

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-6192-10T1

JUSTIN FAONE,

Appellant,

v.

NEW JERSEY DEPARTMENT  
OF CORRECTIONS,

Respondent.

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Submitted May 8, 2012 - Decided May 21, 2012

Before Judges Baxter and Carchman.

On appeal from the New Jersey Department of  
Corrections.

Justin Faone, appellant pro se.

Jeffrey S. Chiesa, Attorney General,  
attorney for respondent (Melissa H. Raksa,  
Assistant Attorney General, of counsel;  
Christine H. Kim, Deputy Attorney General,  
on the brief).

PER CURIAM

This is an appeal from a July 19, 2011 final agency  
decision of the Department of Corrections (DOC) imposing  
disciplinary sanctions upon New Jersey State Prison inmate  
Justin Faone pursuant to N.J.A.C. 10A:4-4.1. The hearing

officer found Faone guilty of prohibited act \*.002, assaulting any person. We affirm.

I.

The charges in question were based on the report of Senior Corrections Officer (SCO) R. Gilhooley,<sup>1</sup> who was standing behind a desk when Faone reached over and snatched the shower list off a clipboard on the desk. Faone then proceeded into the bathroom and threw the shower list in the toilet. When Gilhooley ordered Faone to return to the desk area, Faone approached Gilhooley "in an aggressive manner" and punched Gilhooley in the chest with a "closed fist." Gilhooley activated the emergency button, at which time Faone delivered a second closed fist punch, this time to Gilhooley's face. Gilhooley attempted to restrain Faone, but was unsuccessful, and the two rolled down a nearby flight of stairs. Faone ignored Gilhooley's repeated orders to cease resisting, and continued to strike Gilhooley in the face and torso, until another officer, SCO Myers, arrived at the scene and helped Gilhooley restrain and handcuff Faone.

Later that day, Lieutenant Nywening questioned Faone about the incident. Faone admitted assaulting Gilhooley. He stated, "I threw away the shower list and Gilhooley approached me about it and I hit him, then we fell down the stairs." When asked why

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<sup>1</sup> The record does not specify Officer Gilhooley's first name.

he assaulted Gilhooley, Faone responded "I don't know. I just used bad judgement, I guess."

Faone was examined by medical staff for a laceration to his left eyebrow and other superficial abrasions. Faone admitted to the nurse that he "tried to hit the c/o [corrections officer], the c/o [then called a] code," and in the process "he fell down the steps." SCO Gilhooley was treated by the nursing staff at the prison for pain in his right hand and left pinky caused by the altercation with Faone.

On June 30, 2011, an associate administrator denied Faone's request for a polygraph examination, reasoning "[t]here is adequate information, . . . includ[ing] testimony and medical evidence, . . . for the hearing officer to determine credibility in this case [without a polygraph examination]."

After six adjournments to permit Faone and his counsel-substitute to seek confrontation of Gilhooley and Myers, present confrontation questions and request a polygraph examination of Faone, the hearing began on July 6, 2011 and concluded eight days later on July 14, 2011.<sup>2</sup> After the confrontation with SCO Myers was completed on July 14, 2011, the hearing was once again postponed to afford Faone and his counsel-substitute the

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<sup>2</sup> The eight-day interval was due to SCO Myers's previously-scheduled vacation.

opportunity to provide a written summation, which they submitted the next day.

On July 15, 2011, hearing officer R. Makarski found Faone guilty based upon the eyewitness accounts of both SCO Gilhooley and SCO Myers, as well as Faone's June 15, 2011 statement to Lieutenant Nywening, in which Faone admitted assaulting SCO Gilhooley. Makarski imposed sanctions of fifteen days detention, with credit for time served; 365 days administrative segregation; 270 days loss of commutation credit; thirty days loss of recreation privileges; and thirty days loss of access to the canteen.

Faone filed an administrative appeal. On July 19, 2011, Associate Administrator Sherry Jones modified the sanctions by rescinding the thirty days loss of canteen privileges and by suspending for sixty days the thirty days loss of recreation privileges. She upheld the remaining sanctions and affirmed the finding of guilt on the \*.002 charge.

On appeal, Faone argues that the July 19, 2011 final agency decision should be reversed because: 1) the hearing officer's standard of review was insufficient; 2) the hearing officer's finding of guilt was biased and not supported by sufficient credible evidence in the record; 3) the hearing officer failed to follow applicable procedures in documenting the adjudication

of the disciplinary charge; and 4) DOC's refusal to afford him a polygraph examination violated his right to due process.

