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Disciplining Prisoners for Drug Use or Possession

A lower burden of proof than in criminal drug cases

What burden of proof or evidentiary standard must be met in prison disciplinary hearings, including those for drug possession or use, at least those that may result in the prisoner being deprived of a constitutionally protected liberty interest, such as good time credits?

Criminal prosecutions, it is well known, including prosecutions for drug offenses, require proof "beyond a reasonable doubt." In civil proceedings that may result in the loss of certain highly protected interests, such as parental rights, "clear and convincing evidence" is required. And in the garden variety civil lawsuit seeking money damages, a plaintiff need only prevail by a "preponderance of the evidence" to prevail; in other words show that

their allegations are at least somewhat more likely to be true than false, even if only slightly.

The U.S. Supreme Court, in Superintendent, Massachusetts Correctional Institution at Walpole v. Hill, #84-438, 472 U.S. 445 (1985), ruled that the federally mandated minimum due process constitutional evidentiary burden of proof in a prison disciplinary proceeding resulting in the loss of good time credits is "some evidence," a standard far less stringent than "beyond a reasonable doubt," as well as actually less stringent than "clear and convincing evidence" or even the "preponderance o the evidence."

The Court noted that the loss of good time credits threatens a prisoner's prospective freedom from confinement, extending the length of his imprisonment. The prisoner therefore has a strong interest in seeing that he does not suffer such a loss arbitrarily. But at the same time, the Court was extremely concerned with accommodating that interest in an appropriate manner in the "distinctive setting of a prison, where disciplinary proceedings 'take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.'"

Given that context, the Court ruled as follows:

> "We hold that the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits. This standard is met if 'there was some evidence from which the conclusion of the administrative tribunal could be deduced . . . .' Ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context."

While this is a relatively easy burden to meet, "some evidence" cannot mean literally "none." In Bryant v. State, #CR-02-1556, 884 So.2d 929 (Ala. Crim. App. 2003), for instance, the court found that mere testimony by a correctional officer in a prison disciplinary proceeding that a plastic bag with a green leafy substance found during

another officer's pat down search of the prisoner contained marijuana was insufficient to support a determination of guilt. While scientific testing of the substance was not required to meet the "some evidence" standard applicable in a prison disciplinary proceeding, the officer's "mere conclusion" that the substance was drugs was inadequate, and there was no evidence about the qualifications of either officer to identify marijuana.

Similarly, in one case, the court found that imposing sanctions on a prisoner, including the loss of 151 days of good conduct time, for a charge of possession of a controlled substance was improper when there was no evidence that he possessed or even constructively possessed the heroin in question.

There was evidence that he asked someone outside the prison to send him heroin, and that it was concealed on a postcard addressed to him, but the postcard was intercepted by a guard in the prison mailroom. Since the only charge brought against the prisoner was "possession," and he never possessed the drugs, the court vacated the finding of guilt by the disciplinary hearing, and restored the prisoner's good conduct credits. In re Rothwell, #D051584, 164 Cal. App. 4th, 2008 Cal. App. Lexis 943 (4th Dist.).

In Alicea v. Howell, #03-CV-65071, 387 F. Supp. 2d 227 (W.D.N.Y. 2005), the court concluded that a prisoner was not denied adequate legal assistance at a prison disciplinary hearing that found him guilty of rule violations arising out of a urine sample that tested positive for opiates. 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.

A California prisoner's disciplinary punishment for possession of drugs was adequately supported by "some evidence" based solely on a positive urinalysis test, even if it would have been insufficient under state law to support a criminal conviction. The loss of 120 days of good time credits, however, was excessive under a state statute. In re Dikes, #A104121, 121 Cal. App. 4th 825, 18 Cal. Rptr. 3d 9 (Cal. 1st App. Dist. 2004).

In Void v. Warden, #08-2887, 2009 U.S. App. Lexis 20176 (Unpub. 3rd Cir.), the court concluded that there was some evidence to support a finding of willfulness in the failure of a prisoner to provide a urine sample within the mandated time deadline, and no documented medical condition in the prisoner's records that would justify an extension of that deadline.

The “some evidence” standard is a federal constitutional minimum. Individual states are free, as a matter of state law, to impose a greater burden than that if they choose, and some have.

New York, for instance, appears to apply a requirement that prison disciplinary convictions be supported by "substantial evidence," which is more than "some," but still far less than that required in criminal proceedings.

In Callender v. Goord, 809 N.Y.S.2d 218 (A.D. 3rd Dept. 2005), for instance, the court found that substantial evidence supported a disciplinary determination that a prisoner had violated rules against drug use. The court rejected the argument that positive urinalysis drug test results were caused by "residual traces" of earlier drug use for which the prisoner had already been disciplined, especially since the prisoner himself admitted that he had used marijuana at some time after the prior urine sample was collected.

See also Herring v. Goord, 750 N.Y.S.2d 373 (A.D. 2002), ruling that a disciplinary decision that a prisoner violated rules prohibiting the unauthorized use of a controlled substance was supported by "substantial evidence," including two positive urine tests for the presence of opiates and evidence that the tests and the storage and handling of the samples were properly carried out.

Procedural and evidentiary issues in disciplinary proceedings

A wide variety of procedural and evidentiary issues arise in the context of prison disciplinary hearings, including those involving drug use and possession. Some of them are a result of constitutional due process requirements such as adequate notice, the right to present a defense and call witnesses, etc., while others arise in the context of state law, including state administrative codes and regulations (which often impose very particular requirements, include time limits for filing or processing misconduct complaints.

Inmates have a right to call witnesses at the hearings, and sometimes have claimed that they were improperly denied the opportunity to do so. Such rights can, of course, be waived by the prisoner. Disciplinary process that found inmate guilty of possessing anti-depressant drugs not prescribed for him by the medical staff did not violate his due process rights. Prisoner was provided written notice of the charges, and he waived the opportunities to present witnesses or to be represented during the hearing. Allen v. Reese, #02-2337, 52 Fed. Appx. 7 (8th Cir. 2002).

The right to call witnesses does not give prisoners a license to waste the hearing officer's time with an endless stream of redundant witnesses who provide duplicative tales or are simply not in possession of relevant information. A court ruled in Graziano v. Selsky, 779 N.Y.S.2d 848 (A.D. 3d Dist. 2004), for instance, that a New York 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 prisoner failed to

explain what all these witnesses would add, other than arguments based on "pure speculation."

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

Issues sometimes arise concerning the hearing officer used to conduct disciplinary hearings. In Grillo v. Coughlin, 31 F.3d 53 (2nd Cir. 1994), the court ruled that a hearing officer's consultation with a more experienced hearing officer regarding an issue concerning drug testing did not violate the inmate's due process rights.

Prison disciplinary proceedings are not required to be highly technical, and may be somewhat informal compared to court proceedings. In Sabater v. Selsky, 772 N.Y.S.2d 733 (A.D. 3d Dept. 2004), the court reasoned that 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."

Similarly, while prisoners are entitled to know what evidence was relied on in reaching a disciplinary determination, a court found that 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. King v. Gorczyk, No. 02-180, 825 A.2d 16 (Vt. 2003).

Retaliatory filing of disciplinary drug charges

Separate and apart from any legal requirements for prison disciplinary action, it is clear that the courts will not sanction the taking of adverse actions against prisoners by correctional agencies, officials, or employees motivated by retaliation for their exercising their constitutionally protected First Amendment rights and intended to deter them from and punish them for doing so.

Prisoners who believe that they have been subjected to disciplinary charges, hearings, and sanctions in retaliation for such things as filing complaints or grievances against prison employees or officials, or pursuing lawsuits about prison conditions, can assert legal claims, including claims for money damages, for such retaliation. This topic is discussed in

more detail in Retaliation Against Prisoners for Protected First Amendment Expression, 2010 (3) AELE Mo. L. J. 301.

In a small number of instances, prisoners have asserted such claims in relation to prison disciplinary actions concerning drug use or possession.

Such claims of retaliatory discipline often require the prisoner to show that they are not guilty of the underlying drug offense, as the fact that a prison employee or official may have a motive to dislike or retaliate against the prisoner will not protect the prisoner against disciplinary action when, in the absence of the retaliatory motive, they would have otherwise been subjected to the discipline imposed anyway.

In Farver v. Schwartz, #00-3729EA, 255 F.3d 473 (8th Cir. 2001), for instance, the court ruled that a prisoner who lost good-time credits when he tested positive for drug use could not pursue a claim that an officer asked him to take the test in retaliation for filing a grievance against her unless the disciplinary determination was first set aside. The prisoner could, however, pursue claims of retaliation concerning the filing of allegedly false disciplinary complaints against him or his transfer in alleged retaliation for questioning an officer's authority to deny him legal assistance. Similar principles would apply to claims that drug use or possession disciplinary charges were falsely filed for retaliatory motives.

In one interesting case, a federal appeals court found that a prisoner was required to exhaust administrative remedies before proceeding with lawsuit challenging prison drug testing policies, which constituted a claim about "prison conditions," but he was not required to do so on claims that prison officials took retaliatory disciplinary actions against him individually. Giano v. Goord, #98-2619, 250 F.3d 146 (2nd Cir. 2001)

See also Oyague v. State of New York, #98 Civ. 6721 (TPG), 2000 U.S. Dist. Lexis 12426 (S.D.N.Y.), in which the court ruled 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), and additionally finding that the discipline of the prisoner for various misconduct charges was not retaliatory.

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