

OFFICE OF INSPECTOR GENERAL
OF THE NEBRASKA CORRECTIONAL SYSTEM

NDCS Reliance on Drug Field Tests for Discipline of Incarcerated People

SUMMARY OF INVESTIGATIVE REPORT No. 2024-01

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Doug Koebernick, Inspector General
Zach Pluhacek, Assistant Inspector General

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EXECUTIVE SUMMARY

Synthetic cannabinoids and other “designer drugs” present an incredible challenge to correctional systems. These drugs – which can be distributed via pieces of liquid-soaked paper smaller than a pinky finger – undermine rehabilitation and threaten the health of the prison population and correctional staff. In Nebraska, these drugs also burden outside resources the Nebraska Department of Correctional Services (NDCS, or Department) relies upon for assistance.

In response to this relatively new challenge, since 2018, when disciplining those accused of having drugs in prison, NDCS has relied on field tests that are intended only for initial screening purposes. Results from these tests are not definitive but form the basis for significant sanctions, including the following:

- Lost “good time”;
- Removal from work release or work detail;
- Removal from clinical programming;
- Demotion to a more secure/restrictive facility;
- Confinement to one’s room or cell for a period of weeks, with limited out-of-cell time;
- Loss of canteen and other privileges; and
- Confiscation of property.

These sanctions are determined by NDCS employees but also appear on records available to the Board of Parole, therefore impacting parole decisions, as well.

Prompted by complaints about these tests, the Office of Inspector General of the Nebraska Correctional System (OIG) conducted an investigation into the Department’s use of these unconfirmed results from field tests in its administrative proceedings. The purpose of this investigation was to determine the veracity of the complaints, to assess the Department’s drug testing practices, and ultimately to provide recommendations to the Department.

The OIG recognizes and appreciates the efforts of NDCS and its staff to limit the flow of contraband in state prisons. At the same time, the complainants in this case raise an issue of fundamental fairness and procedural justice. They contend that, in its zeal for keeping drugs out of its facilities, NDCS has become over-reliant upon an imperfect tool and has limited individuals' ability to defend themselves against unwarranted sanctions. Many of these sanctions result in individuals spending additional months or more in prison. Furthermore, the lack of more robust testing may prevent some legitimate seizures from being pursued as criminal cases.

As a result of this investigation, the OIG found:

1. Like any field test, the drug tests used by NDCS can and do sometimes yield inaccurate results.
2. While field tests are not conclusive, they remain a useful tool in screening for possible drug contraband.
3. Despite the potential for false positives and false negatives with field tests, NDCS generally does not obtain or allow for confirmatory testing in disciplinary cases. This raises fairness concerns and is contrary to the user manual for these field tests.
4. Without confirmatory testing, potential criminal activity in state correctional facilities is not being addressed to the fullest extent possible.
5. A state statute which gives incarcerated people the right to confirmatory testing is specific to urine tests, not other types of tests.
6. Significant penalties exist for those who are caught in possession of suspected drug contraband, but the collateral consequences for these individuals can be even greater.
7. While there is no formal process for incarcerated people to request further testing of suspected contraband, some have pursued such testing through alternative channels, which resulted in dismissal of their misconduct reports. This promotes inequity in the disciplinary process.

The OIG recommends NDCS take the following actions:

1. Revise the Department's disciplinary policy to explain the limitations of drug field tests and that misconduct reports should include "other context which establishes substantial evidence of the offense."
2. Ensure that all staff are trained regarding the aforementioned policy change and made aware of the limitations of drug field tests.
3. Revise departmental rules and regulations to provide access to confirmatory testing of suspected drug contraband, similar to what is permitted for urine tests.
4. Identify a provider of affordable and credible confirmatory testing for administrative disciplinary cases.
5. Present, in writing, information about the limitations of field testing and the option to request confirmatory testing to each incarcerated person who faces potential discipline following a field test.
6. Consult independent experts in forensic analysis or forensic toxicology before adopting new field testing technologies or revising policies related to these technologies.

ABOUT THIS REPORT

The Office of Inspector General of the Nebraska Correctional System was established in 2015 to provide oversight and accountability for Nebraska’s correctional system, including the Department of Correctional Services.¹ As part of its work, the OIG receives and investigates complaints, with the goal of providing information and recommendations which may help improve the operations of the correctional system.

In late 2022 and early 2023, several incarcerated individuals submitted complaints to the OIG after they faced discipline or other consequences — for example, being relocated to a more secure facility or having their court-related paperwork confiscated — based on what they alleged were faulty drug tests used by NDCS. The OIG reviewed these complaints, and ultimately merged them into a single investigation, which is documented in this summary report.

The complaints focused on chemical testing of suspected drug contraband, not testing of biological specimens such as urine for toxicological purposes. These are two separate processes under NDCS policy and involve different testing methods. However, because the processes are related, the OIG examined both for this investigation, and information about both is included in this summary report.

The OIG interviewed NDCS staff, incarcerated people, and others with knowledge of the complainants’ specific cases, and examined documentation and evidence from each case. The OIG also gathered information about the Department’s testing practices and the equipment used to conduct the tests; reviewed relevant NDCS policies, procedures, and rules and regulations, state statutes, and case law; and interviewed NDCS staff who oversee the investigative, drug testing, and disciplinary processes at various facilities. Finally, in crafting the recommendations contained in this report, the OIG received input from national and Nebraska-based experts in the field of forensic drug testing and analysis.

¹ Office of Inspector General of the Nebraska Correctional System Act, Neb. Rev. Stat. § 47-901 et seq.

The OIG thanks NDCS staff and experts from the Nebraska State Patrol Crime Laboratory, the National Institute of Science and Technology's Forensic Science Toxicology Subcommittee, and the Drug Enforcement Administration's Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG) for sharing their knowledge and insights. The OIG also thanks NDCS Deputy Director for Prison Operations Robert Madsen for reviewing the cases cited in this report and for his longstanding engagement with the OIG on this topic.

Note on Redactions

This report is a summary version of an investigative report which was submitted to NDCS on February 6, 2024. Pursuant to state law, confidential information has been redacted.² This includes names of individual complainants.

NDCS Response

Pursuant to the Office of Inspector General of the Nebraska Correctional System Act, NDCS was presented with an unredacted version of this report on February 6, 2024. Director Rob Jeffreys responded to the report on February 26, 2024. Director Jeffreys did not provide any corrections to the report and indicated he would take the recommendations under consideration.

² Neb. Rev. Stat. § 47-912.

BACKGROUND AND COMPLAINTS

NDCS uses two separate drug testing processes: one for testing bodily fluids of individuals suspected of being under the influence of banned substances, and another for testing possible drugs or items which might be laced with drugs. Both of these processes rely, at least to some extent, on **screening tests**. Unlike **confirmatory tests**, which are conducted in a laboratory setting, screening tests are less expensive and can be performed almost anywhere. They are also less precise and more frequently render incorrect or misleading results. Screening tests may also be referred to as field tests, presumptive tests, or spot tests.

Standard scientific and forensic toxicology practice is to confirm the results of screening tests with additional testing in a laboratory. As one author noted in a 2021 article for the National Institute of Justice:

“As you strip away the safeguards that laboratory processes are specifically designed to ensure, a hazardous slide toward false positive results becomes more and more likely. ... Field tests create a lot of opportunities for tests to be misunderstood and misapplied if users aren’t fully aware of the limitations of the results they’re producing.”³

Prior to 2018, NDCS utilized the Nebraska State Patrol Crime Laboratory (State Crime Lab) for confirmatory testing of suspected drug contraband for internal disciplinary purposes. However, in early 2018, the State Crime Lab notified NDCS that the lab was no longer able to test samples unless they were related to a death or illness, were in large quantities, or could be directly tied to a criminal prosecution. This was due to the volume of samples that were being submitted by NDCS, the emergence of “designer drugs” which are more difficult to test, and increases in the lab’s overall load of criminal cases.

³ Peter Stout, CEO and President, Houston Forensic Science Center, "Caution Is Necessary When Expanding Field Testing Capabilities," January 5, 2021, [nij.ojp.gov](https://nij.ojp.gov/topics/articles/caution-necessary-when-expanding-field-testing-capabilities): <https://nij.ojp.gov/topics/articles/caution-necessary-when-expanding-field-testing-capabilities>.

