RENDERED: June 20, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-0667-MR

GREGORY MCCONNELL — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 95-CI-211

HARVEY B. FIELDS, Warden,
Lee County Adjustment Center;
ROSCOE MOORE, JR.,
Adjustment Committee Chairperson;
RONALD WATSON, Adjustment Committee Member;
EARL MCQUEEN, Adjustment Committee Memeber — APPELLEES

AND

NO. 96-CA-1161-MR

TROY WATKINS — APPELLANT

v.

APPEAL FROM LEE CIRCUIT COURT
HONORABLE WILLIAM W. TRUDE, JR., JUDGE
ACTION NO. 96-CI-009

HARVEY B. FIELDS, Warden,
Lee County Adjustment Center;
ROSCOE MOORE, JR.,
Adjustment Committee Chairperson;
CHARLIE COMBS, Adjustment Committee Member;
ROBERT GRAY, Adjustment Committee Member — APPELLEES

OPINION
REVERSING AND REMANDING

* * * * * * *

BEFORE: HUDDLESTON, JOHNSON, and KNOPF, Judges.

KNOPF, JUDGE: This is a consolidated appeal from orders dismissing the appellants' declaratory judgment actions. Finding that the trial court prematurely dismissed the appellants' actions, we reverse and remand.

These actions arose separately, however the facts in both appeals are similar. Gregory McConnell and Troy Watkins were housed at the Lee County Adjustment Center. On November 12, 1995, McConnell returned from a furlough and was given a urinalysis test using the EZ-SCREEN® QUIK-CARD™. (EZ-SCREEN®). He tested positive for cocaine use. The test was repeated, with the same result. Watkins returned from his furlough on December 12, 1995, and was given a urinalysis using the Abuscreen® ONTRAK™ card. (ONTRAK™). He also tested positive for cocaine use and a subsequent test confirmed this result.

Both McConnell and Watkins were charged with unauthorized use of drugs or intoxicants. Each pleaded not guilty and requested a hearing before the adjustment committee. The adjustment committee found both inmates guilty and they were each penalized by the loss of sixty (60) days of good time credit. Their separate appeals to the warden were also denied. McConnell and Watkins then each brought petitions for declaratory

judgment in the Lee Circuit Court. The trial court summarily dismissed both petitions as failing to state a claim upon which relief can be granted.

McConnell and Watkins then brought separate appeals. The actions were consolidated on appeal. The appellees filed a notice with this court declining to file a brief and desiring to rely on the Lee Circuit Court's ruling and pleadings. The appellants primarily argue that neither the EZ-SCREEN® test nor the ONTRAK™ test by themselves are sufficiently reliable to provide a basis for depriving an inmate of good time credit.

In the context of prison disciplinary proceedings, the requirements of due process are much more limited than in a criminal trial. Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445, 454, 86 L. Ed. 2d 356, 374, 105 S. Ct. 2768 (1985). The prisoner's due process interests must be accommodated 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 have been lawfully incarcerated for doing so." Id. (quoting, Wolff v. McDonald, 418 U.S. 539, 561, 41 L. Ed. 2d 935, 954, 94 S. Ct. 2963 (1974)). Therefore, the requirements of due process are satisfied if "some evidence" supports the decision by the prison disciplinary board to revoke good time credits. Hill, 472 U.S. at 455, 86 L. Ed. 2d at 365. Furthermore, there must be some "indicia of reliability" of the

information which forms the basis for the prison disciplinary action. Cato v. Rushen, 824 F.2d 703, 705 (9th Cir., 1987).

