

RENDERED: February 13, 1998; 10:00 a.m.  
NOT TO BE PUBLISHED

NO. 97-CA-0352-MR

WILLIAM LEE JACKSON

APPELLANT

V. APPEAL FROM FLOYD CIRCUIT COURT  
HONORABLE DANNY P. CAUDILL, JUDGE  
ACTION NO. 96-CI-874

MICHAEL COOPER

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, HUDDLESTON, and KNOPF, JUDGES.

KNOPF, JUDGE. William Jackson, acting pro se, appeals an order of the Floyd Circuit Court entered on January 16, 1997, dismissing his petition for declaratory judgment brought pursuant to KRS 418.040. We affirm.

Jackson was an inmate at the Otter Creek Correctional Center in June 1996. On June 12, 1996, prison personnel performed a random urine drug test using the ONTRAK drug screening system. After obtaining one positive test result, Sergeant Steve Patton conducted a second ONTRAK drug test, which also indicated a positive result. Jackson was charged with violating Corrections Policies and Procedures (CPP) Category IV-2 involving the unauthorized use of drugs. After a preliminary investigation, the prison Adjustment Committee conducted a

hearing and found Jackson guilty of violating the prison regulation. The Adjustment Committee imposed a penalty of sixty (60) days forfeiture of good time. Jackson appealed the Adjustment Committee's findings to the prison warden, Michael Cooper, who concurred with the decision.

On December 9, 1996, Jackson filed a petition for declaratory judgment seeking reversal of the disciplinary action and expungement of the disciplinary report from his record on grounds the drug testing was unreliable. On December 26, 1996, Cooper filed an answer to the petition and a motion for summary judgment under Rule of Civil Procedure (CR) 56 with accompanying memorandum in support. Cooper maintained that Jackson received sufficient due process and there were no facts in dispute. On January 16, 1996, the circuit court issued an order dismissing the petition with prejudice. This appeal followed.

A petition for declaratory judgment pursuant to KRS 418.040 has become a common vehicle for prison inmates seeking review of their disputes with the Corrections Department. Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977); Graham v. O'Dea, Ky. App., 876 S.W.2d 621 (1994). While technically an original action, such inmate petitions share many of the aspects of appeals of administrative actions. In effect, the circuit court is acting as a court of review, and the review afforded is limited to the administrative record. The court seeks not to form its own judgment, but with due deference to the administrative body, it seeks to insure that the agency's

judgment comports with the legal restrictions applicable to it. American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Comm'n., Ky., 379 S.W.2d 450 (1964). The focal point for this judicial review is the existing administrative record. Thus, these petitions present circumstances in which the need for independent judicial fact finding is greatly reduced. The circuit court's fact finding capacity is required only if the administrative record does not permit meaningful review. Consequently, where principles of administrative law and appellate procedure are implicated in the circuit court's decision, the usual summary judgment analysis must be qualified. In these circumstances, summary judgment in favor of the prison authorities is proper if and only if the inmate's petition and any supporting materials, construed in light of the entire agency record (including, if submitted, administrator's affidavits describing the context of their acts or decisions), does not raise specific, genuine issues of material fact sufficient to overcome the presumption of agency propriety, and the authorities are entitled to judgment as a matter of law. Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 356 (1996).

Jackson argues the disciplinary action violated his constitutional rights to equal protection<sup>1</sup> and due process. More

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<sup>1</sup> The drug tests were conducted pursuant to a prison policy of random drug tests of inmates. Jackson's equal protection claim has no merit because he presents no factual or legal support for his equal protection claim. Therefore, we will not address this issue.

specifically, he contends the Abuscreen ONTRAK assay test for THC provides only a preliminary analytic test result and therefore is inherently unreliable. He points out that the documentation of the test's manufacturer suggests that a more specific alternate chemical method should be used to confirm the ONTRAK test. Thus, he asserts that the ONTRAK test is not sufficiently reliable on which to base prison disciplinary actions. He also maintains that the evidence utilized by the Adjustment Committee was unreliable because there was no chain of custody form prepared by the corrections officers.

The courts have recognized that internal prison security is a legitimate penological objective. See Procunier v. Martinez, 416 U.S. 396, 412, 94 S. Ct. 1800, 1811, 40 L. Ed. 2d 224 (1974). Procedural and substantive due process rights are necessarily circumscribed by the penological need to provide swift discipline in individual cases and the very real dangers of violence or intimidation in prison life. Ponte v. Real, 471 U.S. 491, 495, 105 S. Ct. 2192, 2195, 85 L. Ed. 2d 553 (1985). A highly deferential standard of judicial review is constitutionally appropriate with respect to both the fact finding that underlies prison disciplinary decisions and the construction of prison regulations. Smith v. O'Dea, 939 S.W.2d at 357. In Superintendent, Massachusetts Correctional Institution v. Hill, Walpole, 472 U.S. 445, 454, 105 S. Ct. 2768, 2773, 86 L. Ed. 2d 356 (1985), the United States Supreme Court articulated the quantum of evidence required to support a

decision in a prison disciplinary proceeding consistent with due process as "some evidence in the record." Accord Smith v. O'Dea, supra. The minimal "some evidence" standard, however, requires that the evidence relied upon by the fact finder have some indicia of reliability. See O'Dea v. Clark, Ky. App., 883 S.W.2d 888, 892 (1994); Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987).

In Spence v. Farrier, 807 F.2d 753 (8th Cir. 1986), the Court held that the EMIT (Enzyme Multiple Immunoassay Test) for urinalysis testing of prison inmates for suspected use of drugs, with a confirmatory second test, contained sufficient indicia of reliability to provide some evidence of drug use and to form a basis for disciplinary action. The Court noted that although it was conceivable that an inmate could be unjustly disciplined as a result of EMIT tests, the margin of error was insignificant in light of the institutional goals of discipline, order and security. Id. at 756. The Court said, "states need not implement all possible procedural safeguards against erroneous deprivation of liberty when utilizing results of scientific testing devices in accusatory proceedings." Id. (citing Wycoff v. Resiq, 613 F. Supp. 1504 (N.D. Ind. 1985)). In Spence, the Court listed several cases where courts have found EMIT testing sufficiently reliable to satisfy due process. Similarly, in Higgs v. Bland, 888 F.2d 443 (6th Cir. 1989), the Sixth Circuit found that a positive EMIT test result constituted "some

evidence" on which the Adjustment Committee could conclude a particular inmate was guilty of improper drug use.

Jackson argues that the drug test evidence presented to the Adjustment Committee was insufficient to support the disciplinary actions. We disagree. First, Jackson alleges that the results were unreliable because the corrections officers who administered the tests were not qualified laboratory technicians or authorized medical professionals. The appellee, however, presented evidence to the circuit court that both Sgt. Steven Patton and corrections officer Jimmy Gibson, who witnessed the tests, had attended workshops and received training by Roche Diagnostic Systems, the manufacturer of the ONTRAK testing procedure. In addition, a second confirmatory test was performed shortly after the first test with positive results on both occasions. Both tests were witnessed by Jimmy Gibson and Jackson. In Ransom v. Davies, 816 F. Supp. 681 (D. Kan. 1993), the Court described the ONTRAK test as an immunoassay test similar to the EMIT. The court indicated a testing procedure utilizing the ONTRAK testing system with a second confirmatory test, would be sufficient to satisfy due process and the "some evidence" standard of Superintendent v. Hill, supra. We believe the record and facts in our case support the decision of the Adjustment Committee finding Jackson guilty of improper drug use based on the multiple ONTRAK drug tests.

Jackson's contention that the circuit court's order of dismissal constituted a sua sponte dismissal in violation of the

principals enunciated in Gall v. Scroggy, Ky. App., 725 S.W.2d 867 (1987) (involving CR 12.02 motions) and Storer Communications v. Oldham County, Ky. App., 850 S.W.2d 340 (1993) (involving CR 56 motions) is without merit. The petition was served on the appellee, and he filed an answer and motion for summary judgment. Jackson had sufficient opportunity to supplement his petition and supporting memorandum of law. The record before the circuit court contained all the necessary documents associated with the Adjustment Committee's action. The circuit court stated its reasons for the dismissal in its order. Jackson has demonstrated no prejudice from the procedure used by the circuit court in handling the case. The circuit court's action was consistent with the standard for granting summary judgment in prison disciplinary actions as stated in Smith v. O'Dea, supra.

For the foregoing reasons, we affirm the judgment of the Floyd Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Lee Jackson, Pro Se  
West Liberty, Kentucky

BRIEF FOR APPELLEE:

No brief filed.