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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-2872-20**

KENNETH BARR,

Appellant,

v.

**NEW JERSEY DEPARTMENT
OF CORRECTIONS,**

Respondent.

Submitted November 7, 2022 – Decided April 3, 2023

Before Judges Mayer and Bishop-Thompson.

On appeal from the New Jersey Department of Corrections.

Kenneth Barr, appellant pro se.

Matthew J. Platkin, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Suzanne Davies, Deputy Attorney General, on the brief).

PER CURIAM

Appellant Kenneth Barr, an inmate at New Jersey State Prison, appeals from the final agency decision of the New Jersey Department of Corrections (DOC) upholding a disciplinary hearing officer's finding of guilt and imposition of sanctions for committing institutional fraction, *.004,¹ fighting with another person, in violation of N.J.A.C. 10A:4-4.1(a). We affirm.

We discern the following facts from the record. Barr was housed in 2-Right, a general population housing unit. On December 21, 2020, at approximately 3:18 p.m., Officer Jeremy Cruz and two inmates, Barr and Kelvin Leerdam, who were returning from the shower, stop and assume a "fighting stance." Leerdam "[threw] closed fist punches" at Barr. According to Cruz, in response Barr picked Leerdam up and slammed him to the floor. Cruz gave the inmates several verbal commands to stop fighting, which the two inmates disregarded and continued fighting. Cruz called a code 33—an emergency, officer in need of assistance and deployed oleoresin capsicum (OC) spray. Additional officers responded and again deployed OC spray to gain the inmates' compliance. The inmates were separated and secured by the responding officers.

¹ Generally, "DOC inmate disciplinary regulations classify 'asterisk offenses' as prohibited acts considered to be the most serious violations, resulting in the most severe sanctions." N.J.A.C. 10A:4-4.1. See also Hetsberger v. Dep't of Corr., 395 N.J. Super. 548, 556 (App. Div. 2007).

Barr and Leerdam were separately escorted to the medical clinic and examined. Barr had a small bruise on his left eye. Leerdam had an abrasion to the left second finger.

Both Barr and Leerdam were charged with committing prohibited act *.004. After an investigation, Barr was served with a disciplinary charge.

Prior to the disciplinary hearing, Barr requested and received the assistance of counsel substitute. He pleaded not guilty, claimed self-defense, named Leerdam as the "aggressor" because he threw the first punch, requested leniency and a copy of the housing unit video.

A hearing officer conducted a disciplinary hearing on December 28, 2020. At the disciplinary hearing, counsel substitute reiterated Barr's self-defense claim and denied that Barr "body slammed" Leerdam, who was the aggressor. Barr declined to confront and cross-examine adverse witnesses or call any witnesses to corroborate his claim of self-defense.

After considering the testimony, documents, and the video footage, the hearing officer found Barr guilty of the charge. The hearing officer noted "[Officer] Cruz observed [inmate] Leerdam and [inmate] Barr take a fighting stance and exchange punches. [Inmate] Barr picked up Leerdam and slammed [him] to the ground." The adjudication report further noted the hearing officer

viewed Leerdam and Barr exchanging punches. Based on the evidence, the hearing officer noted "[b]oth inmates had injuries that were consistent with being involved in a physical altercation."

The hearing officer imposed the following sanctions: 120 days in the restrictive housing unit, and the loss of ten days of recreational privileges and ninety days of commutation time. The adjudication report noted the hearing officer imposed sanctions because "[b]oth inmates had injuries that were consistent with being involved in a physical altercation."

On February 26, 2021, Barr filed an administrative appeal based on a violation of standards, misinterpretation of the facts, a plea of leniency, and other unspecified grounds.

On March 8, 2021, the Assistant Superintendent upheld the hearing officer's decision, stating:

My review of this issue reveals that there was compliance with the New Jersey Administrative Code on inmate discipline which prescribed procedural safeguards. The charges were adjudicated according to the code. The preponderance of evidence support[ed] the sanctions levied by the hearing officer.

The disposition also noted "[d]efendant's mental history was reviewed and considered."

On March 15, 2021, Barr filed a second administrative appeal which restated the bases for the initial appeal. In his four-page statement of reasons, Barr argued: the written charge was contradicted by the housing unit video, and was not supported by a finding of guilt, the statement of reasons used to determine guilt failed to address the self-defense claim and why the hearing officer found the self-defense claim to be not-credible.

In response, the DOC advised Barr to direct any additional appeals to the Appellate Division. This appeal followed.

On appeal, Barr raises the following arguments: his due process rights were violated; the charge was not supported by substantial credible evidence in the record; counsel substitute failed to argue the minimum standards in the administrative appeal; and the DOC failed to address the second appeal. We find Barr's argument unpersuasive.

Our role in reviewing a prison disciplinary decision is limited. Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 190 (App. Div. 2010). Generally, the decision must not be disturbed on appeal unless it was arbitrary, capricious, or unreasonable, or lacked the support of "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)).

However, in our consideration, where video tape evidence is involved, we will defer to the agency's determination, as the fact finder, and not substitute our judgment for the agency's, unless its "factual findings are so clearly mistaken—so wide of the mark—that the interests of justice demand intervention." State v. S.S., 229 N.J. 360, 381 (2017); see also State v. McNeil-Thomas, 238 N.J. 256, 272 (2019).

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 charged with disciplinary infractions are entitled were first enumerated by our Supreme Court in Avant v. Clifford, 67 N.J. 496, 522-30 (1975), and are codified in the 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.

Barr contends the hearing officer violated his due process rights because Cruz's report erred in stating Barr slammed Leerdam to the ground and was contradicted by the housing unit video, which was "the only credible, accurate piece of evidence." Barr further contends while he admitted he had a "physical altercation" with Leerdam, it was Leerdam who picked up and slammed Barr to the ground.

We are satisfied from our review of the record that Barr was afforded each of the procedural due process rights articulated in Avant. Here, the department incident reports, video and witness statements supported the hearing officer's finding that both inmates assumed fighting stances and exchanged punches, failed to comply with numerous orders to stop, and did not stop fighting until the officers deployed OC spray. Despite Barr's claim of self-defense, he neither challenged nor presented contradictory evidence at the hearing. Additionally, he declined to call or confront witnesses.

Barr also contends the hearing officer conceded Officer Cruz had "mixed up Leerdam and Barr on the video, . . . Leerdam did begin throwing punches, but he also picked up Mr. Barr and slammed him to the ground." Because he was not the aggressor, Barr claims the charge should not have been sustained and was not supported by substantial credible evidence in the record. We reject this argument.

The hearing officer evaluated Barr's self-defense claim in light of the evidence. Here, Barr offered no evidence to corroborate his claim of self-defense beyond merely asserting such claim. Under the circumstances, where Barr only argued that the video showed he did not initiate the fight, his contention alone does not satisfy his obligation to establish self-defense. See

N.J.A.C. 10A:4-9.13(f). After hearing testimony and reviewing the video, the hearing officer concluded Barr claim he was attacked and acting in self-defense was not supported by credible evidence. Thus, Barr's argument is unsupported by the record.

Barr also argues his due process rights were violated when substitute counsel failed to address the minimum standards in the administrative appeal. Barr makes a sweeping assertion that the initial "administrative appeal submitted failed to make even a passing effort to protect and/or assert [Barr's] right to a meaningful appeal as set forth in [N.J.A.C.] 10A:4-11.4, Investigation of Appeal." Barr fails to cite to specific facts rendering the appeal "deficient". As stated, Barr was accorded his due process rights including his right to an appeal.

N.J.A.C. 10A:4-11.5(a) requires a hearing officer's decision to be upheld unless "procedural safeguards . . . were not followed, new evidence . . . is revealed . . . the sanction [imposed] is disproportionate to the offense" or "the evidence does not support the findings of the [hearing officer] but would support . . . a lesser offense than . . . was charged." In reaching a determination regarding Barr's appeal, the Assistant Superintendent found the required procedural safeguards were followed. Additionally, the Assistant Superintendent applied the proper standard in reviewing Barr's appeal.

We also find no merit to Barr's argument that the DOC failed to address his second administrative appeal. Barr offered no authority in support of his contention that the DOC was required to do more than respond to the second appeal. The DOC was not required to conduct an additional investigation. Rather, the DOC advised Barr that any further appeal of the agency's final decisions should be filed in the Appellate Division. We are satisfied the DOC appropriately advised Barr that his appeal had been considered.

The substantial evidence presented at the hearing supported the hearing officer's finding of guilt on the charge and the imposed sanctions. The decision of the DOC upholding the charge was not arbitrary, capricious, or unreasonable.

Any arguments made by Barr that we have not addressed directly lack 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.



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