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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2004-CA-000627-MR

RONALD M. GOWER

APPELLANT

V.

APPEAL FROM LYON CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, JUDGE  
CIVIL ACTION NO. 04-CI-00011

DALE M. WATSON, WARDEN

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: An inmate bringing a civil suit seeking relief from a prison disciplinary action must prove that the inmate has first exhausted administrative remedies. The circuit court dismissed inmate Ronald Gower's civil suit against Warden Dale Watson arising out of a prison disciplinary proceeding, ruling that Gower failed to establish that he had raised the specific arguments

concerning the chain of custody and reliability of drug test evidence against him in the underlying administrative proceeding. Even so, the court reviewed the record concerning Gower's chain of custody allegations and found it adequately documented in the record. On appeal, we hold that the circuit court properly dismissed Gower's action and affirm.

### **THE DISCIPLINARY PROCESS**

On November 24, 2003, corrections officer Scott Bynum collected a urine specimen from inmate Gower as part of Western Kentucky Correctional Complex's (WKCC),<sup>1</sup> random drug testing program. Another corrections officer, Martin Scheeringa, witnessed the procedure. Both Bynum and Scheeringa signed the custody and control form that accompanied Gower's specimen as required by Department of Corrections Policies and Procedures (CPP) 15.8.<sup>2</sup> Gower also signed the custody and control form, certifying that the specimen was unadulterated, that it was sealed with a tamper-evident seal in his presence, and that the information provided on the custody and control form was correct. The specimen was provided a unique identification

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<sup>1</sup> According to the brief of the Appellee, WKCC Warden Dale Watson, Gower was later transferred to Bell Forestry Camp.

<sup>2</sup> The CPP is incorporated by reference in 501 Kentucky Administrative Regulations (KAR) 6:020.

number, 307379580, and a corresponding bar code. The specimen and custody and control form were sealed together in a pouch and placed in a locked storage unit until picked up by FedEx for delivery to the private testing laboratory. The custody and control form first listed "Airborne" in the space indicated for the delivery service but that typed name was crossed out, and "FED EX" was hand-printed instead.

According to the custody and control form, the specimen was received by the testing laboratory—Advanced Toxicology Network of Memphis, Tennessee—on November 26, 2003, by employee Veronda Boyland-Curtis. Boyland-Curtis certified that the specimen was received with the tamper-evident seal intact. Boyland-Curtis then placed the specimen into temporary storage. The specimen later was removed from temporary storage and placed with other specimens into batch number 96564 for initial testing of the entire batch. The laboratory created an internal custody and control form for initial testing, listing the printed or stamped name of each employee handling the specimen, the employee's signature, the date, the reason for handling the specimen, the batch number, the specimen ID number, and its bar code. After initial testing, the

specimen was again placed into temporary storage awaiting the results of the initial testing.

The initial testing showed positive results indicating drug use, so Gower's specimen was removed from temporary storage and placed in a new batch, number 22634, for confirmation testing. Another internal custody and control form was created for the confirmation testing, listing the same information described above.

After the laboratory completed testing Gower's urine specimen, it confirmed the presence of amphetamines and methamphetamine. It reported the positive test results to WKCC. WKCC then instituted disciplinary proceedings against Gower for unauthorized drug use.

In a disciplinary hearing on December 17, 2003, Gower was found guilty of unauthorized drug use. As punishment, he was placed in segregation for 45 days; and his visitation was restricted for six months. He also forfeited 60 days of good-time credit. Gower appealed this decision to the warden, who affirmed the disciplinary decision.

Gower then filed a petition for declaration of rights with the Lyon Circuit Court. He asserted a due process violation, arguing that the drug test results were unreliable because the chain of custody was defective in

the following four respects: 1) the corrections officer who collected the urine specimen did not transfer it directly to the courier but, rather, placed it into a locked storage box from which the courier later retrieved it; 2) the courier who received the specimen to transfer it to the testing laboratory did not sign for it, and there was also a possible discrepancy about which courier service received the specimen, FedEx or Airborne; 3) the testing laboratory did not create a separate internal custody and control form for each specimen but, rather, used a common form for all of the specimens tested together in the same batch; and 4) one line of the internal custody and control form for the initial testing of Gower's specimen contains the notation "NA" and a hand-drawn line instead of the stamped or printed name and signature of the employee handling the specimen and the date.

