SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1812-21

DAVID CHALUE, a/k/a
DAVID CHALEUX-DELESON,
DAVID CHALVE, DAVID
DELEO, CARLOS HERNANDEZ,
and AL RIZZO,

Appellant,

v.

NEW JERSEY DEPARTMENT
OF CORRECTIONS,

Respondent.

Submitted April 18, 2023 – Decided May 17, 2023

Before Judges Messano and Perez Friscia.

On appeal from the New Jersey Department of Corrections.

David Chalue, appellant pro se.

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

PER CURIAM

David Chalue appeals from a December 20, 2021 final agency decision by the New Jersey Department of Corrections (DOC), which upheld the finding of guilt and imposition of sanctions for prohibited act *.551, making intoxicants, in violation of N.J.A.C. 10A:4-4.1(a)(6)(vii). Chalue is currently incarcerated at New Jersey State Prison (N.J.S.P.), Trenton, serving three consecutive life sentences. We affirm.

On December 2, 2021, at 4:00 p.m., Corrections Officer Pazik conducted a non-routine search of cells in housing unit B. While searching cell 23, which housed Chalue, Pazik discovered under a counter a one-gallon jug containing orange fluid with chunks of fruit. Upon examining the jug, Pazik detected a strong odor of alcohol. The jug was secured as evidence, and Chalue was charged with the prohibited act *.551, "making intoxicants, alcoholic beverages, or prohibited substances, such as narcotics and controlled dangerous substances or making related paraphernalia." N.J.A.C. 10A:4-4.1(a)(6)(vii). An investigation was conducted, and Chalue admitted the fruit juice was his, but denied making an intoxicant. On December 3, 2021, Chalue acknowledged service of the inmate seizure and discipline charge. The charge was referred for a disciplinary hearing, and Chalue pleaded not guilty.

Hearing Officer Simmons presided over the disciplinary hearing. Chalue requested counsel substitute, which was granted. At the hearing, on December 13, 2021, Chalue testified he received the "fruit from the kitchen . . . divided in a jug." Further, Chalue argued the substance was not "hooch," and there was "insufficient evidence." Multiple officers' reports and photographs of the physical materials were submitted into evidence and considered by Simmons. Chalue declined to call any witnesses.

Simmons found substantial credible evidence to demonstrate a violation under *.551, making intoxicants, alcoholic beverages, or prohibited substances. The finding was based on the submitted reports and a review of the physical evidence. Simmons' written adjudication states with respect to the contents of the jug that the "color, look, [and] composition [are] consistent [with] making intoxicant." Additionally, Simmons memorialized: "DHO notes color, fruit composition, smell and location under counter." Chalue was sanctioned to ninety (90) days in a restorative housing unit, ninety days loss of commutation time, 365 days of urine monitoring, and permanent loss of contact visits. Chalue was also referred to the drug diversion program, which he voluntarily accepted.

On December 20, 2021, Chalue filed an appeal from the hearing officer's decision with the DOC. Chalue argued insufficient substantial evidence, failure

of Simmons to explain the basis for finding sufficient substantial credible evidence, and insufficient credibility determinations. In support of his arguments, Chalue relied on an unpublished opinion from our court.[1] In the DOC appeal, Chalue admitted he had the jug of juice and fruit cocktail, but disputed possession of any fermenting agents like sugar or bread. While acknowledging Pazik's statement about a strong smell of alcohol, Chalue argued the liquid could not be found to be an intoxicant because the liquid was not tested. The Assistant Superintendent upheld the decision and sanctions after a review of the arguments presented and the hearing record. This appeal followed.

The following arguments are raised on appeal:

> POINT I
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> THE DISCIPLINARY HEARING OFFICER VIOLATED APPELLANT'S DUE PROCESS RIGHTS, AS SET FORTH IN AVANT V. CLIFFORD [sic], WHEN THE HEARING OFFICER MADE FINDINGS NOT BASED ON SUFFICIENT CREDIBLE EVIDENCE IN THE RECORD.
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> POINT II
>
> THE HEARING OFFICER DID NOT EXPLAIN WHY SHE FOUND THE STAFF MEMBER'S REPORT TO

[1] However, unpublished opinions do not constitute precedent and are not binding on us. Trinity Cemetery Ass'n v. Twp. of Wall, 170 N.J. 39, 48 (2001); R. 1:36-3.

CONSTITUTE "SUBSTANTIAL CREDIBLE EVIDENCE" GIVEN THE RECENT HOLDING IN MALCOLM.

POINT III

THE HEARING OFFICER DID NOT EXPLAIN WHY OR HOW SHE FOUND THE OFFICER'S WRITTEN REPORT TO BE MORE CREDIBLE THAN THE INMATE'S STATEMENT.

Our scope of review of an agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011); Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 190 (App. Div. 2010). As we have long recognized, "[p]risons are dangerous places, and the courts must afford appropriate deference and flexibility to administrators trying to manage this volatile environment." Russo v. N.J. Dep't of Corr., 324 N.J. Super. 576, 584 (App. Div. 1999). "We [therefore] 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) (citing Bailey v. Bd. of Review, 339 N.J. Super. 29, 33 (App. Div. 2001)).

