COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-649

DAVID JACKSON

vs.

DEPARTMENT OF CORRECTION.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, David Jackson, an inmate in the custody of the Department of Correction (DOC), filed an action in the Superior Court pursuant to G. L. c. 249, § 4, seeking judicial review of a decision in a disciplinary proceeding. The plaintiff moved for judgment on the pleadings and the defendant, DOC, cross-moved for judgment on the pleadings. A Superior Court judge allowed the defendant's motion and dismissed the plaintiff's complaint. On appeal, the plaintiff argues that the judge erred in allowing the defendant's motion because the disciplinary decision violated his constitutional free speech rights and failed to comply with due process. The plaintiff also argues that the judge erred in denying him access to evidence at issue in this case. We affirm.

Background. While housed at NCCI-Gardner, the plaintiff wrote and mailed a letter, dated September 6, 2018, to Governor "Baker, Family" at the State House in Boston. The two-page letter contained the following statements: "Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation"; "I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart [sic] of corrupt, hatred that continues to cause division, unrest among the races"; and "If you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family and those of color to there will be no doubt about my commitment to right this wrong." The letter also stated, "Please note that the retaliation and the [withholding] of my special order medical needed footwear will not go without a challenge."

On September 19, 2018, the Executive Office of Public Safety and Security received the letter. A DOC employee filed a disciplinary report, asserting that the plaintiff had "violated department rules and regulations by using obscene, abusive or insolent language and by threatening another with bodily harm or with any offense against another person, their property or their family." The disciplinary report charged the plaintiff with the following offenses: (1) offense 3-04: "[t]hreatening another

with bodily harm or with any offense against another person, their property or their family"; (2) offense 3-25: "[c]ommunicating, directly or indirectly with any staff member, contract employee, volunteer or their relatives at their home address"; (3) offense 3-26: "[u]se of obscene, abusive or insolent language or gesture"; (4) offense 3-30: "[a]ttempting to commit any of the above offenses"; (5) offense 4-04: use of mail in violation of regulations; and (6) offense 4-11: "[v]iolating any departmental rule or regulation." See 103 Code Mass. Regs. § 430.24 (2017). A disciplinary hearing was then scheduled.

Prior to the hearing, the defendant permitted the plaintiff and his attorney to review the letter. Because the defendant deemed the letter "view only" for safety and security reasons, the defendant denied the plaintiff's request for a copy of the letter. See 103 Code Mass. Regs. §§ 430.11(1) & (7) (2017). On November 28, 2018, the disciplinary hearing was held; however, it was continued to December 4, 2018, so that a copy of the letter's envelope could be produced and entered in evidence. At the hearing, the plaintiff's attorney presented evidence, examined witnesses, and argued to the disciplinary hearing officer, inter alia, that the letter was protected speech under the First Amendment because any threatening language did not rise to the level of a "true threat." The hearing officer found

the plaintiff "guilty of charges 3-30 [attempt] via 3-04 [threatening] and 3-26 [use of obscene, abusive, or insolent language]" and dismissed the other charges. As a result, the plaintiff received ten days in disciplinary detention and lost the use of the canteen for sixty days.

The plaintiff appealed the guilty finding to the superintendent, who denied the appeal. On March 7, 2019, the plaintiff filed an action in the Superior Court pursuant to G. L. c. 249, § 4, seeking relief from the disciplinary decision. After the defendant answered and filed the administrative record, the plaintiff moved for judgment on the pleadings and moved to correct the record and request that he have access to a copy of the letter.[1] The defendant cross-moved for judgment on the pleadings. The judge allowed the plaintiff's motion to correct the record in part, but otherwise denied the motion. The judge also allowed the defendant's motion for judgment on the pleadings, finding that substantial evidence supported the disciplinary decision, there were no due process violations, and the plaintiff did not demonstrate any prejudice resulting from the defendant's processing of the disciplinary report. The judge declined to address the

[1] Although the trial record contains a copy of the letter, the letter is marked "not for inmate retention."

plaintiff's First Amendment argument, concluding that it was "not properly before the court."

Discussion. 1. Standard of Review. We review de novo a decision allowing a motion for judgment on the pleadings. See UBS Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 405 (2019); Drayton v. Commissioner of Correction, 52 Mass. App. Ct. 135, 136 n.4 (2001). In considering an appeal from a hearing officer's decision, we review the administrative record "to correct substantial errors of law on the record that adversely affect material rights." Drayton, supra at 140. "Our review of a disciplinary proceeding is based on whether the record contains substantial evidence to support the hearing officer's decision." Puleio v. Commissioner of Correction, 52 Mass. App. Ct. 302, 305 (2001).

2. Protected speech. The plaintiff argues that the judge erred in finding that the letter constituted a sufficient basis for a guilty finding because the letter was a "valid exercise of [his] constitutional and statutory free speech rights." Because the judge concluded that the plaintiff's First Amendment argument was "not properly before the court," we first address whether the plaintiff preserved the argument for appeal.[2]

[2] Although a transcript of any hearing in the trial court may have shed light on the judge's conclusion, no transcript is in the record before us.

Whether a party raised an issue in the trial court, which is necessary to preserve the issue for appeal, requires a fact specific inquiry. See Boss v. Leverett, 484 Mass. 553, 563 (2020). That a trial judge determines that an argument is not before her does not end our inquiry. See M.H. Gordon & Son, Inc. v. Alcoholic Beverages Control Comm'n, 386 Mass. 64, 67 (1982). Here, the record demonstrates that the plaintiff did preserve his First Amendment argument. He argued that his letter was protected speech under the First Amendment at each stage of the administrative proceedings. In his complaint to the Superior Court, the plaintiff alleged that "the letter was a petitioning activity and otherwise protected speech under the First Amendment to the United States Constitution and concomitant rights under Articles 9 and 16 of the Massachusetts Declaration of Rights" and that the disciplinary hearing decision was in "violation of constitutional provisions." The plaintiff also asserted his free speech arguments in his motion for judgment on the pleadings. Accordingly, the plaintiff's First Amendment argument was "properly before" the judge.

Because we conclude that the plaintiff raised this argument, we must determine whether to address it in the first instance. "We generally decline 'to consider constitutional issues for the first time on appeal in order to avoid an unnecessary constitutional decision'" (citation omitted).

Commonwealth v. Guzman, 469 Mass. 492, 500 (2014). However, we may exercise our discretion "to consider important questions of public concern" for the first time on appeal where the record is complete. Gagnon, petitioner, 416 Mass. 775, 780 (1994). Here, we exercise our discretion to decide the issue. As discussed supra, the plaintiff has raised his free speech arguments at every stage of the proceedings. The record is complete, and no issues of fact remain unresolved. In addition, the parties presented and argued the First Amendment issue.

The plaintiff contends that the statements in the letter are constitutionally protected and do not constitute "true threats" under the First Amendment.[3] The plaintiff contends that the letter contains no evidence of an intent to commit an unlawful action against the Governor and his family and that, because he is serving a life sentence without parole, a reader of the letter could not believe that he "could actually make good on any kind of threat." Accordingly, he argues, the sending of the letter constituted a valid exercise of free

[3] The plaintiff also argues that the letter is protected under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. He does not suggest, however, that we analyze art. 16 separately from the First Amendment in this instance. See O'Brien v. Borowski, 461 Mass. 415, 422 (2012) (discussing unprotected speech under both First Amendment and art. 16 of Massachusetts Declaration of Rights).

speech that cannot be the basis of a disciplinary action. We disagree.

True threats are an unprotected class of speech under the First Amendment. O'Brien v. Borowski, 461 Mass. 415, 422 (2012). "'True threats' encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat." Id. at 423, quoting Virginia v. Black, 538 U.S. 343, 359-360 (2003).

Here, the statements contained in the letter, when read together, evince a "serious expression of an intent to commit an act of unlawful violence" directed to the Governor and his family.[4] Id. That the statements arguably do not convey an overt threat does not affect our analysis. See Commonwealth v. Chou, 433 Mass. 229, 236 (2001) (true threats are those that intend "to place the target of the threat in fear, whether the threat is veiled or explicit"). Moreover, contrary to the plaintiff's argument that he could not "actually make good on

[4] The statements include, but are not limited to, the following: "[i]ts apparent that you rotten crackers only respect violence," "I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart of corrupt, hatred that continues to cause division, unrest among the raciest," and "[i]f you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family, and those of color to there will be no doubt about my commitment to right this wrong."

any kind of threat," there need not be evidence "that the threat will be immediately followed by actual violence or the use of physical force" for a statement to constitute a true threat. O'Brien, 461 Mass. at 424, quoting Chou, supra at 235. Cf. Commonwealth v. Ditsch, 19 Mass. App. Ct. 1005, 1005 (1985) (that defendant was incarcerated when he mailed threat to victim and did not have "immediate ability, physically and personally, to do bodily harm" did not preclude conviction for threats; recipient of threat could reasonably have believed that defendant had ability to carry out threat "through the employment of an agent").

The plaintiff's argument that his statements in the letter are analogous to the statement at issue in Watts v. United States, 394 U.S. 705, 706 (1969), is unavailing. In Watts, the petitioner stated at a political rally that, if inducted into the Army and made to carry a rifle, "the first man I want to get in my sights is L.B.J." Watts, supra. The "statement was made during a political debate, . . . it was expressly made conditional upon an event -- induction into the Armed Forces -- which [the speaker] vowed would never occur, and . . . both [the speaker] and the crowd laughed after the statement was made." Id. at 707. The United States Supreme Court concluded that, based on those factors, this speech was political hyperbole, constituting a "very crude offensive method of stating political

opposition to the President." Id. at 708. Here, the plaintiff's statements have no expressive purpose, they did not add to or comment on public discourse. See Chou, 433 Mass. at 236. Nor were they conditional or followed by laughter by the plaintiff or any listeners. Rather, the statements are a veiled threat intended to place Governor "Baker, Family" in fear of violence. Because we conclude that the plaintiff's letter contained unprotected "true threats," the letter was a sufficient basis for disciplinary action.[5]

The plaintiff does not otherwise challenge the judge's conclusion that substantial evidence supported the hearing officer's determination that the plaintiff's statements in the letter "were insolent and threatening when read as a whole" and that there was "sufficient evidence in the record to support" that "[the plaintiff] was guilty of attempting to commit an offense because the letter was not received by Charles

[5] The plaintiff also argues that the letter constituted a protected petitioning activity under the First Amendment, art. 19 of the Massachusetts Declaration of Rights, and pursuant to G. L. c. 127, § 87. Because we determine that the plaintiff's speech was unprotected, we conclude that there was no violation of his right to petition. To the extent that the plaintiff argues that the regulations as applied to him abridged his First Amendment rights, this argument too is unavailing where we conclude that the letter was not protected speech under the First Amendment.

Baker/family" (emphasis omitted). We discern no error in the judge's conclusion.[6]

3. Due process. The plaintiff next contends that the judge erred in finding that the "disciplinary hearing was properly conducted" and satisfied due process. We agree with the judge that there was no due process violation here, albeit for different reasons. See French King Realty Inc. v. Interstate Fire & Cas. Co., 79 Mass. App. Ct. 653, 659 (2011) ("This court may affirm a motion judge's ruling on any ground, even if it differs from the reason relied upon by the judge"). Although the judge determined that procedural due process was satisfied under the test enunciated in Wolff v. McDonnell, 418 U.S. 539, 563-567 (1974), before we reach that analysis, under the Federal Constitution, an inmate has procedural due process protections only if an existing liberty or property interest is at stake. See Sandin v. Conner, 515 U.S. 472, 484 (1995); Torres v. Commissioner of Correction, 427 Mass. 611, 617, cert. denied, 525 U.S. 1017 (1998). A liberty interest is infringed upon where a restraint imposes an "atypical and significant

[6] The plaintiff argues that we should abrogate the "judicially-created rule of deference" towards the defendant. Because he did not raise this argument in the trial court, it is waived on appeal. Cacicio v. Secretary of Pub. Safety, 422 Mass. 764, 769 n.9 (1996). Regardless, we note that "this principle is deference, not abdication." Warcewicz v. Department of Envtl. Protection, 410 Mass. 548, 550 (1991). On the record before us, we discern no error in the judge's deference to the defendant in her decision.

hardship on the inmate in relation to the ordinary incidents of prison life." Sandin, supra. See Torres, supra, at 617-618.