## II.

Our scope of review of Faone's contentions is narrow. We are obliged to affirm DOC's final decision unless it is arbitrary or capricious or unsupported by credible evidence in the record. Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). We consider appellant's first three arguments jointly, as all three challenge the hearing officer's findings of fact and the procedures he employed in conducting the hearing. After carefully considering the arguments Faone advances, we are satisfied that substantial evidence exists to find him guilty of assaulting SCO Gilhooley. The written report of SCO Gilhooley; the written report of SCO Myers, who witnessed Faone striking Gilhooley when Myers arrived on the scene in response to Gilhooley's activation of the emergency button; and Faone's admission to both Lieutenant Nywening and the prison nurse that he hit SCO Gilhooley, were more than sufficient to enable the hearing officer to adjudicate Faone guilty of assaulting SCO Gilhooley.

In points one, two and three, Faone also raises additional arguments not presented either before the hearing officer or in the agency appeal. In particular, he asserts for the first time

that the hearing officer failed to permit him to present documentary evidence in his defense, and that the prison records considered at the hearing were illegible. These arguments lack sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(A) and (E). As for the handwritten copies of the prison records, even if they were difficult to read, a typewritten copy was provided to Faone along with all of the other documents listed in the statement of items comprising the record on appeal.

As for Faone's contention that he was denied the ability to provide documentary evidence in his defense, specifically the photographs taken of himself after the assault, and SCO Gilhooley's medical records, we note that Gilhooley's medical records are confidential, and cannot be produced for Faone's review or in his defense. However, even if the photographs of Faone and the medical records pertaining to Gilhooley had been produced during the hearing, we agree with DOC that the documents would not have assisted the hearing officer in evaluating Faone's defense that he was not the aggressor.

The last claim Faone raises that he did not present to the hearing officer is that the proceeding was defective because neither he nor his counsel-substitute signed line sixteen of the hearing form, which asked them to acknowledge that the form

accurately reflected what had occurred during the hearing. The record demonstrates that the hearing officer signed line sixteen, and noted that the inmate and his counsel-substitute refused to do so. Under such circumstances, Faone's failure to sign the document should not be held against DOC.

We reject all of the claims Faone advances in points one, two and three.

### III.

In point four, Faone asserts that he was denied due process because his polygraph request was denied, despite what he claims were inconsistencies between his medical report and SCO Gilhooley's testimony. An inmate does not have an unconditional right to a polygraph examination. Johnson v. N.J. Dep't of Corrs., 298 N.J. Super. 79, 83 (App. Div. 1997). An inmate's request for a polygraph is not sufficient cause, standing alone, for granting the request. Ibid. A polygraph request should only be approved when "there are issues of credibility regarding serious incidents or allegations" or "when the Administrator . . . is presented with new evidence or finds serious issues of credibility." N.J.A.C. 10A:3-7.1(a). The limits imposed by that regulation are "designed to prevent the routine administration of polygraphs, and a polygraph is clearly not required on every occasion that an inmate denies a

disciplinary charge against him." Ramirez v. Dep't of Corrs., 382 N.J. Super. 18, 23-24 (App. Div. 2005).

In analyzing the requirement of "serious issues of credibility" contained in N.J.A.C. 10A:3-7.1(a)(2), we observed that "inconsistencies in the [officers'] statements or some other extrinsic evidence involving credibility" would be circumstances in which a polygraph examination should be considered. Id. at 24.

Here, we agree with DOC's contention that the record is devoid of any issues of credibility that could not have been determined at a disciplinary hearing. The \*.002 charge was based upon the eyewitness accounts of SCOs Gilhooley and Myers and Faone's own incriminating statements. While Faone claims that there are inconsistencies in the record, he fails to explain what they are. For that reason, in adjudicating the charge, there was no issue of credibility that could not be determined at the hearing, and the denial of Faone's request for a polygraph did not compromise the fairness of the disciplinary process. Furthermore, as DOC correctly maintains, Faone had an opportunity to cross-examine SCOs Gilhooley and Myers, and thereby challenge their version of the facts. The hearing officer concluded that Faone's confrontation of the two officers supported the charge and the answers given by the two officers

were "honest and straightforward." We reject Faone's contention that the denial of his request for a polygraph examination undermined the fairness of the proceedings.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION