RENDERED: July 10, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-2129-MR

ERIC BRADLEY — APPELLANT

V.

APPEAL FROM OLDHAM CIRCUIT COURT
HONORABLE DENNIS A. FRITZ, JUDGE
ACTION NO. 97-CI-00254

STEVE BERRY, WARDEN — APPELLEE

OPINION
AFFIRMING

* * * * * *

BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Eric Bradley (Bradley) appeals pro se from an August 4, 1997, order of the Oldham Circuit Court dismissing his petition for declaratory judgment brought pursuant to Kentucky Revised Statute (KRS) 418.040. We affirm.

Bradley is currently an inmate at the Blackburn Correctional Complex in Lexington, Kentucky. On the morning of

April 8, 1997, prison officials conducted a random drug test of several inmates. Sergeant John Osborne procured a urine specimen from Bradley and placed it in a temporary secure refrigerated holding device. Later that morning, Sergeant Wayne Moyers removed the urine specimen and transported it to Luther Luckett Correctional Center for analysis. The test results were positive for marijuana. A few days later, Bradley was charged with unauthorized use of drugs or intoxicants in violation of Corrections Policies and Procedures (CPP) Category 4, Item 2. On April 25, 1997, a prison disciplinary hearing was held at which Bradley stated he had not used marijuana and could not explain the positive test results. Part of the evidence reviewed by the prison's disciplinary Adjustment Committee was a chain of custody form designed to trace the movement of the urine specimen. Based on the investigative chain of custody and testing information, the Adjustment Committee found Bradley guilty of the CPP provision and imposed a sanction of forty-five days disciplinary segregation and forfeiture of sixty days good time. Upon administrative appeal, Steve Berry, the warden, concurred with the Adjustment Committee's decision.

On June 6, 1997, Bradley filed a petition for declaratory judgment challenging the disciplinary action based on the failure of Sergeant Osborn and Sergeant Moyers to complete the chain of custody form in accordance with prison policies and procedures by signing their names in only one of the two spaces designated for receipt and release of the specimen. Bradley

asked the circuit court to order expungement of the disciplinary report from his record and restoration of the forfeited good time, or in the alternative, grant him a new disciplinary hearing. On July 3, 1997, Berry filed a motion to hold the case in abeyance to allow the Department of Corrections to provide Bradley with a new disciplinary hearing. On July 8, 1997, the Adjustment Committee at Luther Luckett conducted a second hearing that included the same evidence used in the first hearing, but also included affidavits from Sergeant Osborn and Sergeant Moyers concerning their actions in handling the urine sample. Both officers stated that they signed their names in only one of the two columns of the chain of custody form because each had both received and released the specimen. Based on the evidence, the Adjustment Committee again found Bradley guilty of unauthorized use of drugs and imposed the same penalty as before. Shortly thereafter, Berry filed a motion to dismiss the petition based on Bradley's having received a new disciplinary hearing. In August 1997, the trial court granted the motion thus dismissing Bradley's petition for declaratory judgment. This appeal followed.

Bradley argues that his right to due process under the Fourteenth Amendment was violated by the use of a defective chain of custody form. He contends that the prison officers were required to sign the chain of custody form and their affidavits could not cure the failure to follow the correct procedure.

Bradley seeks restoration of his good time and expungement of the disciplinary finding from his prison record.

The issue on appeal is whether the prison officials provided an adequate remedy by conducting a second disciplinary hearing. The appropriate remedy for a due process violation depends in part on whether the violation involves substantive due process or procedural due process. Substantive due process involves violations of "fundamental" rights that are "implicit in the concept of ordered liberty," Paldo v. Connecticut, 302 U.S. 319, 325, 58 S. Ct. 149, 152, 82 L. Ed. 2d 288 (1937), or that "shock the conscience," Rochin v. California, 342 U.S. 165, 172, 72 S. Ct. 205, 209, 96 L. Ed. 2d 183 (1952). Substantive due process does not protect individuals from government action that is merely "incorrect or ill-advised." See Bishop v. Wood, 426 U.S. 341, 350, 96 S. Ct. 2074, 2080, 48 L. Ed. 2d 684 (1976); Interport Pilots Agency, Inc. v. Sammis, 14 F.3d 133, 144 (2nd Cir. 1994). Substantive due process protects rights "against certain government actions regardless of the fairness of the procedures used to implement them." Collins v. City of Harber Heights, 503 U.S. 123, 125, 112 S. Ct. 1061, 1068, 117 L. Ed. 2d 261 (1992).

> A violation of a substantive due process right, for instance, is complete when it occurs; hence, the availability *vel non* of an adequate post-deprivation state remedy is irrelevant. Because the right is "fundamental," no amount of process can justify its infringement. By contrast, a procedural due process violation is not complete "unless and

> until the state fails to provide due process." Zinermon [v. Burch, 494 U.S. 113, 123, 110 S. Ct. 975, 983, 108 L. Ed. 2d 100 (1990)]. In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation [occur]. . . .

McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994), cert. denied, 513 U.S. 1110, 115 S. Ct. 898, 130 L. Ed. 2d 783 (1995) (footnote omitted). In addition, the primary relief sought and available for a procedural due process violation is equitable such as a remedial hearing. Id.

Bradley challenges the initial disciplinary action because two prison employees failed to sign their names in the appropriate spaces on the chain of custody form. Bradley's complaint necessarily implicates procedural due process, rather than substantive due process. The method for completing an adequate chain of custody form involves a procedural evidentiary issue, rather than a substantive issue. Consequently, Bradley's complaint is subject to post-deprivation remedies. A procedural due process violation may be cured by a subsequent adequate hearing. See United States Postal Service v. National Association of Letter Carriers, 847 F.2d 775, 778 (11th Cir. 1988).

Berry argues that the second disciplinary hearing cured any due process violation that may have occurred in the first hearing. The issue then becomes whether the second disciplinary

hearing complied with procedural due process. In the case at bar, Bradley relies on Byerly v. Ashley, Ky. App., 825 S.W.2d 286 (1992) for the proposition that the chain of custody form was inadequate and thus, the disciplinary action was illegal. Meanwhile, Berry maintains any defect in the chain of custody form was cured by the affidavits submitted by the corrections officers and because the affidavits were included in the second disciplinary hearing, any procedural error was remedied. In Byerly, the court held that prison discipline involving unauthorized use of drugs must be based on reliable evidence. The court indicated that the test report linking the positive drug results to Byerly's urine sample was not reliable because the testing laboratory failed to fill out the chain of custody form identifying those persons who handled the sample. The court stated as follows:

> As it is, to punish the appellant the authorities have relied on evidence which is less than reliable because it was not established with reasonable certainty that the specimen tested was the same as that taken from the appellant.

Id. at 288. Byerly does not require that every person handling the specimen sign his name on both the received by and released by portions of the chain of custody form. Byerly merely requires that a reliable chain of custody be established.

A review of the record reveals that Sergeant Osborn signed the chain of custody form indicating that he obtained

possession of the specimen, but he wrote "FCDC Institutional Urine Box" in the space designated "received by." Similarly, Sergeant Moyers wrote "Urine Box - FCDC" in the space for "released by" and signed his name in the space designated "received by." Prior to the second hearing, both corrections officers submitted affidavits stating that they had filled out the chain of custody form but did not sign their names in both spaces because they were the same persons who had either respectively, received or released the specimen. Unlike Byerly, the chain of custody was established in this case. The affidavits of the correction officers removed any ambiguity in the original form. The location of the specimen was accounted for at all times, and when not in the possession of corrections personnel, the specimen was kept in a securely locked refrigerator. The evidence of the chain of custody with the supplemental affidavits presented at the second hearing clearly was sufficiently reliable to support the finding of the Adjustment Committee. Even if a procedural due process violation occurred with respect to the first hearing, any violation was remedied by the holding of the second hearing with the additional evidence of the affidavits by the officers. As a result, Bradley has not established that the disciplinary punishment he received involved a due process violation.

Bradley's reliance on CPP 15.8 and Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L.Ed 2d 675 (1983) is likewise unavailing. CPP 15.8, VI (c)(4) states that each time a sample

is released from a secure holding device, "the form shall be signed on behalf of the holding device." Bradley argues that the mandatory language in CPP 15.8 created a right to have the chain of custody form include the signature of an individual at each step of the specimen handling process. The mere use of the mandatory term "shall" in CPP 15.8, VI (c)(4) did not create a protected liberty interest in having prison officials sign each space in the chain of custody form. Bradley's reliance on the mandatory language in CPP 15.8 for imposing a specific due process procedural requirement is erroneous.

Similarly, while CPP 15.8, VI (c)(4) appears to have been promulgated in response to the decision in Byerly, as explained above, Byerly merely requires a reliable chain of custody. It does not mandate a specific method or procedure for establishing the reliability of the test specimen. In other words, state law does not require signatures in every space of the chain of custody form in all instances. Reliability can be established in other ways, as in this case with the affidavits of the prison officers. While it would certainly be preferable if each person handling a specimen would sign his or her name on the chain of custody form upon receipt and release, this is not required by due process under state law.

In addition, CPP 15.8 VI (c)(4) does not create a substantive right in the procedure described but rather merely sets out a guideline for prison employees in documenting their handling of specimens in order to facilitate a uniform practice.

Even though the two prison officers may not have followed the procedure described in the regulation, this fact alone does not mandate vacating the disciplinary action. Failure to follow the procedures of the regulation allow the inmate to challenge the reliability of the evidence, but violation of the regulation alone does not render the disciplinary action void. Moreover in this particular case, the violation of the prison regulation was harmless error. See Powell v. Coughlin, 953 F.2d 744, 750 (2nd Cir. 1991) (stating harmless error analysis applies to prison disciplinary action). Bradley has not demonstrated any prejudice because of the two prison officers' failure to follow the prison regulation.

For the foregoing reasons, we affirm the order of the Oldham Circuit Court.

ALL CONCUR.

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BRIEF FOR APPELLEE

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