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, 483 (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)). But our review is not "perfunctory[,]" nor is "our function . . . merely [to] rubberstamp an agency's decision[.]" Figueroa, 414 N.J. Super. at 191 (citations omitted). Instead, "our function is to engage in a 'careful and principled consideration of the agency record and findings.'" Ibid. (quoting Mayflower Sec. Co. v. Bureau of Sec. in Div. of Consumer Affairs of Dept. of Law & Pub. Safety, 64 N.J. 85, 93 (1973)).

A hearing officer's findings must be "sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order." Blackwell v. Dep't of Corr., 348 N.J. Super. 117, 122 (App. Div. 2002) (quoting N.J. Bell Tel. Co. Commc'ns Workers of Am., 5 N.J. 354, 377 (1950)).

We review a decision of the DOC in a prisoner disciplinary proceeding to determine whether the record contains substantial evidence the inmate has committed the prohibited act, and whether in making its decision the DOC followed the regulations adopted to afford inmates procedural due process. McDonald v. Pinchak, 139 N.J. 188, 194-95 (1995).

We turn now to address Chalue's arguments as to the (i) insufficiency of reliable proof to sustain a finding of credible substantial evidence, (ii) failure of the hearing officer to explain the evidential findings, and (iii) unjustifiable reliance on Pazik's statement as more credible than appellant's statement.

To find an inmate guilty of a prohibited act under N.J.A.C. 10A:4-4.1, a hearing officer must find substantial evidence of the inmate's guilt. N.J.A.C. 10A:4-9.15(a). "'Substantial evidence' means 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Figueroa, 414 N.J. Super. at 192 (quoting In re Pub. Serv. Elec. & Gas Co., 35 N.J. 358, 376 (1961)). The substantial evidence standard permits an agency to apply its expertise where the evidence supports more than one conclusion. Murray v. State Health Benefits Com'n, 337 N.J. Super. 435, 442 (App. Div. 2001). It is recognized "in prison disciplinary matters we have not traditionally required elaborate written decisions." Blackwell, 348 N.J. Super. at 123.

Chalue contends the record does not support a finding of substantial credible evidence he possessed an alcoholic beverage, as the juice seized was not tested as required, and Simmons did not sufficiently explain her credibility findings. After a careful review of the record, we are satisfied Chalue's

adjudication of guilt was premised on substantial evidence in the record, and he was afforded due process.

There exists no requirement for the DOC to test liquid substances which are the subject of a disciplinary hearing. "Suspected contraband…liquor or items altered from original status may be sent to the laboratory for analysis." N.J.A.C. 10A:3-6.5(b). While liquids may be sent for testing by the DOC, there is no requirement to test liquids which are evidence of the infraction of "making an intoxicant." See Blanchard v. N.J. Dep't of Corr., 461 N.J. Super. 231, 240-41 (App. Div. 2019) (holding the regulation governing testing of substances applies to specimens drawn from an inmate's body "and not substances the inmate actually or constructively possesses.").

Pazik seized the jug of orange liquid with fruit, which had a strong odor of alcohol, and was found under a counter in Chalue's cell. The jug was then photographed for evidence. The consideration and reliance on Pazik's statement regarding the detection of a strong odor of alcohol by Simmons is permissive. It is recognized an officer or lay person may testify to an identified odor of alcohol. See State v. Bealor, 187 N.J. 574 (2006); State v. Cryan, 363 N.J. Super 442 (App. Div. 2003). Chalue's argument that the liquid must have been found to have been "an alcoholic beverage," is thus unavailing. Here there is a

distinction between the act of making an intoxicant and the act of possessing an intoxicant. In the instant matter the charge is for making an intoxicant. It stands to reason an inmate may be found guilty if discovered in possession of separate ingredients which are consistent with "making [an] intoxicant".

Simmons, after reviewing the reports, hearing the testimony, and examining the physical evidence found substantial credible evidence existed to determine the contents, location and smell of the liquid were consistent with making an intoxicant. Simmons' findings were also based on the liquid's color, appearance, and composition. The above evidence relied upon by Simmons in finding the making of an intoxicant in violation of *.551 is delineated in the written adjudication of discipline charge summary, in accordance with N.J.A.C. 10A:4-9.24(a). Chalue's argument Simmons was required to provide greater explanation on "why or how" she found Pazik's statements more credible than his is not supported by law. See, e.g., Blackwell, 348 N.J. Super. at 123-24. We note Chalue called no witnesses, conducted no cross examination, and admitted to possessing the jug of juice with chunks of fruit. As the fact finder, Simmons, was permitted to consider the reports as evidence, and to rely on the examination of physical evidence. N.J.A.C. 1:1-15.1.

Accordingly, there is substantial evidence in the record to support the determination by the DOC upholding the hearing officer's findings.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION