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Disciplining Prisoners for Drug Use or Possession

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This is the third of a three-part series. Click [here](#) to read Part 1 and [here](#) to read Part 2.

Use of confirming tests

Under the mandated “some evidence” legal standard and burden of proof as discussed in the second article in this series, those seeking to impose discipline on prisoners for drug use and possession do not have a great burden to meet, but it is true that some kinds of preliminary [drug tests](#), such as the EMIT screening test, may sometimes elicit false positives. Such false positives may sometimes be detected and eliminated through the use of a second confirming test, such as a gas chromatograph test or a mass spectrometer test, which require careful lab conditions.

Must a second confirming test be utilized? A number of courts have found that such a second confirming test is not an essential legal requirement. See Jensen v. Lick, 589 F. Supp. 35 (D. N.D. 1984), ruling that a single unconfirmed EMIT test was sufficient for prison disciplinary purposes, Smith v. State, 298 So. 2d 483 (Ga. 1983), approving the revocation of probation on the basis of an unconfirmed positive EMIT test, and several other cases holding that one positive unconfirmed test satisfies the “some evidence” burden of proof in prison disciplinary hearings. Driver v. State, 576 So. 2d 675 (Ala. Crim. App. 1991), Harrison v. Dahm, 911 F. 2d 37 (8th Cir. 1991), and Persanzo v. Coughlin, 608 F. Supp. 1504 (S.D.N.Y. 1987).

In Pelua v. Adams, 723 F. Supp. 1394 (D. Nev. 1989), the court rejected the argument that it was required to allow the conducting of an additional test at the expense of the prisoner. See also Koenig v. Vannelli, 971 F.2d 422 (9th Cir. 1992), also rejecting such a requirement.

Some states or localities, however, at times have adopted requirements concerning the conducting of second confirming tests (or who must conduct them) as a matter of their own laws or regulations. In Simpkins v. Riley, 598 N.Y.S.2d 352 (A.D. 1993), for instance, the discipline of a N.Y. prisoner for twice testing positive for cocaine on drug tests had to be annulled when no effort was made to comply with state regulation requiring that second, confirming, test be conducted by a “different trained individual” if available.

In Alexander v. Gilmore, 202 F. Supp. 2d 478 (E.D. Va. 2002), the court ruled that prisoners could not pursue their claim that convicting them of drug use in a disciplinary proceeding without a confirmatory drug test violated their right to due process when they had not previously had their disciplinary conviction set aside.

Dismissing the case, a federal trial court found that a prisoner’s claim that their federal constitutional rights to due process were violated when they lost good-time credits for being under the influence of drugs or intoxicants without being afforded a confirmation drug test was “not cognizable under 42 U.S.C. Sec. 1983” until the prisoner has succeeded in vacating his institutional conviction. The court cited Edwards v. Balisok, 520 U.S. 641 (1997) for this rule.

In Claypool v. Nebraska DCS, #A-02-812, 667 N.W.2d 267 (Neb. App. 2003), the court held that evidence of a positive drug test, a positive retest, and a positive independent retest which the prisoner requested were sufficiently reliable to support his disciplinary conviction for drug use. Direct testimony by the director of a laboratory that did the testing was not necessary when documentation was presented at the hearing concerning the reliability of the testing procedure and the chain of custody of the sample tested.

In Sabater v. Selsky, 772 N.Y.S.2d 733 (A.D. 3d Dept. 2004), the failure of a misbehavior report to use the term “cannabinoids” in describing the positive results of an accused prisoner’s second urine drug screening test was insufficient as a basis to overturn a guilty determination in a prison disciplinary proceeding. The report was adequate in

stating that the first drug test indicated the use of cannabinoids, and that the second test “also proved positive.”

In [Louis v. Dep’t of Corr. Servs. of Nebraska](#), #05-1211, 437 F.3d 697 (8th Cir. 2006), a federal appeals court upheld the constitutionality of a Nebraska prison’s urine sample collection and testing procedures, which included provisions for confirming tests in some instances.

Under the drug-testing program, inmates at the Nebraska State Penitentiary (NSP) are required to provide urine samples to be tested for drug use. Correctional officers or caseworkers collect the samples, which are then submitted to a laboratory that is adjacent to the prison hospital.

The collector takes a sealed cup, shows it to the inmate, breaks the seal, and labels the cup with the inmate’s name and number. The prisoner then urinates in the cup in the presence of the collector and returns it. The collector places a form reflecting the receipt of the sample in an evidence box and takes the sample cup and its corresponding evidence card, which is used to record the chain of custody, to the hospital, where the sample is refrigerated pending lab testing.

Trained lab technicians use the fluorescence polarization immunoassay (FPIA) testing method, which an expert witness for the defendant correctional officials testified is approximately 95% accurate. If that test is positive for drug metabolites, the technician reruns it. When a second test is positive, and the inmate’s medical records do not reflect the use of prescribed medications that could provide a false positive, the technician sends the specimen report and evidence card to the prison disciplinary board.

State law also allows an accused inmate to request an independent test of the urine sample in a private lab using gas chromatography/mass spectrometry (GC/MS) testing, which is more accurate and more expensive than the FPA, and has a typical cost of \$30, although the cost can be as much as \$90, depending on the drug at issue. The inmate pays the cost of the confirmatory GC/MS test if the sample tests positive for drugs.

The inmate accused of drug use can call witnesses at his disciplinary hearing but not the lab technician, who provides a written statement of the procedures used in the lab.

The appeals court agreed that the prisoners had a protected liberty interest in not being arbitrarily deprived of their good-time credits, a punishment for drug violations, and were therefore entitled to due process in the drug testing and disciplinary proceedings.

The appeals court found nothing wrong with the current urine sample collection procedure and rejected the argument that due process required that the inmate himself sign and seal the specimen. There was no evidence that the current collection procedure had resulted in erroneous deprivations of good-time credits, and the procedures used conform to practices used in private employer workplace drug testing. They were found to be “adequate to ensure reasonably reliable results.”

The appeals court also found nothing wrong with the testing procedures, or the fact that prisoners who wanted a confirmatory GC/MS test were made to pay for it if that test was also positive for drugs.

Finally, it found that the refusal to permit prisoners to call lab technicians as witnesses at disciplinary hearings was justified by the “need to manage the environment of a prison and to maximize the productivity” of the technicians employed. The written statements by the technicians provided to inmates concerning the testing procedures and the qualifications of the lab supervisor, along with reports of the drug tests themselves, were found to be adequate.

While confirming tests are not legally required, it is suggested that they should be done if time and resources will allow without unnecessary delay, to enhance the reliability of results, and avoid, to the extent possible, punishing innocent prisoners on the basis of “false positives.”

State law procedural requirements

A good amount of attention was directed in earlier articles in this series to the requirements of federal constitutional law as to due process in prison disciplinary cases. It would be a real mistake, however, not to look beyond that and carefully examine the state statutes, caselaw, administrative codes, and policies and procedures in one’s own jurisdiction that apply in prison disciplinary proceedings.

In [Roman v. Coughlin](#), 609 N.Y.S.2d 732 (A.D. 1994), for example, a court ruled that a New York prisoner could not be disciplined for violating a rule requiring that he submit to urinalysis drug testing when he was not informed, as state law provided, of the penalties that could accompany any refusal. Such state law procedural requirement operates independently from federal constitutional law. Due process as mandated by the Constitution and the decisions of the federal courts, constitute a required minimum which states are not free to ignore, but which they are allowed to supplement and go beyond.

This may apply to the sanctions that may be applied as well to the procedural rules for discipline. In the case of [In re Dikes](#), No. A104121 121 Cal. App. 4th 825;18 Cal. Rptr. 3d 9 (Cal. 1st App. Dist. 2004), for instance, a California prisoner’s disciplinary punishment for possession of drugs was adequately supported by “some evidence” based solely on positive urinalysis test, even if it would have been insufficient under state law to support a criminal conviction. A loss of 120 days of good time credits, however, was excessive under a state statute.

Particular rights or requirements may also be imposed by state law concerning the calling of witnesses in prison disciplinary cases involving drugs. Sometimes, based on the particularities of the charges against the prisoner, the failure to call a specific witness against him may be fatal to the prospects for a disciplinary conviction.

Discipline imposed on a prisoner for alleged drug dealing in a facility was properly set aside, one court held, when the corrections officer who wrote a report based on confidential informants' testimony was not called as a witness at the hearing, as the statements provided by the confidential informants lacked "any degree of reliability or trustworthiness."

Further, a mandatory rule of the Louisiana Department of Public Safety and Corrections provided that "The accusing employee must be summoned when the report is based solely on information from Confidential Informants." [Singleton v. State of Louisiana Department of Public Safety & Corrections](#), #2003 CA 1294 (La. App. 1st Cir. 2004).

Prison discipline and collateral consequences

Disciplining a prisoner for drug possession or use may, in some instances potentially lead to collateral consequences apart from the sanctions imposed by a disciplinary hearing.

As the case of [Anderson v. Recore](#), #05-4096, 446 F.3d 324 (2nd Cir. 2006), illustrates, however, it is sometimes necessary that such collateral consequences not be automatic results of the discipline, but be examined in their own right, with appropriate due process when required.

In this case, a federal appeals court ruled that the removal of a New York prisoner from a work release program for use of cocaine without providing him with notice and a hearing violated his due process rights.

The removal occurred after he was accused of engaging in the use of cocaine. The prisoner faced disciplinary charges regarding his drug use for which he had been found guilty during a separate disciplinary proceeding. The appeals court, however, found that the prisoner had a liberty interest in continuing his participation in the work release program, and was therefore entitled to procedural due process before his removal.

This was the case because, under the applicable rules, the disciplinary conviction and any factual determinations that it made concerning the prisoner's drug use did not deprive the committee in charge of temporary work release program of the use of its discretion to continue his participation in the program, so that his removal from the program was not automatic.

The defendants, therefore, in allegedly not giving him notice and a hearing at which he could be heard prior to removing him from the program for the use of cocaine, violated his due process rights.

The court found that the defendants were entitled to qualified immunity from liability, however, because reasonable persons could have believed that they had no discretion to continue his participation in the program after the drug use charges, which formed the basis for his removal, were sustained at the disciplinary hearing, and after he was

confined to the prison for 30 days as a result of the disciplinary hearing. Under these circumstances, they could have reasonably believed that no further hearing was required.

Before imposing collateral consequences on a prisoner following discipline for drug use and possession, the question of whether the prisoner may have some independent right, under federal or state law, to continued participation in work, education, vocational training, recreation, exercise, or religious activities and programs should be determined. Prisoners who violate rules concerning drug possession and use must face meaningful consequences to deter and punish, but at the same time, unrelated rights should be respected, and careful consideration should accompany any decision to deprive prisoners of activities and programs that may aid in their rehabilitation or which may increase their well being or health, physical or mental.

Recommendations

While no single approach to drugs in correctional institution can fit all circumstances, the following are some general recommendations that we believe are widely applicable and should be followed as to dealing with drug-related prisoner discipline.

1. Written policies should be developed, adopted, and periodically reviewed to ensure that they are working and that they can be modified to adjust to changing circumstances in your facility, in the law, and new developments in drug testing technology.
2. Written materials should be provided to all prisoners setting forth the facility's drug possession and testing policies, including the penalties for infractions, and information about testing procedures to be followed.
3. Preliminary drug testing protocols such as EMIT testing are sufficient so long as the one selected has been tested for reliability and all personnel have been properly trained in its use;
4. Confirming tests should be done if time and resources will allow without unnecessary delay;
5. Careful measures should be taken to preserve the chain of custody of test specimens.
6. Test results should always be communicated to the prisoner;
7. Disciplinary hearings may be postponed for a brief period of time if necessary to allow for testing to be completed;
8. Charges based on use and/or possession of drugs should be supported by some test of the substance as opposed to a staff member's conclusion;

9. It is not necessary to provide detailed evidence of the testing procedure at a disciplinary hearing so long as a protocol is used (and followed) which has been determined to be reliable;
10. A prisoner is not entitled to have his own test done on the sample by his own procedure or laboratory;
11. The specimen may be destroyed once the testing and hearing have been completed; and,
12. Records of testing of the equipment and training of staff should be kept. Such testing and training must be revisited on a periodic basis.

The goal should be to institute testing and disciplinary procedures that are fair in fact, that prisoners come to expect as a matter of routine, and that prisoners can perceive as fair and predictable rather than arbitrary and capricious.

Conclusion

This three-part article has reviewed some of the key issues that may arise in connection with disciplining prisoners for drug use or possession. While it would probably constitute a mere fantasy to think that correctional facilities can be rendered truly drug free, it is not too much to hope for that well thought out and executed drug testing programs and measures adopted to control the smuggling of contraband can greatly reduce it and bring it within manageable bounds.

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