



ISSN 1935-0007

Cite as: 2010 (10) AELE Mo. L. J. 301

Jail & Prisoner Law Section – October 2010

Disciplining Prisoners for Drug Use or Possession

Contents Part One (This issue)

- **Introduction**
- **Use of drug test results for disciplinary purposes**
- **Chain of custody of samples for drug testing**
- **Refusal to comply with drug testing procedures**
- **Resources and References**

Contents Part Two (Nov. issue)

- **A lower burden of proof than in criminal drug cases**
- **Procedural and evidentiary issues in disciplinary proceedings**
- **Retaliatory filing of disciplinary drug charges**

Contents Part Three (Dec. issue)

- **Use of confirming tests**
- **State law procedural requirements**
- **Prison discipline and collateral consequences**
- **Recommendations**
- **Conclusion**

Introduction

Drug use and possession in jails and prisons is a major problem. Substantial numbers of prisoners were substance abusers prior to their incarceration.

According to one [report](#), while the U.S. has only 5% of the world's population, it consumes two-thirds of the world's illegal drugs. It also states that 1.5 million of the 2.3 million inmates in U.S. prisons (65%) meet medical criteria for either alcohol or other drug abuse and addiction, and another 20 percent, 458,000, while not meeting those criteria, were nevertheless substance involved at the time of their crimes (under the influence of drugs or alcohol, violating drug or alcohol laws, or stole to buy drugs).

Substantial resources are devoted to attempting to prevent the introduction of drugs into correctional facilities, and their presence there increases the risk of violence, including attacks on employees and fights among inmates concerning drug transactions. Drugs in prisons can also strengthen the hand of gangs.

Despite all efforts to keep illegal drugs and unauthorized prescription medicines out of prisoner hands, prisoners do manage to get these substances, which are brought in by newly arriving prisoners, by visitors, and even, in some instances, by corrupt employees.

The focus of this article is on disciplining prisoners for drug use or possession. It does not address [Fourth Amendment](#) issues that may arise in the context of drug testing and searches of prisoners, their cells, incoming correspondence, visitors, or employees for drugs. It also does not address cases focused solely on the reliability of various drug testing techniques, or concerning the observation of prisoners providing urine samples. At the end of this first part of this three-part article, there are a number of relevant resources and references listed.

Use of drug test results for disciplinary purposes

Prisoners have rights to fair procedures (due process) in the imposition of discipline, if the discipline will deprive them of a constitutionally protected liberty interest, such as the loss of good-time credits, or subject them to an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” See [Wolff v. McDonnell](#), #73-679, 418 U.S. 539 (1974), [Baxter v. Palmigiano](#), #74-1187, 425 U.S. 308 (1976), and [Sandin v. Connor](#), #93-1911, 515 U.S. 472 (1995).

The elements of due process in this context include receiving written notice of the claimed violation, an opportunity to be heard if the prisoner wishes, time within which to prepare a defense, having an independent fact-finder, the right to offer evidence and call witnesses, a written decision of the determination, and assistance in presenting a defense, if needed.

Prisons and jails may impose discipline on prisoners for drug use and possession, and may use drug-screening tests as the basis for such discipline, but must comply with these requirements.

In [Allen v. Reese](#), #02-2337, 52 Fed. Appx. 7 (Unpub. 8th Cir. 2002), the court ruled that the disciplinary process that found an inmate guilty of possessing anti-depressant drugs not prescribed for him by the medical staff did not violate his due process rights. He was provided with written notice of the charges, and he waived the opportunities to present witnesses or to be represented during the hearing. See also [In Re Dikes](#), #A104123, 18 Cal. Rptr. 3d 9 (Cal. App. 1st Dist. 2004), concluding that a urinalysis test that was

positive for the controlled substance TCH (Cannabinoids) was “some evidence” sufficient to uphold a disciplinary hearing’s finding that a prisoner possessed contraband in violation of prison rules.

Discipline of a prisoner charged with use of multiple drugs may be upheld even if there is only evidence sufficient to support the use of one of them. In [Smith v. Coughlin](#), 594 N.Y.S.2d 95 (A.D. 1993), for example, a prisoner who tested positive for opiates and cocaine could not challenge the discipline based on a theory that consumption of poppy seeds resulted in a false positive for opiates, since the positive drug test for cocaine, standing alone, was sufficient to support the discipline imposed.

The failure of correctional officials to provide a prisoner with the actual lab reports resulting from his random drug test at his disciplinary hearing did not violate his due process rights. In this case, the Vermont Supreme Court upheld a “zero tolerance” policy against use of illegal drugs. Correctional officials, it said, need not set a “threshold level” for indications of drug use found in inmate's urine to convict him of a rule violation. [King v. Gorczyk](#), #02-180, 825 A.2d 16 (Vt. 2003).

As long as a prisoner is afforded the ability to call witnesses, due process is not violated by his failure to actually call them. In [Perez v. McKean](#), #05-1034, 136 Fed. Appx. 542 (Unpub. 3rd Cir. 2005), the court noted that the prisoner was not prevented, at a disciplinary proceeding concerning alleged drug use, from presenting evidence that the medication he was taking at the time caused a false positive urinalysis test result for THC metabolite. His disciplinary loss of good time credits therefore did not violate his right to due process.

A prisoner was not denied adequate legal assistance at prison disciplinary hearing, which found him guilty of rule violations arising out of a urine sample that tested positive for opiates, a court ruled. The prisoner was allowed the assistance of a prison teacher at the hearing, and prisoner made an explicit statement at the hearing that he was satisfied with this assistance. The determination of the hearing was adequately supported by some evidence of the prisoner’s guilt. The right to assistance at a disciplinary hearing does not mean the right to a lawyer. [Alicea v. Howell](#), #03-CV-65071, 387 F. Supp. 2d 227 (W.D.N.Y. 2005).

A prisoner’s right to call witnesses is not unlimited. In [Graziano v. Selsky](#), #94565, 779 N.Y.S.2d 848 (A.D. 3d Dist. 2004), the court ruled that a prisoner was not improperly denied the right to call witnesses at the disciplinary hearing finding him guilty of violating prison rules against the use of controlled substances based on the hearing officer’s refusal to allow him to call every other prisoner who provided a urine sample on the same date. The finding of guilt was based on substantial evidence and the prisoner

failed to explain what all these witnesses would add, other than arguments based on “pure speculation.”

See also [Louis v. Dep't of Corr. Servs. of Nebraska](#), # 05-1211, 437 F.3d 697 (8th Cir. 2006), holding that prison rules prohibiting inmates from calling drug testing lab technicians as witnesses at disciplinary hearings were not a violation of procedural due process. The court also upheld the constitutionality of Nebraska prison's urine sample collection and testing procedures.

Chain of custody of samples for drug testing

One requirement that most courts have been concerned about is the issue of the chain of custody of prisoner urine samples used for drug testing. Without a clear chain of custody for the samples tested, how can one be sure the sample that tested positive actually came from the prisoner, particularly as many prisoners are tested and testing labs process hundreds or thousands of samples in any given timeframe.

In [Martin v. State](#), 616 So.2d 384 (Ala. Cr. App. 1993), the court held that the failure to show chain of custody of urine sample that tested positive for drug use entitled prisoner to a new disciplinary hearing. Similarly, in [Byerly v. Ashley](#), 825 S.W.2d 286 (Ky. App. 1991), the court ruled that an inmate should not be punished for positive results on urinalysis drug test when chain of custody of urine sample was not established once the sample reached the testing laboratory.

A prisoner was entitled to a judicial review of a disciplinary report concerning his alleged drug use after asserting that his urine sample was switched with that provided by his cell mate for purpose of the drug test, and providing affidavits concerning the alleged violation of the specimen collection and drug testing procedures. [Henderson v. Crosby](#), #2D04-1761, 891 So. 2nd 1180 (Fla. App. 2nd Dist. 2005).

See also [Bourgeois v. Murphy](#), 809 P.2d 472 (Idaho 1991), concluding that discipline of a prisoner based on a single, unconfirmed positive drug test had to be overturned based on inadequate procedures for guaranteeing the chain of custody of urine samples.

In [Montalbo v. Selsky](#), 752 N.Y.S.2d 920 (A.D. 2003), on the other hand, the court found that any questions regarding the chain of custody of the prisoner's urine samples, which was the basis for the finding that he violated prison disciplinary rules prohibiting the use of controlled substances twice, were sufficiently explained in the course of the testimony presented at the disciplinary hearing. Similarly, in [Curry v. Coughlin](#), 573 N.Y.S.2d 774 (A.D. 1991), a prisoner failed to establish a flaw in the chain of custody of his urine sample; “speculation” about a mix-up in samples was insufficient to overturn discipline for failing a drug test.

A disciplinary conviction of a prisoner for the unauthorized use of controlled substances was sufficiently supported by a correctional officer's testimony that he collected the prisoner's urine sample and kept the sample secured and in his possession, preserving the chain of custody prior to testing. [Saif'Ul'Bait v. Goord](#), 788 N.Y.S.2d 712 (A.D. 3d Dept. 2005). See also [Odome v. Goord](#), 779 N.Y.S.2d 603 (A.D. 3d Dept. 2004), in which a court concluded that the chain of custody of the urine sample was maintained properly, and upheld a disciplinary determination that a prisoner violated rules against the use of controlled substances, and [Davis v. Selsky](#), 759 N.Y.S.2d (A.D. 3d Dept. 2003), as well as [Otero v. Selsky](#), 779 N.Y.S.2d 648 (A.D. 3d Dept. 2004), in both of which the chain of custody of the prisoner's urine sample was adequate.

Minor technical errors may be ignored. For example in [Maldonado v. Selsky](#), 557 N.Y.S. 2d 746 (A.D. 1990), discipline against the prisoner was upheld despite a one digit error in recording his number of the form. Everything else was accurate, including his name, cell number, location, and date. See also [Lucas v. Voirol](#), #2003-CA-001811-MR, 136 S.W.3d 477 (Ky. App. 2004), in which disciplinary finding against prisoner for violating rules against marijuana use was supported by sufficient evidence, including drug test results which were admissible despite certain problems concerning the chain of custody of a urine sample, where the sample was clearly identified and had an intact seal when it arrived in a reasonable period of time at the testing lab.

One federal appeals court ruled that a prisoner could be disciplined for drug use on the basis of drug test even with an incomplete chain of custody on urine sample. [Thompson v. Owens](#), #89-5149, 889 F.2d 500 (3rd 1989). The court noted that the prisoner did not allege that prison officials or employees tampered with the samples, nor did he allege that they failed to follow their own procedures. The court concluded that the prisoner did not present a viable constitutional claim and that a chain of custody requirement would be nothing more than an improper independent assessment into the reliability of the evidence.

Refusal to comply with drug testing procedures

A prisoner knows whether or not he or she has used drugs. It is no surprise then that some prisoners attempt to avoid being punished for such use by refusing to submit to drug tests or coming up with reasons why they cannot supply a urine sample. Some prisoners, of course, may actually be unable to produce a sample immediately, and testing procedures must allow such prisoners an adequate time within which to do so.

Failure to comply with direct orders to submit to drug testing procedures, however, in itself can be a disciplinary offense subject to punishment. Courts have upheld sanctions imposed on prisoners for such non-compliance, rendering their actions ineffective as a way of avoiding punishment.

In [Guillen v. Finnan](#), #06-3970, 2007 U.S. App. Lexis 21031 (Unpub. 7th Cir.), the court stressed that a prisoner's refusal to submit a urine sample for the purposes of drug testing was not constitutionally protected conduct, and he could be properly disciplined for a violation of prison rules requiring him to do so. A prison was not required to have "probable cause" to conduct such testing, and could do so on a random basis.

In an earlier case, [Forbes v. Trigg](#), 976 F.2d 308 (7th Cir. 1992), the same court held that a prisoner's rights were not violated by disciplining him for refusal to take urine drug test; his work in a barber shop in a building where outsiders came created possibility of prisoners obtaining contraband from visitors or other outsiders.

Similarly, in [Brown v. Goord](#), 795 N.Y.S.2d 407 (A.D. 3rd Dept. 2005), a prisoner who left a urinalysis testing area was properly found guilty of violating drug testing procedures and disobeying a direct order. The fact that a regulation allowed a prisoner who could not immediately provide a urine sample in response to an order to do so within three hours did not alter the result, since the discipline was not imposed on the basis of his inability to immediately produce a sample, but rather on his decision, after being told of the consequences, of leaving the area before the three hour time period was expired.

