A:3-

5.11(f)(8) not included on the continuity of evidence form is the date and time the specimen was placed in the evidence refrigerator.

"The determination whether the chain of custody of a drug sample has been sufficiently established to justify admission of test results is committed to the discretion of the trier of fact." In re Lalama, 343 N.J. Super. 560, 565 (App. Div. 2001). There is an abuse of discretion where a "decision [is] made without a rational explanation, inexplicably depart[s] from established policies, or rest[s] on an impermissible basis." United States v. Scurry, 193 N.J. 492, 504 (2008) (citing Flagg v. Essex Cty. Prosecutor, 171 N.J. 561, 571 (2002)).

Based on the evidence presented, we do not find the hearing officer abused their discretion by rejecting Scott's claim the absence of the date and time the specimen was placed in the refrigerator on the continuity of evidence form required dismissal of the prohibited offense, *.204, charge. As we have explained, the chain of custody of a specimen is sufficiently established to support admission of the specimen's test results where the evidence shows

> there is a "reasonable probability that the evidence has not been changed in important respects." [State v. Brunson, 132 N.J. 377, 393-94 (1993)] (quoting State v. Brown, 99 N.J. Super. 22, 28 (App. Div. 1968)). Thus, it is not necessary for the party introducing such evidence "to negate every possibility of substitution." Brown, 99 N.J. Super. at 27; see generally McCormick on Evidence § 212 (Strong ed., 5th ed. 1999).

> Although the reported New Jersey appellate decisions involving chain of custody issues have all been criminal cases, it is even clearer in an administrative proceeding that a party seeking to introduce drug test results only needs to show a "reasonable probability" that the integrity of the sample has been maintained, because a relaxed standard of admissibility of evidence applies in administrative proceedings.
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> [Lalama, 343 N.J. Super. at 565-66.]

Measured against these standards, Lloyd's failure to record the precise time he placed the specimen in the refrigerator on the continuity of evidence form does not establish there was inadequate evidence establishing a proper chain of custody of the urine specimen. The evidence presented at the hearing — including Lloyd's responses to Scott's questions and the confidential log showing placement of the urine specimen into the evidence refrigerator — established Lloyd placed the sealed specimen in the refrigerator on September 10, 2021, and the laboratory received and tested the same sealed specimen three days later.

Thus, there is substantial credible evidence establishing a "reasonable probability" the specimen tested by the DOC laboratory is the same specimen Lloyd obtained from Scott. Therefore, the hearing officer's determination there was a proper chain of custody of the urine specimen from Lloyd's receipt of the specimen through its testing at the DOC laboratory did not constitute an abuse

of discretion. See ibid.; see also Allstars Auto. Grp., Inc., 234 N.J. at 157. We therefore reject Scott's claim there was inadequate evidence establishing the chain of custody of the urine specimen that tested positive for K-3 and which supported the hearing officer's determination Scott committed prohibited act *.204.

We also find no merit to Scott's claim a reversal of the DOC's decision is warranted because Lloyd provided vague responses to the questions posed on Scott's behalf and the hearing officer determined Lloyd was not required to answer others. "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, 556-57 (1974)). An inmate's more limited procedural rights, initially set forth in Avant v. Clifford, 67 N.J. 496, 522-24 (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 v. Dep't of Corr., 330 N.J. Super. 197, 203 (App. Div. 2000) (citing McDonald v. Pinchak, 139 N.J. 188, 202 (1995)).

The regulations include a limited right to confront and cross-examine witnesses. N.J.A.C. 10A:4-9.14. The regulation affords an inmate the "opportunity for confrontation and cross-examination" of the DOC's witnesses where the hearing officer "deems it necessary for an adequate presentation of the evidence." N.J.A.C. 10A:4-9.14(a). The regulation also allows a hearing officer "to refuse . . . cross-examination" when it is determined to be irrelevant or harassing, N.J.A.C. 10A:4-9.14(b)(2), (4), and permits a hearing officer to "disallow any questions that may" be irrelevant, repetitive, or meant to harass, N.J.A.C. 10A:4-9.14(d)(2), (3), and (4). Where a hearing officer denies an inmate's request to "ask certain cross-examination questions, the reasons for the denial shall be specifically set forth on" the disciplinary report. N.J.A.C. 10A:4-9.14(f). "A proceeding in which the right of confrontation and cross-examination has been unduly curtailed . . . lacks both the form and substance of a fair hearing." Jones v. Dep't of Corr., 359 N.J. Super. 70, 78 (App. Div. 2003).

Scott argues the hearing officer unduly limited his right to cross-examine Lloyd. More particularly, Scott explains Lloyd said he set the sealed specimen "aside" and then took it to the evidence refrigerator. Scott claimed the court then erred by determining counsel substitute's follow-up question — what Lloyd meant when he said he set the sample "aside" — sought irrelevant information and was harassing because the evidence otherwise established the specimen was sealed from

the time it was voided into the test cup by Scott until it was tested at the DOC laboratory. Scott claims Lloyd's response to the question denied him the ability to properly challenge the chain of custody.

We reject Scott's claim the hearing officer's determination requires a reversal of the DOC's final decision. Even assuming the hearing officer should have permitted Lloyd to answer the question, the error was harmless because an adequate chain of custody was otherwise established by the evidence demonstrating a reasonable probability there was no change in the condition of specimen in the test cup — it was at all times sealed until it was tested at the laboratory. See Lalama, 343 N.J. Super. at 565-66.

Scott also claims he was denied his rights to confrontation and cross-examination of Lloyd because Lloyd provided vague or what Scott claims were generic responses to some of the questions he posed. We do not consider the argument because Scott did not raise it before the hearing officer, Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also In re Bd. of Educ. of Boonton, 99 N.J. 523, 536 (1985) (applying Nieder to appellate review of an agency decision), and because it otherwise lacks sufficient merit to warrant discussion, R. 2:11-3(e)(1)(E).

Any arguments made by Scott that we have not addressed directly are not of sufficient merit to warrant 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.

CLERK OF THE APPELLATE DIVISION