SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2460-21

MICHAEL DARBY,

Appellant,

v.

NEW JERSEY DEPARTMENT OF CORRECTIONS,

Respondent.

Submitted May 30, 2023 – Decided June 22, 2023

Before Judges Whipple and Smith.

On appeal from the New Jersey Department of Corrections.

Michael Darby, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Donna Arons, Assistant Attorney General, of counsel; Christopher C. Josephson, Deputy Attorney General, on the brief).

PER CURIAM

Petitioner Michael Darby, an inmate, appeals from a final decision of the Department of Corrections (DOC), which denied his request to receive two video grams. The DOC found that the video grams violated its regulations against lewd and pornographic material being transmitted to inmates. On appeal, petitioner contends, among other things, the DOC was arbitrary, capricious, and unreasonable in rejecting the video grams. We affirm.

The DOC implemented a pilot program to permit inmates' friends and relatives to prepare and send short video mail grams through a private messaging service called JPay. In its June 5, 2020 memo, announcing the JPay program, the DOC notified the inmates that all inbound video mail grams would be reviewed prior to release. The DOC's stated purpose in creating this pilot program was to "mitigate the impact of ongoing . . . adjustments within the [prison] due to COVID-19" for the inmate population.

On July 2, 2020, petitioner learned he had been sent seven video grams. The DOC transmitted only five to him, and petitioner made a formal inquiry to the DOC about the status of the missing two videos. On July 14, 2020, a DOC employee responded to petitioner in writing, stating "[t]he rules for video grams include NO NUDITY — NO EXCEPTIONS. The two videos dated [July 3] of a music video, showed nude women in a shower, therefore they were rejected."

The petitioner next filed a grievance challenging the Department's decision and seeking review of the rejected video grams. The DOC rejected the grievance via email and petitioner appealed. The DOC moved to remand on January 7, 2022. Its purpose in seeking remand was to provide proper notification of its final decision to petitioner, and to issue a revised final decision grounded in that record. We granted the DOC's motion for remand.

Upon remand, on March 7, 2022, the DOC issued a revised final decision in which it explained its basis for rejecting the two video grams. The DOC noted that, "[t]he rejected videos contains scenes of two individuals taking a shower together while touching each other inappropriately coupled with lewd content." The DOC concluded that, "based upon the experience and professional expertise of correctional administrators and judged in the context of a correctional facility and its paramount interest in maintaining safety, security, order and rehabilitation[,]" the two video grams violated N.J.A.C. 10A:18-2.14(6).

Petitioner appeals the DOC's final decision arguing: the DOC failed to afford him due process; the DOC's rejection of the video grams violated petitioner's constitutional liberty interests; the initial rejection by DOC personnel violated its own policies; and finally, DOC's rejection of the videos was the result of an improper scheme by its employees to act as JPay vendors.

Our role in reviewing the decision of an administrative agency is limited. In re Taylor, 158 N.J. 644, 656 (1999); Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 190 (App. Div. 2010). We will not upset the determination of an administrative agency absent a showing: that it was arbitrary, capricious, or unreasonable; that it lacked fair support in the evidence; or that it violated legislative policies. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980) (citing Campbell v. Dep't of Civ. Serv., 39 N.J. 556, 562 (1963)).

We accord particular deference to the expertise and "broad discretionary powers" of the Commissioner of Corrections in managing the State prisons pursuant to his statutory responsibilities. Jenkins v. Fauver, 108 N.J. 239, 252 (1987). We also note that "[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).

"The fact of confinement and the needs of the penal institution impose limitations on constitutional rights, including those derived from the First Amendment, which are implicit in incarceration." Jones v. N.C. Prisoners' Lab. Union, Inc., 433 U.S. 119, 125 (1977). Courts usually evaluate claims of access to publications under the First Amendment. See Beard v. Bank, 548 U.S. 521

(2006) (prohibiting access to newspapers, magazines, and family photographs to the "worst of the worst" inmates to create an incentive towards better behavior does not violate the First Amendment). Indeed, both inmates and their correspondents have a First Amendment right to send and receive mail. See Thornburgh v. Abbott, 490 U.S. 401, 407 (1989).

But the exercise of these constitutional rights is necessarily limited by the fact of the inmate-recipient's incarceration. "The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security." O'Lone v. Est. of Shabazz, 482 U.S. 342, 348 (1987). "Thus, a prison inmate 'retains [only] those rights that are not inconsistent with his status as [an inmate] or with the legitimate penological objectives of the corrections system.'" DeHart v. Horn, 227 F.3d 47, 51 (3d Cir. 2000) (quoting Pell v. Procunier, 417 U.S. 817, 822 (1974)).

Moreover, inmates have no right to receive materials that constitute obscenity. Miller v. California, 413 U.S. 15, 23 (1973) ("[O]bscene material is unprotected by the First Amendment.").

The DOC adopted N.J.A.C. 10A:18-2.14 to assist in regulating correspondence received by inmates. Subsection (a)(6) reads in pertinent part:

> (a) Any correspondence for an inmate may be withheld in the mail room or taken from an inmate's possession by the correctional facility Administrator, designee, or custody staff if it falls within one of the following categories:
>
> . . . .
>
> 6. The correspondence contains material, which, based upon the experience and professional expertise of correctional administrators and judged in the context of a correctional facility and its paramount interest in maintaining safety, security, order, and rehabilitation:
>
> i. Taken as a whole, appeals to a prurient interest in sex;
>
> ii. Lacks, as a whole, serious literary, artistic, political, or scientific value;
>
> iii. Depicts, in a patently offensive way, sexual conduct, including patently offensive representations or descriptions of ultimate sexual acts, masturbation, excretory functions, lewd exhibition of the genitals, child pornography, sadism, bestiality, masochism, extreme close-up photos, any touching, manipulation, spreading, or opening of the genitals or buttocks (any gender), pornography, or sexually explicit material . . . .
>
> [N.J.S.A. 10A:18-2.14(a)(6).]

We turn to the merits of petitioner's claims.

Petitioner received video gram mail that was sent to him, except for the two video grams which violated DOC regulations and policy. The DOC concluded the rejected videos, depicting images of two nude women showering and touching each other, violated N.J.A.C. 10A:18-2.14(a)(6). The DOC specifically rejected petitioner's argument that the videos were mere nudity, and not pornography. We defer to the agency's factfinding, as it was based on the evidence in the record, the video grams themselves.

Next, petitioner's First Amendment rights were not violated. Federal jurisprudence has consistently deemed content of this nature obscene and not protected by the First Amendment.

Finally, the record shows petitioner's due process rights were not violated. He submitted a formal inquiry when he learned the video grams were first rejected, and he received a response in which DOC personnel cited the "no exceptions" nudity policy. Petitioner next filed a grievance and received an emailed decision from the DOC the same day. He appealed that decision, and the DOC sought a remand, which we granted. Upon remand, the DOC issued its final decision denying petitioner's request to receive the two video grams. Any procedural defects regarding notice of the DOC's final decision to petitioner were cured on remand.

The DOC's final decision rejecting the two video grams was not arbitrary, capricious, or unreasonable, and we find N.J.A.C. 10A:18-2.14(a)(6) does not violate petitioner's constitutional interests. We find no error on this record.

To the extent we have not specifically addressed petitioner's remaining contentions, we find they lack sufficient merit to warrant discussion in our written opinion. R. 2:11-3(e)(1)(E).

Affirmed.