The circuit court granted the warden's motion to dismiss Gower's complaint. The court concluded that because Gower did not attach documents to his petition demonstrating which issues he had raised at the administrative level, he failed to meet his burden of proving that he had exhausted his administrative remedies

as required by KRS<sup>3</sup> 454.415(1)(c). The circuit court also noted that the chain of custody was sufficient. Thus, even if Gower had properly shown exhaustion of his administrative remedies, he would still have failed to establish a due process violation. This appeal followed.

#### **STANDARD OF REVIEW**

The guarantee of fundamental fairness implicit in the due process clauses of the state and federal constitutions dictates that disciplinary sanctions cannot be imposed against an inmate unless there is some reliable evidence that the inmate committed an infraction justifying the sanctions.<sup>4</sup> In Byerly v. Ashley,<sup>5</sup> this Court held that a urine drug test satisfies the "some evidence" standard so long as proof of the chain of custody establishes the likelihood that the correct sample was tested and that it was not adulterated.<sup>6</sup> The Kentucky Supreme Court has held that "[e]ven with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all

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<sup>3</sup> Kentucky Revised Statutes.

<sup>4</sup> Lucas v. Voirol, 136 S.W.3d 477, 479 (Ky.App. 2004).

<sup>5</sup> 825 S.W.2d 286 (Ky.App. 1991).

<sup>6</sup> *Id.* at 287.

possibility of tampering or misidentification.”<sup>7</sup> The chain of custody is sufficient “so long as there is persuasive evidence that ‘the reasonable probability is that the evidence has not been altered in any material respect.’”<sup>8</sup> Moreover, any gap in the chain of custody normally goes to the weight of the evidence not its admissibility.<sup>9</sup>

**EXHAUSTION OF ADMINISTRATIVE REMEDIES**

The circuit court dismissed Gower’s petition because he did not establish that he had exhausted his administrative remedies. KRS 454.415(1) sets forth the following restrictions on an inmate’s filing of a civil action:

- (a) No action shall be brought by an inmate, with respect to a prison disciplinary proceeding . . . , until administrative remedies as set forth in Department of Corrections policies and procedures are exhausted.

. . . .

- (c) The inmate shall attach to any complaint filed documents verifying that administrative remedies have been exhausted.

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<sup>7</sup> Rabovsky v. Commonwealth, 973 S.W.2d 6, 8 (Ky. 1998).

<sup>8</sup> *Id.*, quoting United States v. Cardenas, 864 F.2d 1528, 1532 (10<sup>th</sup> Cir. 1989).

<sup>9</sup> Rabovsky, *supra*.

To challenge the outcome of a disciplinary proceeding, an inmate is required to raise all claimed errors in an administrative appeal to the warden within fifteen days of the disciplinary proceeding.<sup>10</sup> The failure to raise an issue before the administrative body precludes an inmate litigant from asserting that issue in an action for judicial review of the agency's action.<sup>11</sup>

The circuit court found that Gower had filed a timely appeal with the warden. But he did not attach any documents to his petition verifying what issues had been raised in his administrative appeal to demonstrate the exhaustion of his administrative remedies as required by KRS 454.415(1). Because of this failure, the circuit court dismissed Gower's petition. Gower notes that he did attach a copy of the disciplinary report form to his petition and asserts that this form demonstrates that he had exhausted his administrative remedies. He focuses on the statement by the warden contained in the report: "I find the chain of custody to be intact and within the ruling of [Byerly v. Ashley]." Gower asserts that this statement proves that he raised the issue of the chain of custody at the administrative level, thus preserving this issue and

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<sup>10</sup> See KAR 6:020, CPP 15.6(F).

<sup>11</sup> O'Dea v. Clark, 883 S.W.2d 888, 892 (Ky.App. 1994).

exhausting his administrative remedies. But the warden's making a finding of fact on the chain of custody does not necessarily mean that Gower raised this issue in his administrative appeal.<sup>12</sup> Even if Gower did raise the general issue of the chain of custody at the administrative level, this is not sufficient. In his petition for declaration of rights, Gower asserted four specific ways in which the chain of custody was broken. Based on the record before it, the circuit court concluded that it could not determine which, if any, of these specific theories Gower had raised below. So it dismissed Gower's petition for declaration of rights.

On appeal before this Court, Gower asserts that he raised the issues of the annotation of "NA" in the internal custody and control form and the laboratory's use of a common internal custody and control form for each batch of specimens in his appeal before the warden. However, he concedes that he did not raise the issues concerning the irregularity in the name of the courier and the lack of a courier's signature or the temporary storage of the specimens in a locked box before they were

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<sup>12</sup> Cf. O'Dea, 883 S.W.2d at 889, 891-892 (holding that an inmate failed to challenge the chain of custody for his urine sample at his disciplinary hearing or before the warden and was, consequently, barred from raising the issue on judicial review, despite the fact that the warden specifically found the "chain of custody in order.")

transferred to the courier at the administrative level. He further admits that by failing to raise these two issues at the administrative level, he is precluded from raising them in an action for judicial review. Consequently, we affirm the circuit court's decision with respect to these two issues, which Gower admits were not raised before the warden.<sup>13</sup>

With respect to the remaining two issues, regardless of whether or not Gower actually raised them at the administrative level as he alleges, he presented no evidence to the circuit court showing that he had done so. Therefore, we affirm the circuit court's dismissal of his petition for declaration of rights for failure to establish exhaustion of administrative remedies and preservation of the errors asserted.

#### **CHAIN OF CUSTODY**

Although the circuit court dismissed Gower's petition for declaration of rights for failure to prove exhaustion of his administrative remedies, it also noted that his petition would have failed on its merits regardless because the chain of custody was sufficient.

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<sup>13</sup> Even if Gower had continued to maintain that he had raised these two issues below and had exhausted his remedies, we would still have affirmed the circuit court's dismissal for failure to demonstrate exhaustion of remedies with respect to these two issues.

Like the trial court, although we decide this case on Gower's failure to establish exhaustion of remedies, we also shall address the merits of his remaining claims concerning breach of the chain of custody.

**USE OF COMMON CONTROL AND CUSTODY FORM PER BATCH**

Gower argues that the fact that the testing laboratory did not maintain a separate internal custody and control form for his specimen indicates a deficiency in the chain of custody. Drug testing at the laboratory is performed in batches, meaning that each specimen in a particular batch is handled together by the same employees. Gower asserts that rather than signing an individual internal custody and control form relating to a specific specimen, each laboratory employee handling a specimen signs a common internal custody and control form relating to all the specimens in that batch. He further asserts that after testing is complete, an unknown employee photocopies this common internal custody and control form, attaching each inmate's individual specimen ID number to the lower, right-hand corner of the photocopy and attaches the photocopied internal custody and control form to the inmate's individual custody and control form sent by WKCC. In support of his claim, Gower has produced photocopies of

internal custody and control forms for other inmates whose specimens were tested either in the same initial batch<sup>14</sup> or the same confirmation batch<sup>15</sup> as Gower's specimen. The internal custody and control forms of specimens tested in the same batch do appear to be identical except for the individual specimen ID number in the lower, right-hand corner of each sheet. But we have no evidence concerning when or how these copies are made.

Gower argues that the laboratory's use of a common internal custody and control form rendered his test results unreliable for the following reasons:

The result of one single individual assigning a specimen identification number to a photocopy of the internal chain of custody documentation renders the internal chain of custody documentation meaningless. Not one of the personnel that signed for receiving the batch of specimens has verified that the urine specimen at issue was actually in their possession. Further, the person who assigned the identification number is not in a position to verify that each of the personnel that allegedly handled the specimen had actually possessed or performed a test on the specimen. Consequently, the integrity of the chain of custody is jeopardized and the reliability of the evidence is tainted due to an individual assigning a urine

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<sup>14</sup> Batch number 96564.