The appellants point out that the EMIT (Enzyme Multiple Immunoassay Test) has been found to be sufficiently reliable to meet due process standards. In Spence v. Farrier, 807 F.2d 753 (8th Cir., 1986), the Eighth Circuit found that the EMIT had been shown to be sufficiently accurate to form a sufficient basis for disciplinary action. The Sixth Circuit in Higgs v. Bland, 888 F.2d 443 (6th Cir., 1989), also found that the presence of a positive EMIT constitutes "some evidence" from which the adjustment board could conclude that a tested inmate was guilty of the offense of drug use. The Sixth Circuit further noted:

> Of course, a test which produced frequent incorrect results could fail to constitute "some evidence" under the Hill standard. However, no evidence was produced in this case to indicate that the probability of false results was more than a mathematical possibility. In evaluating the possibility of false positives, it should be kept in mind that [t]he specific dictates of due process must be shaped by 'the risk of error inherent in the truth finding process as applied to the generality of cases ' rather than the rare exceptions. [citation omitted]

Id. at 449.

The only reported case we have found regarding the tests at issue in this case involves a challenge to the use of the ONTRAK™ test in Kansas. Ransom v. Davies, 816 F. Supp. 681 (D. Kan., 1993). The inmate was subjected to a drug test using the ONTRAK™ test. The Court described the ONTRAK™ test as an

immunoassay test. The inmate tested positive for use of stimulants and was subject to disciplinary action. The Court held that a single positive ONTRAK™ test result was sufficient to constitute "some evidence" supporting the conclusion reached by the disciplinary board. Id. at 682. We found no cases discussing the reliability of the EZ-SCREEN® test.

A petition for declaratory judgment pursuant to KRS 418.040 has become the vehicle, whenever habeas corpus proceedings are inappropriate, whereby inmates may seek review of their disputes with the Corrections Department. Polsgrove v. Kentucky Bureau of Corrections, Ky., 559 S.W.2d 736 (1977). While technically an original action, such inmate petitions share many of the aspects of appeals. They invoke the circuit court's authority to act as a court of review. The court seeks not to form its own judgment, but with due deference, to ensure that the agency's judgment comports with the legal restrictions applicable to it. American Beauty Homes Corp. v. Louisville & Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450 (1964). 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. Summary judgment in favor of the Corrections Department is proper if and only if the inmate's petition and any supporting materials, construed in the light of the entire agency record (including, if

submitted, administrators' 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 Department is entitled to judgment as a matter of law. Smith v. O'Dea, Ky. App., 939 S.W.2d 353, 356 (1996).

Our problem in these appeals is that the appellees presented no evidence at all regarding the accuracy or even the nature of these tests. The only item in the record addressing this issue appears on the adjustment committee appeal form denying McConnell's appeal stating: "Testing process meets standards established by the Ky Dept. of Corrections for reliability." As a result, we conclude that the trial court prematurely dismissed the appellants' actions. By raising the issue of the accuracy of the tests, they sufficiently stated a cause of action upon which relief could be granted. Their allegations were not rebutted by the record. However, there were issues of fact which remained for the trial court to address.

At the same time, we also hold that disciplinary actions based on urinalysis immunoassay testing, with a confirmatory second test, contains sufficient indicia of reliability to provide some evidence of drug use. Spence v. Farrier, 807 F.2d at 756. So long as there is evidence that the test is reasonably reliable, we will not require the Corrections Department to use a particular brand of test. The choice of tests is a matter which should remain within the discretion of

the Department.

Therefore, we remand this action to the trial court for further findings of fact. However, the appellee's burden on remand is minimal. The appellees must present some evidence showing the accuracy of the EZ-SCREEN® and ONTRAK™ tests.[1] If the appellees present some evidence establishing that these tests are urinalysis immunoassay tests and have a comparable reliability to the EMIT, then the trial court may find that there was sufficient indicia of reliability to support the adjustment committee's decision.

Accordingly, the orders of the Lee Circuit Court are reversed, and this matter is remanded for further findings of fact and judgment consistent with this opinion.

[1] An affidavit from the Corrections Department detailing these facts should be sufficient to meet this burden of proof unless the appellants present other evidence challenging the accuracy of the tests.

ALL CONCUR.

BRIEFS FOR APPELLANTS:

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Troy Watkins, Pro Se
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NO BRIEF FOR APPELLEES

ENTRY OF APPEARANCE FOR APPELLEES:

R. Allen McCartney
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