IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MONICA FAGAN, Applicant, v. STATE OF IOWA, Respondent.	CASE NO. PCCE090131 **AMENDED APPLICATION FOR POSTCONVICTION RELIEF**

The Applicant, Mo Fagan[1], appears before this Court and for his Amended Application for Postconviction Relief states as follows:

INTRODUCTION

1. This action, with others before this Court,[2] highlight numerous systemic problems in the disciplinary process at Iowa prisons.

2. The Iowa Correctional Institution for Women ("ICIW") has engaged in mass urinalysis ("UA") testing on incarcerated individuals absent any suspicion of illicit drug use, which, undertaken with inadequate procedures and coupled with an unconstitutional burden of proof before the disciplinary body, has resulted in the erroneous imposition of major disciplinary sanctions on Applicant and others despite their innocence.

JURISDICTION

[1] Mo is a transgender male and uses he/him pronouns. Mo has not yet been able to legally change his first name, which was Monica. However, Mo associates the name Monica with his former name before he began living full time as himself, a man, and experiences discomfort when he is referred to using that name. Mo respectfully requests that he be referred to using the correct male name and pronouns in accord with his gender identity by all parties and the Court whenever legally possible during the course of this litigation.

[2] Postconviction relief actions arising out of substantially the same facts and legal grounds are currently pending before this Court in *Harris v. Iowa*, No. PCCE090014, and *Wright v. Iowa*, No. PCCE090035.

3. At all times relevant to this matter, Applicant has been incarcerated at ICIW.

4. ICIW is located in Mitchellville, Polk County, Iowa.

5. This action is thus proper before the District Court for Polk County pursuant to Iowa Code section 822.7.

6. Pursuant to Iowa Code section 822.2(1)(*f*), Applicant has duly exhausted the appeal procedure of Iowa Code section 903A.3(2) and now properly brings this action for postconviction relief to challenge the discipline imposed and the consequent unlawful forfeiture of earned time.

7. Applicant further brings this action pursuant to Iowa Code section 822.2(1), subsections (*a*), (*d*), (*e*), and *(g*), to the extent such are implicated within the grounds for relief more fully described below.

BACKGROUND

8. Applicant takes multiple legitimately prescribed medications, including Lexapro (escitalopram), topiramate, metronidazole, Benadryl (diphenhydramine, an antihistamine used as a sleep aid), hydroxyzine (another antihistamine), metoprolol, aspirin, rizatriptan, testosterone, and Strattera (atomoxetine).

9. ICIW administers these medications to Applicant.

10. Applicant's urine would reasonably be expected to contain chemicals or chemical derivatives of these medications.

11. In January 2024, ICIW began implementing widespread and suspicionless UA testing on large portions of the prison population. For example, over the course of three days, ICIW conducted UA testing on over 100 individuals using kits provided by Premier Biotech.

12. On information and belief, the testing kits utilized are immunoassay tests, a cheaper, but less accurate, testing method than other alternatives.

13. Such tests are intended for use in preliminary drug screening, and any potential positive result should be followed by a second, confirmatory test undertaken of the sample in a laboratory setting by trained medical review officers.

14. Part of the confirmatory testing of such results includes comparison between them and the test-taker's list of legitimately prescribed medications by an individual with the knowledge and experience to identify which prescription medications may cause false positive drug test results.

15. ICIW does not send samples to a laboratory for confirmatory testing.

16. ICIW does not allow individuals to obtain confirmatory testing from an independent lab, regardless of whether the incarcerated individual offers to cover the costs of such testing.

17. ICIW does not allow individuals to take a voluntary retest.

18. ICIW does not ask for test takers to provide a list of legitimately prescribed medications taken.

19. ICIW does not consistently compare test results to test takers' medications lists to identify potential false positives, even if specifically requested by the test takers.

20. Appropriate training of those conducting and reviewing UA tests should be in place and regularly reviewed for compliance to ensure testing procedures minimize risks of inaccurate results.

21. The training, if any, provided to the correctional officers responsible for conducting testing at ICIW is inadequate and/or not being followed.

22. To better ensure the accuracy of test results that may carry disciplinary consequences, UA test samples must be taken under sanitary conditions with regard to the privacy

of the individuals from whom the samples are obtained and in a manner reasonably calculated to preclude contamination or substitution of the sample.

23. The mass UA testing at ICIW of hundreds of incarcerated individuals creates a situation where correctional officers are rushed and disorganized, exacerbating existing failures in protocol and leading to mistakes.

24. UA testing at ICIW is not performed under appropriate sanitary conditions. For example, the testing area is not sanitized between tests, and the collection receptacles (the "hats" that are placed within the toilet bowl) are not individually packaged or sterilized. Correctional officers handling the samples do not consistently change their gloves in between samples.

25. UA testing at ICIW is not performed with regard to the privacy of the individuals from whom the samples were obtained.

26. UA testing at ICIW is not conducted in a manner reasonably calculated to preclude contamination or substitution of the sample. For example, in addition to the lack of proper sanitization procedures noted above, samples are not consistently kept in view of the incarcerated individuals during processing and multiple correctional officers may handle a single test.

27. On information and belief, over the course of three days of testing (January 28, 30, and 31), between 20 and 30 incarcerated individuals were alleged to show positive results for benzodiazepines of the 100-something tested. Of these, between 16 and 20 were released from administrative segregation and their disciplinary reports dropped after ICIW officials concluded legitimately prescribed medications had resulted in numerous false positives. In other words, ICIW itself determined approximately two-thirds of the "positive" tests were false positives.

28. Applicant was among those tested on January 31.

29. During the testing on January 31, Applicant was made to strip naked in an open restroom. His request that the door be closed while undressing was denied.

30. During the testing on January 31, Applicant observed the correctional officer conducting the test fail to sanitize the restroom between tests.

31. During the testing on January 31, Applicant observed the correctional officer conducting the tests fail to change gloves in between handling his and other individuals' samples.

32. During the testing on January 31, Applicant observed multiple correctional officers handling his sample.

33. During the testing on January 31, the sample taken from Applicant was not visible to him during processing but was placed behind a desk.

34. According to the disciplinary notice, Applicant's UA test "show[ed] an unknown substance [that] gave a positive result for benzodiazepine (BZO)."

35. Applicant did not consume any benzodiazepines. Indeed, Applicant reached seven years of sobriety on February 8, 2024, and, as he would explain to the administrative law judge, his sobriety "is all [he] has." Applicant takes his sobriety extremely seriously.

36. Applicant did not exhibit any signs of intoxication from any benzodiazepines.

37. The strip search of Applicant did not reveal any benzodiazepines.

38. No search of Applicant's property revealed any benzodiazepines.

39. No other incarcerated individual or informant accused Applicant of consuming or possessing any benzodiazepines.

40. Applicant has minimal prior disciplinary history.

41. Diphenhydramine, particularly the large dose Applicant took the night before the test, is known to cause false positive results for benzodiazepines.

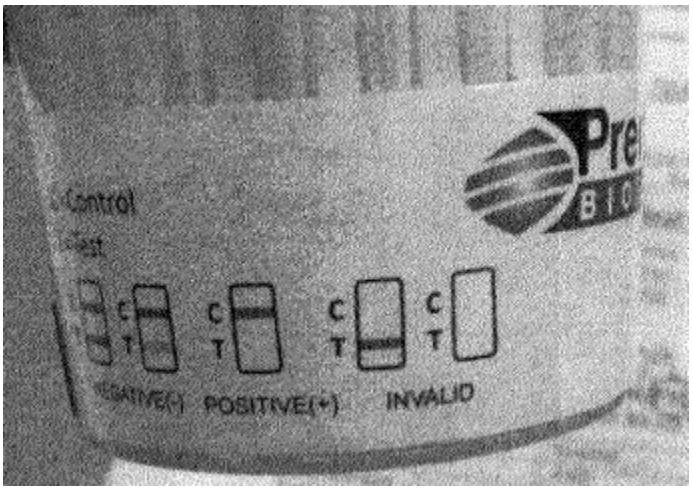
42. Hydroxyzine is also known to cause false positive results for benzodiazepines, as is aspirin.

43. Lisinopril may also result in false positive drug tests.

44. Applicant was never asked to provide a list of legitimately prescribed medications as part of the drug test.

45. On information and belief, no person at ICIW ever compared Applicant's test results to a list of his legitimately prescribed medications.

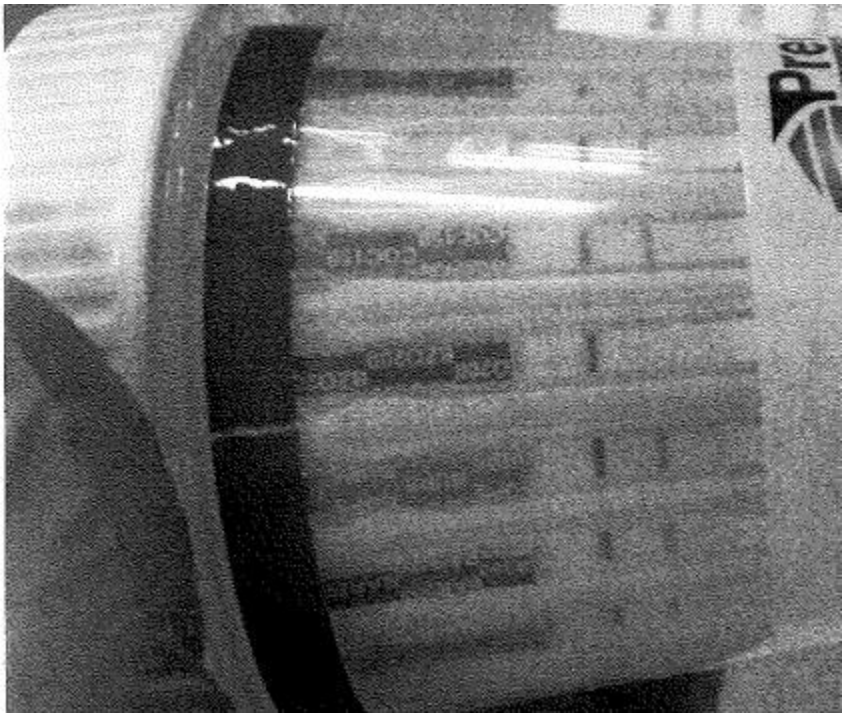
46. According to the picture taken by correctional officers of the labeling on the Premier Biotech cup used, a negative result is indicated by the presence of a shaded-in "control" line, and a shaded-in "test" line. A faintly shaded "test" line still indicates a negative result, while a positive result is only indicated by the total absence of shading on the "test" line and a fully shaded "control" line.



47. On information and belief, correctional officers at ICIW have complained of the difficulty in identifying the presence of faintly shaded lines.

48. On information and belief, correctional officers at ICIW struggling to read the tests will not administer a second test but instead will pass the test around to other officers for their opinion. Often, correctional officers disagree.

49. The pictures of the test provided to the administrative law judge are not of sufficient resolution or quality to review ICIW officer's interpretation of the results. For example, faintly shaded lines may appear on each of the test strips submitted to the administrative law judge, who would find it difficult to discern either way:



50. After the test, Applicant was placed in segregation for seven days.

51. Applicant had gone into the test confident due to his sobriety and was shocked by the results.

52. After being told the test allegedly showed a positive result, Applicant immediately told the investigator about his medications, explaining they likely caused a false positive, and requested the test be sent to a lab for confirmation testing.

53. ICIW correctional officers told Applicant the test would be sent to a lab for confirmation testing.

54. ICIW did not send the test to a lab for confirmation testing.

55. Applicant was accused of violating disciplinary rules 21, 29, and 43: "medication violations," "being intoxicated or under the influence," and "attempt or complicity."

56. The hearing before the administrative law judge took place on February 14, 2024.

57. According to the State of Iowa Department of Corrections Policy Number IO-RD-03, *Major Discipline Report Procedures*, a medication violation occurs when:

> a) The incarcerated individual fails to follow the prescription or direction for any medication or fails to follow the rules governing self-administered medications.
>
> b) The incarcerated individual stores, saves, removes, gives, or receives any medication.
>
> c) The incarcerated individual is repeatedly late for or repeatedly misses scheduled medication lines or medical appointments.

58. No evidence exists or was provided to the administrative law judge that would indicate Applicant committed any of the conduct described by a medication violation.

59. According to Policy IO-RD-03, an incarcerated individual violates the rule of being intoxicated or under the influence "when the incarcerated individual uses or is found to be intoxicated or under the influence of drugs, dangerous drugs, and intoxicants."

60. Except on the basis of the alleged test result, no evidence exists or was presented to the administrative law judge that would indicate Applicant used or was found to be intoxicated or under the influence of any drugs, dangerous drugs, or intoxicants.

61. According to Policy IO-RD-03, a person violates the rule of attempt or complicity "when the incarcerated individual attempts any of the listed offenses or is in complicity with others who are committing or attempting to commit any of the listed offenses."

62. Except on the basis of the alleged test result, no evidence exists or was presented to the administrative law judge that would indicate Applicant attempted to consume or possess any drugs, or was complicit in the consumption or possession of drugs, or otherwise attempted or was complicit in the attempt of other rule violations.

63. The administrative law judge made findings of fact and applied "the 'some evidence' standard of proof pursuant to case law."

64. The administrative law judge relied on the disciplinary notice, a confidential investigation of violations report, the aforementioned photos of the test results, and the correctional officer's "test results record." Essentially, the administrative law judge relied solely on the test results as read by the correctional officer.

65. The administrative law judge relied on no other inculpatory evidence, as such evidence does not exist.

66. The administrative law judge received Applicant's exculpatory evidence, including, without limitation, Applicant's denial of committing the alleged rule violations, Applicant's assertion that his sobriety (seven years as of February 8, 2024—the week before the hearing) means everything to him, and Applicant's assertion that the test result must have been a false positive due to legitimately prescribed medications.

67. The administrative law judge nevertheless held Applicant violated rules 21 (medication violations) and 29 (being intoxicated or under the influence).

68. The administrative law judge did not find Applicant guilty of violating rule 43 (attempt or complicity). The administrative law judge did not provide a reason for this holding, or explain the apparent contradiction with the finding of guilt on rule 29.

69. The administrative law judge sanctioned Applicant with 7 days of disciplinary detention, giving him credit for the 7 days spent in administrative segregation, and ordered the forfeiture of 20 days of Applicant's earned time.

70. Applicant duly appealed the hearing decision to the warden, reiterating the bases for his denial of the charges. Applicant noted past instances when ICIW reduced disciplinary sanctions from a major report to a minor report due to the incarcerated individual's lack of a disciplinary record related to controlled substances. Applicant further articulated how the variations in testing results create a lack of confidence that can only be remedied by confirmation testing of the sample—which ICIW did not do. Applicant noted he takes many legitimately prescribed medications that could also cause a false positive. Applicant explained particularly that the Benadryl (diphenhydramine) he takes can cross-react as a benzodiazepine, and that when that happens the test must be sent to the lab for verification.

71. Warden Michelle Waddle modified the holding of the administrative law judge without explanation.

72. Warden Waddle removed the class B violation of rule 29 (medication violation), while leaving the class D violation of rule 21 (being intoxicated or under the influence) violation in place.

73. Warden Waddle did not adjust the sanctions based on this modification, stating they "will remain the same."

74. Thus, Warden Waddle affirmed a sanction of the loss of 20 days earned time on a single class D violation despite the fact that Iowa Department of Corrections Policy IO-RD-03, *Major Discipline Report Procedures*, section (IV)(M)(2)(a)(4)(a), provides that a loss-of-earned-time sanction for a class D violation is "not to exceed 16 days."

75. Applicant timely filed this Petition for Postconviction Relief.

GROUNDS UPON WHICH APPLICATION IS BASED

VIOLATION OF DUE PROCESS

76. All allegations contained within previous paragraphs are incorporated herein by this reference.

77. The Fourteenth Amendment to the U.S. Constitution provides that no person shall be "deprived of life, liberty or property without due process of law."

78. Article I, section 9 of the Iowa Constitution similarly provides that "no person shall be deprived of life, liberty, or property, without due process of law."

79. The administrative law judge in this matter held Applicant guilty based merely on "some evidence" of the accused rule violations.

80. The administrative law judge did not find it "more likely than not" Applicant violated the rules.

81. The administrative law judge did not find there was a "preponderance of the evidence" Applicant violated the rules.

82. The administrative law judge did not weigh the inculpatory evidence against the exculpatory evidence in any manner; rather, the presence of "some"—*any*—evidence, however unreliable, rebutted, or illogical, required a finding of guilt.

83. Accordingly, Applicant was found guilty solely on the basis of a single unclear, disputed, and inaccurate drug test, which was taken under circumstances likely to lead to contamination and was never subjected to confirmation testing, and which allegedly showed a positive result that is potentially attributable to Applicant's legitimately prescribed medications, despite any and all evidence Applicant was able to muster in defense.

84. The constitutional requirements of due process apply to prison disciplinary hearings and appeals from the same.

85. The "some evidence" rule was developed by the U.S. Supreme Court as a standard of *review* in judicial review—not as a standard of *proof* before the disciplinary body.

86. The administrative law judge erroneously applied the "some evidence" rule as a standard of proof.

87. The "some evidence" rule, as a standard of proof before the disciplinary body, does not provide the fundamental fairness guaranteed by the due process clauses of the state and federal constitutions.

88. The "some evidence" rule, as a standard of proof before the disciplinary body, does not meet the guarantee of the due process clauses of the state and federal constitutions against the arbitrary or retaliatory deprivation of liberty.

89. The use of the "some evidence" rule as a standard of proof by the administrative law judge violated Applicant's right to due process under the state and federal constitutions.

VIOLATION OF IOWA CODE

90. All allegations contained within previous paragraphs are incorporated herein by this reference.

91. Iowa Code section 903A.3(1) provides that an administrative law judge may order the forfeiture of earned time only "[u]pon finding that an inmate has violated an institutional rule."

92. The necessary "finding" under Iowa Code section 903A.3(1) must be made on a preponderance-of-evidence or more-likely-than-not standard.

93. The administrative law judge in this matter ordered Applicant's earned time forfeited on a finding reached by application of the "some evidence" rule.

94. The forfeiture of Applicant's earned time was thus unlawful as inconsistent with the statutory laws of the State of Iowa.

INSUFFICIENT/UNRELIABLE EVIDENCE

95. All allegations contained within previous paragraphs are incorporated herein by this reference.

96. To sustain a finding of violation of a disciplinary rule, there must be "some evidence" in the record before the administrative law judge to support the holding. This evidence must be credible and reliable.

97. The evidence relied upon by the administrative law judge in this case consisted solely of a single unclear, disputed, and inaccurate drug test, which was taken under circumstances likely to lead to contamination and was never subjected to confirmation testing, and which allegedly showed a positive result that is potentially attributable to Applicant's legitimately prescribed medication.

98. The evidence was neither credible nor reliable, and the administrative law judge erred by concluding on the basis of such evidence that Applicant violated rules 21 and 29.

99. The evidence was also insufficient to constitute even "some" evidence of guilt of the violations of rules 21 and 29.

100. Rule 21 defines a medication violation. The drug test does not show or imply that Applicant "fail[ed] to follow the prescription or direction for any medication," "fail[ed] to follow the rules governing self-administered medications," "store[d], save[d], remove[d], [gave], or receive[d] any medication," or that Applicant was "repeatedly late for or repeatedly misse[d] scheduled medication lines or medical appointments."

101. The administrative law judge made no other factual finding and was presented with no other evidence that would indicate Applicant committed a violation of rule 21.

102. While Warden Waddle dismissed the rule 21 violation on appeal, the warden did not adjust the sanctions imposed.

103. Rule 29 defines the violation of being intoxicated or under the influence. The drug test, standing alone, does not show that Applicant was actively "intoxicated or under the influence of drugs, dangerous drugs, and intoxicants," but only implies that Applicant may have, at some point in the past, used the controlled substances tested.

104. The administrative law judge made no other factual finding and was presented with no other evidence that would indicate Applicant committed a violation of rule 29.

105. The administrative law judge's apparent finding that Applicant did *not* violate rule 43, attempt or complicity, undercuts its other findings of guilt of violating rules 21 and 29.

106. The warden's apparent finding that Applicant did *not* violate rule 21 either, further undercuts the administrative law judge's finding of guilt of violating rule 29.

107. The administrative law judge did not identify which violations warranted the sanctions imposed, nor between them what amount of sanction is attributable to which violation, nor whether the finding of not guilty on one of the charged rule violations was taken into account.

108. The warden failed to adjust the sanction imposed after dismissing the rule 21 violation. The warden further violated Iowa Department of Corrections Policy by leaving in place a reduction of 20 days earned time on a class D violation, which permits only a loss of up to 16 days earned time.

REQUEST FOR RELIEF

Pursuant to Iowa Code chapter 822, Applicant respectfully requests the Court:

1. Find that the ALJ's application of a merely "some evidence" standard of proof deprived Applicant of due process as guaranteed under the state and federal constitutions;

2. Find that the ALJ's application of a merely "some evidence" standard of proof violated Iowa Code;

3. Reverse the ALJ's decision finding Applicant violated rules 21 and 29 and reverse the decision of the warden finding Applicant violated rule 29, restore the earned time deemed forfeited by the ALJ and warden, expunge the discipline from Applicant's prison record, and enter such other and further relief as may be necessary to restore Applicant's privileges at ICIW; or, in the alternative, remand this matter for rehearing by the ALJ to conduct the proceeding using a lawful preponderance of the evidence standard of proof; and

4. Enter all such other and further relief as this Court deems just.

Respectfully submitted,

/s/ Thomas Story
Thomas Story, AT0013130
Rita Bettis Austen, AT0011558
ACLU of Iowa Foundation Inc.
505 Fifth Avenue, Ste. 808
Des Moines, IA 50309-2317
Telephone: (515)-207-7799
Fax: (515)-243-8506
Email: thomas.story@aclu-ia.org
rita.bettis@aclu-ia.org

Leah Patton, AT0006022
Patton Legal Services, LLC
P.O. Box 8981
Ames, IA 50014
Telephone: (515) 686-6267
Fax: (515) 598-7876
Email: leah@pattonlegalservices.com

ATTORNEYS FOR APPLICANT

Proof of Service

The undersigned certifies that the foregoing instrument was served upon all parties of record via EDMS on August 26, 2024.

/s/ Thomas Story
Thomas Story