<sup>15</sup> Batch number 22634.

specimen identification number to a photocopied page of signatures.

According to Gower, the only way to preserve the chain of custody is for the testing laboratory to fill out a separate internal custody and control order for each specimen. We are not persuaded.

CCP 15.8 VI(3)(B)<sup>16</sup> requires the testing laboratory to take the following measures: "The laboratory personnel conducting the testing shall sign and date the Chain of Custody certifying that the sample: 1. was received intact; and 2. is properly identified as the inmate's." In addition to these requirements, this Court held in Byerly that the testing laboratory should fill out a form to indicate who received the specimen and who handled it throughout the testing process.<sup>17</sup> But we do not think that it is necessary that each specimen have its own internal control and custody form.

Gower asserts that the laboratory employee or employees copying the common form, attaching the specimen ID number to it, and attaching it to a WKCC custody and control form have no way of knowing whether they have actually received a particular inmate's specimen. This

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<sup>16</sup> KAR 6.020.

<sup>17</sup> *Supra* at 288.

assertion rests on the premise that the laboratory employees have no idea what specimens are in a specific batch and do not check by name, specimen ID number, bar code, or other means to see that they have all of the specimens assigned to the batch and no other specimens. But Gower offers no reason to support a belief that this is the case. As for the assertion that the person who makes the copies has no personal knowledge whether each of the employees who signed the common control and custody sheet actually possessed and tested the particular specimen at issue, this may be true. But it is also true that an employee conducting a test on a specimen may have no personal knowledge whether an employee who signed the common custody and control form as performing an earlier test actually performed that test.

Short of requiring a single laboratory employee to maintain custody of a particular specimen at all times, perform all tests on that specimen, and prepare all accompanying paperwork or, alternatively, requiring each person involved in the drug testing in any way, including preparation of paperwork, to testify in person, there may always be the remote possibility for error. Due process does not require the establishment of a perfect chain of custody, free of any possibility of tampering or

misidentification, even when dealing with substances such as urine or blood which are not clearly distinguishable or identifiable.<sup>18</sup> All that is required is persuasive evidence indicating the reasonable likelihood that the evidence being tested was correctly identified and untainted.<sup>19</sup> The testing laboratory's method of testing specimens in batches and keeping a common internal custody and control form satisfies this requirement. This Court is unconvinced that requiring the laboratory to complete an individualized internal custody for each specimen is necessary.<sup>20</sup>

**NOTATION "NA" IN PLACE OF LABORATORY EMPLOYEE'S NAME**

Gower also asserts that the chain of custody is deficient because the internal custody and control form for the initial testing of his specimen in batch number 96564 contains the notation "NA" and a hand-drawn line in place of the name and signature of one employee handling the specimen and the date. But an examination of the form indicates that unlike Byerly, this is not a situation in

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<sup>18</sup> Rabovsky, *supra*.

<sup>19</sup> Byerly, *supra*; Rabovsky, *supra*.

<sup>20</sup> Moreover, such a requirement creates an obvious additional burden upon the laboratory employees.

which some unknown person or persons handled the specimen.<sup>21</sup> The internal custody and control form identifies each laboratory employee who handled the specimen, when it was handled, and why. The shorthand notation "NA" on one line merely indicates that a particular available procedure was not performed. It does not suggest a gap in this chain of custody. Notwithstanding the fact that one available procedure was not performed, the internal custody and control form establishes the likelihood that the correct sample was unadulterated and duly tested. Therefore, the chain of custody is sufficient.

#### DISPOSITION

For the reasons discussed in this opinion, the Lyon Circuit Court's order dismissing Gower's petition for declaration of rights is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Rebecca Baylous  
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<sup>21</sup> In Byerly, the laboratory's form was essentially left blank and did not indicate who received the specimen, whether it was sealed, or who handled the specimen for testing. *Supra* at 287-288.