Here, the plaintiff received ten days in disciplinary detention and lost the use of the canteen for sixty days. Our case law establishes, and the plaintiff has not argued to the contrary, that this disciplinary sanction is not an atypical and significant hardship compared to ordinary prison life that results in the deprivation of a liberty interest. See Puleio, 52 Mass. App. Ct. at 306 ("Ten days' detention in a disciplinary segregated unit does not present the type of atypical, significant deprivation in relation to ordinary incidents of prison life that results in infringement of a liberty interest"); Drayton, 52 Mass. App. Ct. at 138 (thirty days in isolation, loss of visitation privileges for one year, and transfer to higher security prison did not infringe on prisoner's liberty interests). See also Sandin, 515 U.S. at 486 (thirty days in segregated confinement "did not present the type of atypical, significant deprivation" that might create liberty interest).[7]

[7] On appeal, the plaintiff also asserts his due process rights under art. 12 of the Massachusetts Declaration of Rights. This argument does not appear in the trial record, however, and is waived. See Cacicio, 422 Mass. at 769 n.9. Even assuming the plaintiff preserved the argument and established an "atypical and significant hardship," on the record before us, we conclude that his due process rights under art. 12 were not violated. See Torres, 427 Mass. at 618 & 619 n.11.

The plaintiff also contends that the defendant violated due process by failing to comply with its own regulations. See Drayton, 52 Mass. App. Ct. at 139-140 (even where punishment does not implicate a liberty interest, prisoners may still allege that prison officials failed to adhere to process required in department regulations). This argument is unavailing.

The plaintiff first argues that the defendant failed to apprise him of the proscribed conduct that was the basis of his later punishment in violation of 103 Code Mass. Regs. § 430.09(3) (2017). This regulation requires, in relevant part, that "[a]t all levels of review, the disciplinary report shall be reviewed for accuracy." Here, the disciplinary report provided a list of the offenses that the plaintiff was accused of, stated that the offenses stemmed from the letter the plaintiff sent to Governor "Baker, Family," and used excerpts from the letter to support the offenses charged in the report. To the extent that the report did not quote the precise portions of the letter that the hearing officer's decision relied upon, the plaintiff has not shown how he was prejudiced by that omission. See Massachusetts Prisoners Ass'n Political Action Comm. v. Acting Governor, 435 Mass. 811, 824 (2002) (court's power on certiorari is not exercised to remedy mere technical errors that have not resulted in manifest injustice).

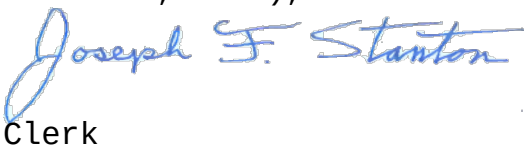
The plaintiff next argues that the defendant denied him a copy of the letter in violation of discovery rules in 103 Code Mass. Regs. § 430.11. The defendant "deemed the letter view only for safety and security reasons." As the judge noted, "[the plaintiff] and his counsel were permitted to view the letter before the hearing and did in fact review it prior to the hearing" and the plaintiff's counsel waived the forty-eight hour notice requirement and proceeded with the hearing. We discern no violation of the regulation. See 103 Code Mass. Regs. § 430.11(7). Moreover, we see no prejudice entitling the plaintiff to relief. See Massachusetts Prisoners Ass'n Political Action Comm., 435 Mass. at 824.

4. Access to the letter. The plaintiff contends that the judge erred in denying his request for a copy of the letter. We disagree. As discussed supra, the defendant determined that the letter was "view only for safety and security reasons" and therefore limited the plaintiff's access to the letter during the disciplinary proceedings. See 103 Code Mass. Regs. § 430.11(7). On appeal to the Superior Court, and to this court, the administrative record included a copy of the letter, which was marked "not for inmate retention." We see no error in the judge's decision to deny the plaintiff's request where he remains in the defendant's custody and the defendant is

responsible for maintaining safety and security. See Commonwealth v. Jessup, 471 Mass. 121, 129 (2015).

Judgment affirmed.

By the Court (Neyman, Sacks & Lemire, JJ.[8]),



Clerk

Entered: June 9, 2021.

[8] The panelists are listed in order of seniority.