A prisoner found guilty on disciplinary charges of failing to provide a urine sample for drug testing within a two-hour deadline was given all the process he was due, a court ruled. He received 24 hours notice of the charges against him, the opportunity to present evidence and call witnesses, and was given a written decision stating the evidence relied on and the reasons for the decision. There was some evidence to support a finding of willfulness in the failure to provide a urine sample within the time deadline, and no documented medical condition in the prisoner's records that would justify an extension of that deadline. [Void v. Warden](#), #08-2887, 2009 U.S. App. Lexis 20176 (Unpub. 3rd Cir.).

In [Ruggiero v. Goord](#), 796 N.Y.S.2d 752 (A.D. 3d Dept. 2005), the court upheld a determination that a prisoner was guilty of failing to obey a direct order and refusing to comply with instructions concerning urinalysis drug testing procedures. The result was supported by substantial evidence, including the testimony of the correctional officers who reported the incident.

See also [Medina v. Selsky](#), 814 N.Y.S.2d 828 (A.D. 3rd Dept. 2006), in which a court ruled that a New York prisoner was properly found guilty of refusing a direct order and refusing to comply with urinalysis testing procedures. He claimed to be unable to provide a requested urine sample, and then disregarded a direct order to go to a shower room until he was ready to provide such a sample, despite being told that such disobedience could result in the same punishment as a positive drug test.

In one interesting case, a court stated that a prisoner's alleged "stage fright," making it difficult for him to produce a urine sample for drug testing while being observed, was not a disability for purposes of the Americans With Disabilities Act (ADA). Oyague v. State of New York, #98 Civ. 672, 2000 U.S. Dist. Lexis 12426 (S.D.N.Y.).

Resources

The following are some useful resources related to the subject of this article.

- [Drugs and Drug Screening](#). Summaries of cases reported in AELE publications.
- [Drug Enforcement Administration](#).
- [Drug Use Estimates](#).
- Federal Bureau of Prisons, [Inmate Discipline](#), 28 C.F.R. Part 541.
- Federal Bureau of Prisons, [Drug Programs](#), 28 C.F.R. Part 550.
- [Office of National Drug Control Policy](#).
- [Prisoner Discipline](#). Summaries of cases reported in AELE publications.

References:

- Heino Stöver and Ingo Ilja Michels, "[Drug use and opioid substitution treatment for prisoners](#)," Harm Reduction Journal 2010, 7:17
- National Center on Addiction and Substance Abuse. "[Behind Bars II: Substance Abuse and America's Prison Population](#)," (Columbia University 2010).
- Office of National Drug Control Policy, "[2008 Arrestee Drug Abuse Monitoring Program \(ADAM II\)](#)," (May 2009).
- Seena Fazel Parveen Bains and Helen Doll, "[Substance abuse and dependence in prisoners: a systematic review](#)." Addiction 101:181-191 (2006).
- Bureau of Justice Assistance, "[Residential Substance Abuse Treatment for State Prisoners \(RSAT\) Program](#)," (April 2005).
- "[Screening and Assessing Mental Health and Substance Use Disorders Among Youth in the Juvenile Justice System: A Resource Guide for Practitioners](#)" (NCJ 204956) (December 2004).
- "[Drug Detection in Prison Mailrooms](#)." National Institute of Justice, U.S. Department of Justice (November 2004).
- Jennifer Wynn, "[Junk in the Joint: The Real Dope on the Prison Drug Scene](#)," Prison Life, pgs. 46-51 v&54-55 (Feb. 1996).

AELE Monthly Law Journal

Bernard J. Farber
Jail & Prisoner Law Editor
P.O. Box 75401
Chicago, IL 60675-5401 USA
E-mail: bernfarber@aele.org
Tel. 1-800-763-2802

© 2010, by the AELE Law Enforcement Legal Center

Readers may download, store, print, copy or share this article,
but it may not be republished for commercial purposes. Other
web sites are welcome to link to this article.

- The purpose of this publication is to provide short articles to acquaint the reader with selected case law on a topic. Articles are typically six to ten pages long. Because of the brevity, the discussion cannot cover every aspect of a subject.
- The law sometimes differs between federal circuits, between states, and sometimes between appellate districts in the same state. AELE Law Journal articles should not be considered as “legal advice.” Lawyers often disagree as to the meaning of a case or its application to a set of facts.

[AELE Home Page](#) --- [Publications Menu](#) --- [Seminar Information](#)