IN THE SUPREME COURT OF THE STATE OF ALASKA

MATE VALOAGA, Appellant, v. DEPARTMENT OF CORRECTIONS, Appellee.	)	Supreme Court No.: S-18814

Trial Court Case No.: 3PA-22-01593CI

APPEAL FROM THE SUPERIOR COURT,
THIRD JUDICIAL DISTRICT AT PALMER,
THE HONORABLE JOHN C. CAGLE, JUDGE

BRIEF OF APPELLEE DEPARTMENT OF CORRECTIONS

TREG TAYLOR
ATTORNEY GENERAL

Andalyn Pace (1305025)
Assistant Attorney General
Department of Law
1031 West Fourth Avenue, Ste. 200
Anchorage, AK 99501
(907) 269-5190

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Appellate Courts

By: Julia A. Kentch
Deputy Clerk

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ALASKA STATUTES:

AS 33.30.295

(a) A prisoner may obtain judicial review by the superior court of a final disciplinary decision by the department only if the prisoner alleges specific facts establishing a violation of the prisoner's fundamental constitutional rights that prejudiced the prisoner's right to a fair adjudication. An appeal shall be commenced by the prisoner filing a notice of appeal and other required documents in accordance with AS 09.19 and the applicable rules of court governing administrative appeals that do not conflict with AS 09.19. Unless the appeal is not accepted for filing under AS 09.19.010 or is dismissed under AS 09.19.020, a record of the proceedings shall be prepared by the department, consisting of the original papers and exhibits submitted in the disciplinary process and a cassette tape of the disciplinary hearing. The record shall be prepared and transmitted in accordance with the applicable rules of court governing administrative appeals.
(b) A disciplinary decision may not be reversed
(1) unless the court finds that the prisoner's fundamental constitutional rights were violated in the course of the disciplinary process, and that the violation prejudiced the prisoner's right to a fair adjudication;
(2) because the department failed to follow hearing requirements set out in state statutes and regulations, unless the prisoner was prejudiced by the denial of a right guaranteed by the Alaska Constitution or United States Constitution; if such prejudice is found, the court shall enter judgment as provided in (c) of this section and remand the case to the department; or
(3) because of insufficient evidence if the record described in (a) of this section shows that the disciplinary decision was based on some evidence that could support the decision reached.
(c) The court shall enter judgment setting aside or affirming the disciplinary decision without limiting or controlling the discretion vested in the department to allocate resources within the department and to control security and administration within the prison system.

ALASKA REGULATIONS:

22 AAC 05.455

(a) A prisoner is presumed innocent of an infraction, and the facility has the burden of establishing guilt. A prisoner cannot be found guilty of an alleged infraction unless the hearing officer or a majority of the disciplinary committee, as applicable, is convinced from the evidence presented at the hearing that the prisoner's guilt is established by a preponderance of the evidence. The decision in the adjudicative phase of the hearing

must be based only on evidence presented at the hearing. If a prisoner does not request the presence of the facility staff member who wrote the disciplinary report, the report may be considered as evidence by the disciplinary tribunal and alone may serve as the basis for a decision. Other hearsay evidence may be considered if it appears to be reliable. The decision in the dispositive phase of the hearing may be based on evidence presented at the hearing or contained in the prisoner's case record.

(b) If the disciplinary tribunal is not convinced from the evidence presented at the hearing that the prisoner is guilty of committing the infraction charged, the prisoner may be found guilty of a lesser infraction necessarily included in the infraction charged if the evidence presented at the hearing establishes the prisoner's guilt by a preponderance of the evidence.

(c) For purposes of this section, a lesser infraction is necessarily included in the infraction charged if (1) the lesser infraction is inherently related to the infraction charged, so that proof of the greater would ordinarily entail proof of the lesser, (2) the infraction charged requires the disciplinary tribunal to find a disputed fact that is not required for conviction of the lesser infraction, and (3) the evidence relied on by the disciplinary tribunal supports conviction of the lesser infraction.

PARTIES

Appellant Mate Valoaga appeals from a disciplinary decision of appellee State of Alaska, Department of Corrections in which he was found guilty of refusing to provide a urine sample for substance abuse testing.

ISSUES PRESENTED

1. *The constitutionality of the preponderance of the evidence standard*. In *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill* the United States Supreme Court held that the "some evidence" evidentiary standard satisfied due process. This balanced the prisoners' interests at stake and the legitimate institutional needs of "assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation." In *Nordlund v. Dep't of Corr.* this Court held that the "some evidence" standard of review mandated by AS 33.30.295(b)(3) satisfied the Alaska Constitution, agreeing that the highly charged atmosphere in which disciplinary proceedings occurred supported relying on a "basis of evidence that might be insufficient in less exigent circumstances.[1] Should the Court confirm that the "some evidence" standard of proof satisfies Alaska due process?

2. *Waiver of issues relating to DOC 808.14*. DOC Policy 808.14 outlines DOC's substance abuse testing policy, including the procedures for collection. Urine testing is standard, but alternative testing methods may be used if a prisoner has a

[1] 520 P.3d 1178, 1183–84 (Alaska 2022).

demonstrated medical or mental health condition interfering with a prisoner's ability to provide a urine sample.[2] During the disciplinary proceeding Mr. Valoaga never requested alternative testing or indicated that he had a medical or mental health condition that prohibited him from providing a urine sample. This prevented DOC from addressing this issue at that time. Did Mr. Valoaga waive the argument that he should have been provided alternative testing?

3. *Sua sponte alternative testing*. Without a request from Mr. Valoaga or an indication that a medical or mental health condition prevented him from providing a urine sample, was DOC nonetheless required to provide him alternative testing?

INTRODUCTION

In *Wolff v. McDonnell* the United States Supreme Court established the minimum due process protections the federal constitution required in prisoner disciplinary proceedings.[3] Those include "(1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action."[4]

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[2] DOC P&P 808.14, *available at* https://doc.alaska.gov/pnp/pdf/808.14.pdf.

[3] 418 U.S. 539 (1974).

[4] *See Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985) (citing *Wolff*, 418 U.S. at 563-567).

A question the *Wolff* Court did not answer was the "specified quantum of evidence to support the factfinder's decision."[5] It answered that question in *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*. After balancing the prisoners' interests at stake and the legitimate institutional needs of "assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation," it held that due process was satisfied if "some evidence" supports the disciplinary decision.[6]

By regulation the State of Alaska, Department of Corrections establishes a preponderance of the evidence burden of proof in its disciplinary decisions.[7] Mr. Valoaga challenges that standard, contending that due process requires clear and convincing evidence. He argues that *Hill* only established the standard of review used by a reviewing court in an appeal, and not the minimum evidentiary standard. That is incorrect. *Hill* is an extension of *Wolff*, outlining the required due process protections to be accorded to a prisoner in a disciplinary matter.

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5 *Id*.

6 *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454-55 (1985).

7 22 AAC 05.455(a).

In *Nordlund v. Dep't of Corr.* this Court held that the "some evidence" standard of review mandated by AS 33.30.295(b)(3) satisfied the Alaska Constitution.[8] In doing so the *Nordlund* court approved of the rationale used in *Hill*:

> Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances. The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. [Disciplinary decisions are] not comparable to a criminal conviction, and neither [is] the amount of evidence necessary to support such a conviction.[9]

Against this backdrop it should be recognized that the preponderance of the evidence standard satisfies Alaska's due process requirements. A balancing of the interests does not support imposing the evidentiary standard suggested by Mr. Valoaga, which is significantly more stringent than the standard of review.

STATEMENT OF THE CASE

I. Mr. Valoaga failed to provide a urine sample for substance abuse testing within the two-hour time limit specified by policy.

On April 9, 2022, Officer Clark asked Mr. Valoaga, housed at the time at DOC's Goose Creek Correctional Center, to provide a urine sample for a random test for illicit substances. [Exc. 62]. DOC Policy 808.14, which articulates a zero-tolerance policy for substance abuse in institutions, provides for random tests as deemed necessary by the superintendent.[10] The policy outlines the procedure for collection, including steps if a

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8 520 P.3d 1178, 1183–84 (Alaska 2022).

9 *Nordlund v. Dep't of Corr.*, 520 P.3d 1178, 1184 (Alaska 2022).

10 DOC P&P 808.14, *available at* https://doc.alaska.gov/pnp/pdf/808.14.pdf.

prisoner indicates they cannot provide a sample.[11] The prisoner will be detained for up to two hours, and may be provided a limited amount of water during that time.[12] If the prisoner does not provide a sample during the two hours it is considered a refusal and a violation of 22 AAC 05.400(c)(16).[13] The policy also provides for alternative methods of testing if the prisoner has a demonstrated medical or mental health reason that prevents submission of a urine sample, or as otherwise approved by the Director.[14]

Mr. Valoaga tried for about 30 minutes to produce a sample. [Exc. 62]. He was unable to do so. [Exc. 62]. At Mr. Valoaga's request Officer Clark gave him an opportunity to drink some water. [Exc. 62]. The two-hour limit expired, and Mr. Valoaga did not produce a urine sample. [Exc. 62]. During this time Mr. Valoaga did not indicate any medical or mental condition that would have prevented him from providing a urine sample, and he did not request alternative testing. [Exc. 62]. He received a disciplinary write-up for a violation of 22 AAC 05.400(c)(16). [Exc. 62].

Mr. Valoaga waived the 48-hour notice requirement for a hearing and the assistance of a hearing advisor to prepare his defense, both provided for by regulation.[15] [Agency R. 13]. Mr. Valoaga also did not request any witnesses or evidence. [Hearing Audio; Agency R. 13].

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11 *Id.*

12 *Id.* at VI.C.4.

13 *Id.*

14 *Id.* at VI.E.

15 *See* 22 AAC 05.415(a); 22 AAC 05.440.

At the April 18, 2022, disciplinary hearing Mr. Valoaga defended himself on the grounds that he had not done anything wrong. [Hearing Audio 4:08-4:18, 5:38-6:16; Exc. 53-54]. Mr. Valoaga stated that he did not know about the policy regarding the two-hour timeframe, and that he would comply going forward. [Hearing Audio 4:32-5:25]. At no point did Mr. Valoaga contend that a medical issue interfered with his ability to provide a urine sample or argue that he should have been allowed a different testing method.

Given the undisputed evidence that Mr. Valoaga did not provide a urine sample within the two-hour timeframe, the hearing officer found him guilty. [Hearing Audio 10:04-10:32; Exc. 54-54]. The hearing officer imposed 30 days punitive segregation with 15 days suspended for 180 days pending no guilty findings, and 30 days loss of commissary. [Exc. 52].

Per policy and regulation Mr. Valoaga appealed to the superintendent, arguing, among other things, that the hearing officer was not an Article III judge, that no facts were proven beyond a preponderance of the evidence, and that the superintendent was liable to him for a $10,000 penalty per day. [Exc. 56-59]. Mr. Valoaga did not argue that he had a medical condition that interfered with his ability to provide a sample, or that he should have been offered alternative testing. The superintendent denied Mr. Valoaga's appeal. [Exc. 56-59].

II. The superior court upheld the constitutionality of the preponderance of the evidence burden of proof and DOC P&P 808.14 VI.

In his points on appeal Mr. Valoaga contended that the evidence presented at the hearing did not support a guilty finding by any of the established burdens of proof and that DOC P&P 808.14 VI.C.4 was unconstitutional. [Exc. 63]. In briefing Mr. Valoaga contended that a clear and convincing standard of proof was constitutionally required because it was fundamentally unfair for him to equally share the risk of an erroneous decision with the government, as would be the case with a preponderance of the evidence standard. [Exc. 6].

The superior court denied Mr. Valoaga's appeal. [Exc. 43-51]. After reviewing *Superintendent Massachusetts Inst., Walpole v. Hill* and *Nordlund v. Department of Corrections* the superior court concluded that because the preponderance of the evidence burden of proof established by DOC regulation was higher than the "some evidence" standard discussed in those cases it was constitutional. [Exc. 45-46]. The superior court also found that regardless of the burden of proof a guilty decision was supported because there was no dispute that Mr. Valoaga had failed to provide a urine sample within the specified time. [Exc. 46].

Even though Mr. Valoaga had not fully briefed the issue, the superior court considered his argument that DOC P&P 808.14 VI was unconstitutional. [Exc. 46]. However, the superior court noted that the issue was "almost certainly waived." [Exc. 47].

The superior court interpreted Mr. Valoaga's argument to be that DOC was unconstitutionally treating the purported inability to provide a sample within two hours as a refusal. [Exc. 47]. While noting some concerns about the two-hour time limit, the superior court concluded that DOC was entitled to deference in establishing policies like 808.14 and that there needed to be a cutoff in the testing process to allow officers "to complete their duties according to DOC's schedule, rather than the inmate's." [Exc. 47-48]. It was not going to second-guess DOC's reasoning on this point. [Exc. 48]. Regarding alternative testing, Mr. Valoaga had not shown a qualifying condition that would warrant that. [Exc. 49].

STANDARDS OF REVIEW

A court may reverse a DOC disciplinary decision only if it "finds that the prisoner's fundamental constitutional rights were violated in the course of the disciplinary process, and that the violation prejudiced the prisoner's right to a fair adjudication."[16] This Court reviews de novo whether an inmate has received procedural due process and whether the inmate has suffered prejudice.[17] This Court independently reviews the merits of an administrative decision when the superior court acts as an intermediate appellate court.[18]

The question of what standard of proof applies to a given issue is a question of law to which this Court will ordinarily apply its independent judgment unless the "issue

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16 AS 33.30.295(b)(1).

17 *Nordlund*, 520 P.3d at 1181.

18 *Id.*

involves agency expertise or the determination of fundamental policy questions on subjects committed to the agency."[19]

ARGUMENT

I. The preponderance of the evidence burden of proof satisfies due process.

A. *Hill* established the minimum evidentiary standard to be used by a disciplinary tribunal.

Mr. Valoaga contends that in *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill* the United States Supreme Court approved the "some evidence" standard as the standard of review a court applies in reviewing a disciplinary decision, and not the minimal evidentiary standard a disciplinary tribunal may use. [Appellant's Br. 4]. This is not supported by the language or analysis in *Hill*. *Hill* established that due process did not require a disciplinary tribunal's decision to be supported by anything more than "some evidence."

The United States Supreme Court identified the issue as "whether findings of a prison disciplinary board that result in the loss of good time credits must be supported by a certain amount of evidence in order to satisfy due process."[20] This is a focus on the procedure of the disciplinary tribunal, and not the actions of a reviewing court. Indeed, immediately before discussion of the "some evidence" standard the Court had declined to reach the question of whether judicial review of disciplinary decisions was

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[19] *DeNuptiis v. Unocal Corp.*, 63 P.3d 272, 277 (Alaska 2003).

[20] *Superintendent, Massachusetts Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 453 (1985).

constitutionally mandated.[21] Without a recognized right to judicial review, this is an instance where the standard of review equals the evidentiary standard.

In reaching its conclusion the *Hill* Court reviewed its earlier decision in *Wolff v. McDonnell* where it had established the minimum due process requirements of a disciplinary hearing.[22] While outlining several protections, *Wolff* had not addressed the necessary quantum of evidence.[23] To answer that question the *Hill* Court balanced the prisoners' and government's relative interests, noting that the "requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action."[24]

A prisoner had a significant interest in loss of good time credits, which was the disciplinary sanction at issue, because of the potential increase in incarceration time.[25]

On the other hand, disciplinary matters occurred in "the distinctive setting of a prison,"[26] and prison administrators were acting in a highly charged atmosphere.[27] Because disciplinary proceedings took place in a "closed, tightly controlled environment," it was important that any due process protections "recognized the legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding

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21 *Id.*

22 *Id.* at 454.

23 *Id.*

24 *Id.*

25 *Id.*

26 *Id.*

27 *Nordlund*, 520 P.3d at 1184; *Hill*, 472 U.S. 445, 456 (1985).

burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation."[28]

Therefore, the United States Supreme Court held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits."[29] That standard would "help to prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens."[30] The Court declined "to adopt a more stringent evidentiary standard as a constitutional requirement."[31]

In *Goff v. Dailey* the United States Court of Appeals, Eighth Circuit rejected the same argument that Mr. Valoaga makes here, disagreeing with the prisoner's contention that precedent regarding "some evidence" only established it as the standard of review.[32] Similar to the Court in *Hill*, the Eighth Circuit balanced the interests at stake—the prisoner's "interest in assuring that disciplinary actions that infringe on their protected liberties are not imposed arbitrarily," and the government's interest in "assuring the safety of inmates and prisoners [and] avoiding burdensome administrative requirements that might be susceptible to manipulation."[33] Having made this analysis, the Eighth

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28 *Hill*, 472 U.S. at 454-55.

29 *Id.* at 455.

30 *Id.*

31 *Id.* at 456.

32 *Goff v. Dailey*, 991 F.2d 1437, 1440 (8th Cir. 1993).

33 *Id.* at 1441.

Circuit confirmed that a prisoner's "constitutional interest in a non-arbitrary result is fully satisfied if the disciplinary committee bases its decision on at least 'some evidence' against him."[34]

Federal due process only requires that a disciplinary decision be supported by some evidence. Because the preponderance of the evidence standard imposed by DOC regulation is more demanding, it satisfies federal due process.

B. The preponderance of the evidence standard is constitutional under state law.

1. Balancing of the interests supports a preponderance of the evidence standard.

As outlined in his superior court brief incorporated by reference, Mr. Valoaga contends that the state constitution requires a clear and convincing evidence standard rather than the preponderance of the evidence standard established by DOC regulation.[35] [Exc. 6-11]. Due process does not impose this heightened requirement.

DOC agrees with Mr. Valoaga that the framework in *Mathews v. Eldridge* is typically used to determine the appropriate standard of proof. [Exc. 7]. That requires looking at

> the private interest affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[36]

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34 *Id.* at 1442.

35 22 AAC 05.455(a).

36 *DeNuptiis v. Unocal Corp.*, 63 P.3d 272, 279 (Alaska 2003).

While Mr. Valoaga discusses several collateral consequences that a prisoner may experience because of a disciplinary decision, including potential use in criminal proceedings, or as a factor in terminating parental rights or denying discretionary parole eligibility, [Exc. 10], he fails to identify or balance those against the important interests that DOC has as the prison administrator. That balancing supports a roughly equal sharing of the risk of an erroneous decision.

While not citing to *Mathews*, in *Hill* the United States Supreme Court nonetheless conducted that balancing test in holding that the "some evidence" standard was an appropriate evidentiary standard. This Court and the United States Supreme Court performed similar inquiries in *McGinnis v. Stevens*[37] and *Wolff*,[38] respectively.

The concerns for institutional safety, administrative efficiency, and preserving the rehabilitative nature of the disciplinary process have been mentioned a few times in this brief.[39] It is also notable that, although in *Nordlund v. Dep't of Corr.* this Court considered the standard of review and not the burden of proof, it adopted the reasoning from *Hill* that supported the "some evidence" evidentiary standard.[40] The interests are of sufficient significance on either side to warrant equally sharing the risk of an erroneous decision.[41]

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37 543 P.2d 1221, 1229 (Alaska 1975).

38 418 U.S. 539, 562–63 (1974).

39 *Hill*, 472 U.S. at 454–55.

40 *Nordlund*, 520 P.3d at 1184.

41 *See DeNuptiis*, 63 P.3d at 279–80.

2. Alaska precedent supports a preponderance of the evidence standard.

While in a different context, this Court's decision in *Disciplinary Matter Involving Walton* supports use of the preponderance of the evidence standard.[42] There, an attorney facing disciplinary charges contended that a clear and convincing evidence standard, rather than a preponderance of the evidence standard, should apply.[43] Similar to DOC regulation, the Bar Rules provided for that evidentiary standard.[44] Also similar to major DOC disciplinary proceedings, disciplinary proceedings in which an attorney might be suspended or disbarred "must conform to the requirements of due process under both the federal and Alaska constitutions."[45]

After reviewing other authority and considering the important policy issues at play, this Court rejected the attorney's contention.[46] The Court described the balancing process used to reach that conclusion:

> In that process the court must weigh the private interest involved in any given proceeding against the public's interest, and determine whether, given the relative strengths of those interests, the risk of error of an incorrect factual decision should be evenly borne or should be placed more heavily upon the public. If, because the individual's interest is greater than the public's, the risk should be placed more heavily upon the public, then a higher standard of proof must be used.[47]

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42 676 P.2d 1078, 1085 (Alaska 1983).

43 *Id.* at 1084.

44 *Id.*

45 *Id.* at 1082.

46 *Id.* at 1084.

47 *Id.* at 1084–85.

The attorney had a significant interest in the practice of law, his livelihood, and protecting its interest.[48] However, the public also had a substantial interest in a fair and accurate judicial system "which requires that lawyers working within it act with integrity and honesty."[49] Given their position of trust and the ability to engage in activities from which others were excluded, there was a risk of substantial harm from an attorney acting unethically.[50]

Not persuaded that the attorney's practice of law and reputation were so much more substantial than the identified public interests, this Court concluded that neither the federal or state constitutions required the clear and convincing standard of proof—"the risk of error should be borne equally."[51]

Like the situation in *Disciplinary Matter Involving Walton*, prisoner disciplinary proceedings have important individual interests on one side, and substantial interests that go beyond administrative efficiency on the other. Like attorney disciplinary matters, prisoner disciplinary proceedings should not require more than a preponderance of the evidence burden of proof.

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48 *Id.* at 1085.

49 *Id.*

50 *Id.*

51 *Id.*

3. Mr. Valoaga's other arguments do not change the propriety of the preponderance of the evidence standard.

Mr. Valoaga cites to this Court's discussion in *McGinnis v. Stevens* about the standard of proof "of guilt [being] substantially more probable than . . . innocence,"[52] [Exc. 7-8, 10], but that case did not establish this as a constitutional minimum as Mr. Valoaga urges. Rather, this case considered DOC regulations at the time, which provided for that standard of proof. That regulation has changed. Determining that this standard did not violate due process is not the equivalent of designating it as constitutionally required.[53]

Mr. Valoaga also contends that a stricter evidentiary standard is required because he has not yet been convicted of the offense for which he is being held. [Exc. 38]. While it is true that a pretrial detainee may not be punished prior to an adjudication of guilt, that is punishment for the crime with which the pretrial detainee is charged.[54]

Federal law clearly permits imposing discipline on pretrial detainees.[55] While there is a distinction between discipline for pretrial and sentenced inmates, it is not regarding the appropriate standard of proof. Rather, pretrial inmates are entitled to a due process

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52 *McGinnis v. Stevens*, 543 P.2d 1221, 1229 (Alaska 1975). Mr. Valoaga interprets this standard to be one of "clear and convincing evidence."

53 *Id.* ("Thus, we hold that the Division's adoption and use of the guilt determination criterion of 'substantially more probable than . . . innocence' is not violative of Alaska's constitution and affords adequate protection to the inmate in disciplinary proceedings.").

54 *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

55 *Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996) ("Our conclusion does mean, however, that pretrial detainees may be subjected to disciplinary segregation only with a due process hearing to determine whether they have in fact violated any rule.").

hearing under circumstances where a sentenced prisoner would not. For example, punitive segregation is not considered a deprivation of a liberty interest and can be imposed without the protections outlined in *Wolff*.[56] This is because punitive segregation is not viewed as a dramatic departure from the basic conditions of a sentence: "Discipline by prison officials in response to a wide range of misconduct falls within the expected perimeters of the sentence imposed by a court of law."[57] However, that analysis does not apply to pretrial detainees who have not yet been convicted, and therefore a due process hearing is required before imposing punishment.[58]

Here Mr. Valoaga was provided with a due process hearing with the protections outlined in *McGinnis v. Stevens*.[59] There is no support to impose the additional burden of a heightened standard of proof for a process that serves the same goals for sentenced and unsentenced inmates.

C. Any error associated with the applicable evidentiary standard is harmless.

The Court need not reach the question of the applicable standard of proof. Regardless of what it was, the disciplinary tribunal would have reached the same decision. There is no dispute that Mr. Valoaga was not able to provide a urine sample in the allotted time. There is no dispute that he committed a violation of

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56 *Sandin v. Conner*, 515 U.S. 472, 487 (1995).

57 *Id.* at 485.

58 *See Mitchell v. Dupnik*, 75 F.3d 517, 524 (9th Cir. 1996).

59 *McGinnis v. Stevens*, 543 P.2d 1221, 1236–37 (Alaska 1975).

22 AAC 05.400(c)(16). This is supported not just by the preponderance of the evidence, but by clear and convincing evidence. There was no prejudice to Mr. Valoaga as to the standard of proof used by the disciplinary tribunal.[60]

II. DOC P&P 808.14 is constitutional.

A. Mr. Valoaga has waived the argument that he should have been provided alternative testing and his challenge to P&P 808.14 because he did not exhaust his administrative remedies.

This Court should not consider Mr. Valoaga's argument as to the constitutionality of P&P 808.14 VI or that he should have been offered alternative testing. At no point during the disciplinary proceeding or in his appeal to the superintendent did he tell officials he had a medical or mental health condition that prevented him from providing a sample or ask for alternative testing. [Exc. 56-59, 62; Hearing Audio]. Further, the document Mr. Valoaga presents for the contention that DOC offers saliva testing as a matter of course, [Exc. 42], was not considered by the agency during the disciplinary hearing, and therefore not a part of the record and should not be considered.[61]

This Court has recognized that "an issue not presented to an administrative decisionmaker generally cannot be argued for the first time in court."[62] Overall, the doctrine of administrative exhaustion serves the purpose of "allowing the agency to correct its own errors so as to moot judicial controversies, develop a factual record, and

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60 *See* AS 33.30.295(b)(1).

61 *See State, Dep't of Nat. Res. v. Transamerica Premier Ins. Co.*, 856 P.2d 766, 776 (Alaska 1993) (noting that "an appellate brief can neither append nor refer to evidence outside the record.").

62 *Walker v. State, Dep't of Corr.*, 421 P.3d 74, 78 (Alaska 2018).

discourage the deliberate flouting of its processes."[63] In *James v. State, Dep't of Corr.* this Court applied the doctrine to appeals from disciplinary decisions, determining that the appellant prisoner had waived arguments because he had not raised them during the administrative proceedings and because they were insufficiently briefed.[64]

While in *Walker v. State, Dep't of Corr.* this Court held that issue exhaustion would not necessarily always preclude a prisoner from raising an issue on appeal that was not presented during the institutional proceedings,[65] there is no cause to excuse Mr. Valoaga's failure here. The reasons potentially excusing issue exhaustion outlined in *Walker* included lack of notice of the requirement to the prisoner, the limited resources available to a prisoner during the administrative appeal process, and the statutorily limited review of disciplinary decisions accorded to a court under AS 33.30.295.[66]

Regarding the latter, AS 33.30.295 already circumscribed review of disciplinary decisions, requiring a prisoner to allege a violation of fundament constitutional rights.[67] Therefore the real issue was "whether prisoners should be required to raise *constitutional* claims during their administrative appeal in order to avoid waiver."[68] Because the DOC officials handling institutional appeals would have no special expertise to address

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63 *Broeckel v. State, Dep't of Corr.*, 941 P.2d 893, 896 (Alaska 1997).

64 *James v. State, Dep't of Corr.*, 260 P.3d 1046, 1050 n.12 (Alaska 2011). *overruled by Walker*, 421 P.3d 74.

65 *See Walker*, 421 P.3d at 81.

66 *Id.* at 79-81.

67 *Id.* at 80.

68 *Id.*

constitutional claims, judicial review of such claims without requiring exhaustion would not "impermissibly displace agency skill or invade the field of agency discretion."[69]

Mr. Valoaga's contention that he should have been offered alternative testing is not a challenge to the disciplinary process, but rather to DOC operations—how it conducts its substance abuse testing. As such, this is a matter within the expertise of the agency.

Mr. Valoaga had notice of the potential availability of alternative testing and the consequences for failure to provide a sample within the two-hour timeframe. DOC P&P 808.14 VI.C.4 informs prisoners that a "prisoner who fails to provide a urine specimen within two hours of being ordered to do so shall be considered to have refused to submit the specimen."[70] DOC P&P 808.14 VI.E notifies prisoners that alternative methods to urine testing may be used "if a prisoner has a demonstrated medical/mental health condition that prevents the submission of a urine sample, or as otherwise approved by the Director."[71]

Whether Mr. Valoaga had a medical or mental health condition that necessitated alternative testing is knowledge he would possess. Knowledge of his own physical condition is different from the constitutional claims in *Walker* for which prisoners would likely "lack the time and expertise necessary to effectively present."[72]

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69 *Id.*

70 DOC P&P 808.14 VI.C.4., *available at* https://doc.alaska.gov/pnp/pdf/808.14.pdf.

71 DOC P&P 808.14 VI.E, *available at* https://doc.alaska.gov/pnp/pdf/808.14.pdf.

72 *Walker*, 421 P.3d at 80.

Despite this notice, Mr. Valoaga did not request alternative testing or alert anyone of a medical or mental health condition that prevented him from providing a urine sample. Mr. Valoaga would have had this opportunity during his interactions with Officer Clark, during the disciplinary hearing, and in his appeal to the superintendent.

Because of Mr. Valoaga's failure DOC was precluded from potentially providing alternative testing or considering that as grounds for dismissing the disciplinary charge. The goal of allowing an agency to correct its own errors, assuming there was one, that is served by administrative exhaustion is in full force here and should preclude consideration of these arguments.[73]

B. Due process did not require DOC to *sua sponte* provide Mr. Valoaga with alternative testing.

Mr. Valoaga argues that he should have been offered saliva testing and that P&P 808.14 VI is unconstitutional as applied to him because he did everything physically possible to comply with DOC's substance abuse policy. Because Mr. Valoaga did not request alternative testing or indicate a physical or mental health condition that prevented him from providing a urine sample during the disciplinary proceeding, he appears to assert that DOC should have provided alternative testing without any prompting from him.

There is no support for the contention that DOC was constitutionally required to provide him saliva testing because it was his intent to comply with DOC's zero tolerance substance abuse policy. Taking this argument to its end, DOC would essentially be

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[73] *Broeckel v. State, Dep't of Corr.*, 941 P.2d 893, 896 (Alaska 1997).

required to provide saliva testing anytime a prisoner failed to provide a sample within the two-hour timeframe, as Mr. Valoaga still does not identify any particular reason why he was unable to do so.

Mr. Valoaga claims that "the facts are undisputed that it was physically impossible for [him] to urinate within the time frame demanded," [Appellant's Br. 10], but that is not a claim which DOC can test. The only support is Mr. Valoaga's own assertion, as there is no documented medical or mental health reason that supports his claim. Unfortunately, and with no aspersion on Mr. Valoaga's credibility, his explanation could easily be used by prisoners seeking to evade disciplinary violations for failure to provide a urine sample where the alleged "failure" was motivated by avoiding a positive test result.

In *Larson v. State, Dep't of Corr.*[74] this Court did not conclude that DOC was required to provide alternative testing whenever a prisoner failed to provide a urine sample within the two-hour timeframe. Rather, at issue was whether a prisoner had sufficiently pled an Eighth Amendment claim for cruel and unusual punishment related to his alleged paruresis, a condition that made it physically impossible for him to provide a urine sample while someone was watching.[75] DOC's random substance abuse testing required him to provide a urine sample in the presence of an officer, and the prisoner alleged that to comply he would have to consume enough water to make urination an

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74 284 P.3d 1 (Alaska 2012).

75 *Larson v. State, Dep't of Corr.*, 284 P.3d 1, 4 (Alaska 2012).

involuntary function, causing him intense pain and amounting to physical torture.[76] This Court concluded that sufficiently pled a claim.[77]

While *Larson* did not establish the constitutional boundaries of alternative testing, it does indicate that the Eighth Amendment may require alternative testing as an accommodation to a demonstrated physical or mental health condition. DOC P&P 808.14 VI provides for this. The document Mr. Valoaga provides in support of his contention that DOC must provide saliva testing, a Substance Abuse Testing form for another prisoner, [Exc. 42], appears to be the result of just such a request for accommodation.

Larson also indicates that a prisoner is required to actually make a showing of a need for an accommodation to obtain an exception from the urine testing that is generally applicable to the prisoner population. In *Larson* the prisoner had provided evidence that he had repeatedly brought the issue to the attention of correctional officers, medical staff, and the superintendent, and had requested various accommodations to provide a sample for substance abuse testing.[78] These requested accommodations included being allowed to drink as much water as possible to provide a urine sample, to use a substitute testing method such as saliva, or to be placed in a dry cell by himself to provide a urine sample.[79]

CONCLUSION

For these reasons, the Court should uphold the disciplinary decision.

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76 *Id.*

77 *Id.* at 9.

78 *Id.* at 4.

79 *Id.*