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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4019-21**

ONDRE WEEKES,

Appellant,

v.

NEW JERSEY DEPARTMENT
OF CORRECTIONS,

Respondent.

Submitted September 27, 2023 – Decided October 17, 2023

Before Judges Smith and Perez Friscia.

On appeal from the New Jersey Department of
Corrections.

Ondre Weekes, appellant pro se.

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

PER CURIAM

Ondre Weekes, an inmate at Mid-State Correctional Facility, appeals pro se from a final agency decision of the Department of Corrections imposing discipline upon him for committing prohibited act *.204, use of any prohibited substance such as drugs or intoxicants not prescribed. Weekes appeals, contending, among other things, that the Department's decision violated his right to procedural due process. For the reasons which follow, we reverse and remand.

I.

On July 13, 2022, Weekes was randomly selected for drug testing, and he provided a urine specimen to Senior Correctional Police Officer (SCPO) J. Kurz.¹ Kurz tested the specimen on-site at 9:30am. The test came back positive for synthetic marijuana, also known as K3. Weekes signed a continuity of evidence (COE) form, acknowledging the specimen he provided was closed, sealed, and labeled by Kurz. The COE form reveals that Kurz turned the specimen over to another corrections officer, SCPO J. Hans, at 9:35 a.m., who placed it in the evidence refrigerator at 9:36 a.m. Subsequent handling of the specimen is not documented on the COE form or elsewhere in the record.

¹ The record only reveals the corrections officers' first initials and last names, and we use that convention in this opinion.

On July 21, 2022, the lab returned a positive K3 confirmation, and the Department served Weekes with a disciplinary report charging him with committing prohibited act *.204: use of a prohibited substance. The charge was based on the field and lab-tested sample taken from Weekes on July 13.

Weekes pled not guilty and was assigned a counsel substitute. He did not testify at his hearing, but in a statement denied smoking K3. He requested an opportunity to submit a second specimen, and sought discovery of documentary evidence against him, specifically the urine "measurement level." He offered no witnesses on his behalf and declined to confront or cross-examine any adverse witnesses. Weekes did not expressly challenge the specimen's chain of custody.

The disciplinary hearing officer (DHO) found Weekes guilty of the prohibited act charged. She made brief written findings, noting: Weekes voided a random urine specimen; the on-site test came back positive for K3; and the Departmental lab confirmed that the specimen tested positive for a "prohibited substance." The DHO specifically noted that she "relied on [the] COE and NJ DOC Lab report." Weekes received 100 days loss of commutation time, ninety days in the restorative housing unit and permanent loss of contact visits as discipline for the infraction.

Weekes administratively appealed the DHO's initial decision, arguing he was denied procedural due process because: he was not allowed the opportunity to see the confirmatory report and COE; the DHO was biased; and the hearing took place more than seven days after the infraction. On August 4, 2022, the Department adopted the DHO's initial decision as final.

Before us Weekes contends the Department's decision violated his procedural due process rights and that his inability to review documentary evidence at the hearing violated principles of fundamental fairness. We recognize Weekes does not expressly allege a defect in the chain of custody. Because Weekes questioned the size and purity of his urine specimen in his departmental appeal, however, we view his challenge as also raising the chain of custody issue.

Our scope of review of an agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011). "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). But our review is not "perfunctory[.]" nor is "our function . . . merely [to] rubberstamp an agency decision." Figueroa v. N.J. Dep't of Corr., 414 N.J. Super. 186, 191 (App. Div. 2010). Instead, "our

function is '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)).

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) (quoting Stallworth, 208 N.J. at 194). "'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)).

Weekes generally argues that the Department's final decision violated his procedural due process rights. We recognize that the Department has adopted detailed regulations for drug testing inmates in a manner designed to protect chain of custody for urine specimens, therefore we consider whether deviation from the Department's own testing standards renders the Department's final decision unsupported by substantial credible evidence in the record. Stated differently, the question becomes: was the Department's final decision disciplining Weekes based on a defective chain of custody?

N.J.A.C. 10A:3-5.11(e) governs the collection, handling, and testing of specimens provided by inmates. It requires a COE form to be completed by custodial staff, or other authorized staff member, and maintained with each specimen collected.

N.J.A.C. 10A:3-5.11(f) requires each step in the process for on-site testing and laboratory confirmation be documented. The regulation reads in pertinent part:

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.

. . . .

9. Inmate urine specimens transported out of the correctional facility for laboratory testing shall be transported, where reasonably practical, in an iced cooler or similar device. The date and time of the removal of the urine specimen from the correctional facility, as well as the date and time of specimen receipt by the testing facility shall be noted on the continuity of evidence form by the person(s) performing these functions.

10. Laboratory testing of urine specimens shall be conducted only when the urine specimen arrives at the testing facility in a sealed and approved urine specimen container.

[N.J.A.C. 10A:3-5.11(f) (emphasis added).]

Weekes acknowledged by his signature on the COE form that his urine specimen was closed, sealed, and labeled in his presence by SPCO Kurz. Kurz then attested on the COE form that he transferred the specimen to SPCO Hans, who then attested on the COE form that he placed it in the evidence refrigerator. Thereafter, however, the chain of custody was broken. The parts of the COE form which document subsequent steps in the chain were left blank. Those subsequent steps included: Part III, D. labeled, "Specimen removed from evidence refrigerator"; Part III, E. labeled, "Specimen transported to Designated Laboratory"; and Part IV, labeled, "Specimen received and seals checked at laboratory." Parts III and IV of the COE form had blank spaces where Department staff should have filled out the name, rank or title of persons handling the specimen, as well as the date and time they did so.

We have addressed defective chain of custody for drug-test specimens in the administrative context. In re Lalama, 343 N.J. Super 560, 565 (App. Div. 2001). "The determination whether the chain of custody of a drug specimen has been sufficiently established to justify admission of test results is committed to the discretion of the trier of fact." Ibid. "[I]t is not necessary for the party introducing such evidence 'to negate every possibility of substitution.'" Lalama, 343 N.J. Super. at 566 (quoting State v. Brown, 99 N.J. Super. 22, 27 (App. Div.

1968)). However, the party must show there is a "reasonable probability that the evidence has not been changed in important respects." Id. at 565-66 (quoting State v. Brunson, 132 N.J. 377, 393-94 (1993)).

In Lalama, we affirmed the final decision of the Department of Personnel, which found the City of Paterson sufficiently established the chain of custody of a urine sample before the Merit System Board when it sought to remove a firefighter following a positive drug screen. Id. at 566-67. The chain of custody defect stemmed from a courier's failure to sign the transmittal form, and the laboratory's failure to record how the sample had been transported. Id. at 564. However, the Lalama record contained sufficient evidence to establish the reliability of the transfer, including testimony. The probative evidence included proof the lab received the sealed specimen container, and testimony from a fire official responsible for administering drug tests to firefighters. Id. at 567. Concluding there was a reasonable probability that the evidence had not been changed in important respects, we noted, "links in the chain of custody of a urine sample or other similar evidence are not required to be established by any particular form of evidence." Ibid. (quoting Brown, 99 N.J. Super. at 28).

We note that Weekes did not raise defective chain of custody as a defense before the DHO, and he waived confrontation of adverse witnesses.

Accordingly, the Department was not afforded the opportunity to address the purported defect at the hearing. Nonetheless, the Department elected to proceed with an inmate drug-test disciplinary proceeding without a properly documented COE form or appropriate alternative proofs. Weekes raised contamination of the urine sample for the first time in his administrative appeal to the superintendent of corrections. However, the COE was admitted in evidence at the hearing as and the hearing officer expressly "relied on [the] COE" to support the sanction in the hearing officer's decision. Because both parties have played a role in creating this gap in the record, and we accept that Weekes challenged the specimen sample, we remand for amplification of the record on the limited question of the chain of custody of Weekes' specimen.

The chain of custody for Weekes' specimen significantly departs from N.J.A.C. 10A:3-5.11. The Department, pursuant to the standard established in Lalama, has the flexibility on remand to correct its COE omissions. The Department may present testimony from corrections officers or staffers as to the chain of custody. It may present a separate written log from the confidential evidence refrigerator where Weekes' specimen was stored, as well as any log maintained by the lab documenting its receipt of the specimen with the seals intact.

The record contains insufficient evidence to support a finding that there is a reasonable probability that Weekes' specimen had not changed in important respects. After SPCO Hans placed Weekes' specimen in the evidence refrigerator, its subsequent travels are unaccounted for. There is no indication on the COE form where the specimen went after it was placed in the evidence refrigerator, who handled it and when, and whether the seal was intact when presented to the lab for sampling. The record reveals no explanation for the defect in the chain of custody, nor does it reveal a basis for the Department's reliance on such a defective chain. The Department's proofs fell short of the standard set in Lalama, which held there was other testimonial and documentary evidence the Department could rely upon to establish chain of custody.

In the absence of testimony or other evidence, we decline to extend the reasonable probability standard espoused in Lalama to the limited facts in the record. Such a holding would defeat the Department's comprehensive regulatory policy in place for protecting the due process rights of inmates who are drug tested. Corrections staff are required by regulation to complete and maintain a COE form "[e]ach time a specimen is collected." N.J.A.C. 10A:3-5.11(e). Ensuring that the Department follows its own policy places no additional burden on corrections staff. When the Department makes mistakes in maintaining the

COE form, it can supplement the defective form with testamentary and documentary evidence. Lalama, 343 N.J. Super. at 567.

Even considering the relaxed standard of evidence used in administrative appeals, Lalama, 343 N.J. Super at 547-48, on this record, Weekes' discipline cannot survive scrutiny. The Department had glaring omissions in its mandated continuity of evidence forms, and it produced no alternative authentication evidence for us to consider, as in Lalama. Accordingly, {continue paragraph} we are left with no sufficient, credible evidence in the record to support discipline against Weekes for violating *204. Consequently, the Department's final decision was a mistaken exercise of discretion. We need not reach Weekes' remaining arguments.

We reverse and remand for a hearing to be conducted by the Department on the sole issue of the chain of custody of Weekes' sample. The Department shall conduct the hearing in accordance with departmental rules within forty-five days. Weekes' discipline is vacated, and all privileges taken away as a result of his discipline shall be restored pending the outcome of the remand hearing.

If the Department again finds Weekes guilty of violating *204, his discipline shall be reinstated. If the Department finds that the chain of custody of Weekes' sample has been broken and the alternative COE proofs proffered do

not satisfy its burden under Lalama, then it shall dismiss the *204 charges, and his discipline shall remain vacated.

Reversed and remanded for a limited hearing consistent with the principles outlined above. Weekes' discipline is vacated. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION