

VT SUPERIOR COURT
WASHINGTON UNIT
VERMONT SUPERIOR COURT

SUPERIOR COURT
Washington Unit

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CIVIL DIVISION
Docket No. 65-1-16 Wncv

Frank Foster,
Plaintiff,

v.

Lisa Menard, Commissioner, Vermont
Department of Corrections, and Ralph
Cherry, Warden, N.L.C.F.,
Defendants.

FILED

Opinion and Order on Cross-Motions for Summary Judgment

In this petition for review of governmental action under Vt. R. Civ. P. 75, Inmate Frank Foster seeks review of the Vermont Department of Corrections' (the "DOC's") imposition of a disciplinary conviction after he preliminarily tested positive for Suboxone. Mr. Foster asserts that the DOC's reliance on an unconfirmed preliminary test violates its own policies and that there was no other evidence that he had consumed Suboxone. The DOC argues that there was adequate evidence of a violation to satisfy the applicable "some evidence" standard. The parties have filed cross-motions for summary judgment.

1. *Summary Judgment Standard*

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Vt. R. Civ. P. 56(c)(2), shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. Vt. R. Civ. P. 56(c)(3); *Gallipo v. City of Rutland*, 163 Vt. 83, 86

(1994) (summary judgment will be granted if, after adequate time for discovery, party fails to make showing sufficient to establish essential element of the case on which the party will bear burden of proof at trial). Where there are cross-motions for summary judgment, as here, “both parties are entitled to the benefit of all reasonable doubts and inferences.” *Montgomery v. Devoid*, 2006 VT 127, ¶ 9, 181 Vt. 154, 156.

2. *The Facts*

While housed in an out-of-state facility, Mr. Foster was randomly selected for a routine drug test. See DOC Directive #409.04, Procedural Guidelines § 1. The preliminary test was positive for Suboxone. The officer conducting the test filed a disciplinary report. The officer investigating the disciplinary report recorded that Mr. Foster “stated that he does not do drugs and the test was not accurate. [He] thinks that the test should have been sent to the lab.” The “NLCF Substance Abuse Screening: Record and Chain of Custody” form is marked to indicate a preliminary positive test result and that further testing is needed. DOC policy is clear that “[i]f the preliminary test is positive and the inmate fails to admit to use of a prohibited substance, a confirmation test **must** be conducted by a State-contracted testing laboratory.” DOC Directive #409.04, Procedural Guidelines § 2(d)(iv) (emphasis in original.) Mr. Foster never admitted to the use of a prohibited substance, but no such confirmatory test was ever conducted.

The written reports were placed in evidence at Mr. Foster’s disciplinary hearing. At the hearing, Mr. Foster pleaded “not guilty.” When permitted to

present his case, he said, "I don't have anything to present." There was no indication of any evidence of guilt in the administrative record, except for the result of the preliminary test. The hearing officer ruled: "Based on the preponderance of the evidence, I find you guilty. You dropped dirty for Suboxone. You failed to submit a clean sample. You never denied doing Suboxone." Mr. Foster then sought review here.

3. *Analysis*

The State argues that the Court should affirm the conviction because there is "some evidence," *LaFaso v. Patrissi*, 161 Vt. 46, 49 (1993), of guilt in the record. That evidence apparently consists exclusively of the preliminary drug test result and Mr. Foster's failure to more affirmatively deny drug use at his disciplinary hearing. In the circumstances of this case, the Court cannot conclude that the some evidence standard is met.

This was a random drug test. It was not undertaken based on any evidence or belief that Mr. Foster would test positive. For example, no corrections officer suspected that he was under the influence because of the way he was acting or because of some other evidence. When he did test positive, Mr. Foster clearly objected that he does not consume drugs, the test must be wrong, and the sample should be sent out for confirmation. That denial was part of the record at the hearing. DOC policy in no uncertain terms requires a confirmatory test absent an admission. The hearing officer can be presumed to know the DOC's directives and the evidence described above was before him. In this context, there is no fair way to

construe Mr. Foster's statement that he had no case to put on, moments after saying he was not guilty, as an admission. For the initial test in this case to have sufficient evidentiary weight on its own to sustain a conviction, a confirmatory test was required.

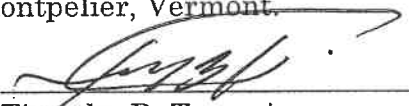
Nor was there is any other evidence in the record that might point toward Mr. Foster's guilt. Given Mr. Foster's denial noted in the investigative report and his entry of a not guilty plea, the hearing officer's statement that Mr. Foster did not deny his guilt is plainly wrong.

With nothing more than a preliminary test that has not been confirmed in accordance with DOC policy, the conviction cannot be sustained.

Conclusion

WHEREFORE, Mr. Foster's motion for summary judgment is granted and the State's is denied. Mr. Foster's conviction is reversed, and the DOC is ordered to expunge it from Mr. Foster's record.

Dated this 31 day of August 2016, at Montpelier, Vermont.



Timothy B. Tomasi,
Superior Court Judge