The change left NDCS without an obvious means of obtaining confirmatory tests for a significant amount of suspected contraband found within its facilities. It is unclear what, if any, efforts the Department undertook to identify other sources of confirmatory testing.

Since that time, NDCS has relied upon a few different brands of presumptive field testing devices. The most recent known to the OIG is a series of tests manufactured by Texas-based DetectaChem and sold under the product name MobileDetect. MobileDetect tests are colorimetric tests, which “rely on simple chemical reactions and produce visible results that can be interpreted with the naked eye.”⁴ (These tests are similar in appearance and function to home pregnancy tests, or the COVID-19 rapid tests which became unfortunately familiar in recent years.) MobileDetect was the most commonly used field test within NDCS at the time of this investigation, and details in this report are specific to MobileDetect tests. However, the broader concerns and conclusions raised herein relate to all field tests.

Beginning in late 2022, the OIG received several complaints from individuals who faced disciplinary action or other consequences based on field test results they claimed were inaccurate. In reviewing these complaints, it was determined that four provide the clearest examples of the concerns raised. These examples are cited only because they illustrate questions or inconsistencies with the NDCS drug testing process. Because confirmatory testing was not conducted, the OIG has no way of knowing whether these individuals were, in fact, in possession of contraband.

Case 1

On September 22, 2022, Complainant 1 was removed from the Community Corrections Center-Omaha and transferred to the Omaha Correctional Center after receiving a misconduct report for possessing a suspected intoxicant and interfering with a search. Complainant 1 contended the substance – liquid inside a bottle – was body oil he had received from a relative. A series of

⁴ Harper L, Powell J, Pijl EM. An overview of forensic drug testing methods and their suitability for harm reduction point-of-care services. *Harm Reduction Journal*, 14(1), 52. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5537996/>

MobileDetect tests indicated “positive detection” with “possible substances detected” including fentanyl and synthetic cannabinoids.

Complainant 1 submitted an inmate interview request seeking an independent test of the liquid, but this request was denied by NDCS. On November 23, 2022, Deputy Director for Prisons Robert Madsen informed the OIG of the following:

“We utilized another field test on the body oil/cologne which came back inconclusive. As such, we are not considering it as fentanyl. [Complainant 1] was not found guilty of drug abuse via the misconduct report and ultimately the Appeals Board reversed the decision on this report in which he was originally found guilty by the committee of refusing/interfering with a search. Had the additional field test come back with a similar result, we would have taken the evidence to the State Lab for testing as such would possibly be a felony offense.”

However, prior to this being resolved, Complainant 1 had already been reclassified and transferred to the Work Ethic Camp. He never returned to community corrections, and was paroled from the Work Ethic Camp on February 22, 2023.

Case 2

On November 30, 2022, and again on December 16, 2022, intelligence staff at the Omaha Correctional Center confiscated “legal paperwork” belonging to Complainant 2 after some of the papers tested “positive” for “possible substances” including synthetic cannabinoids, synthetic cathinones, and BZP, using MobileDetect tests. Staff indicated that the paperwork had been sent by the Lancaster County Clerk of the District Court. Complainant 2 had recently filed a civil complaint against NDCS in the Lancaster County District Court, alleging negligent dental care.

Complainant 2 received misconduct reports for drug or intoxicant abuse in both cases, and both were later dismissed for reasons unrelated to the MobileDetect test results. Despite purportedly testing positive for possible illegal substances and coming from the Clerk of the District Court, the papers were not referred to law enforcement, and it does not appear NDCS performed any confirmatory testing on the paperwork. In May 2023, Deputy Director Madsen stated in an email that the evidence would be destroyed “in the near future.”

In the meantime, the Lancaster County District Court began receiving second- and third-hand reports that mail from its office was testing positive for synthetic cannabis in state prisons. On January 13, 2023, the clerk of the district court informed his staff about the situation in an email:

“The Sheriff’s Deputies informed me that, although synthetic cannabis is considered contraband in the prison system, it is not illegal to own, and in fact may be found in many legal products. Such as hand lotion. While we don’t know this is what’s causing the positive tests, I’d ask that everyone take a look at the products they use at work and at home, and if there are any synthetic cannabis products in them, you NOT use them at work, and to the extent possible, not use them in the morning before coming in to work.”

“As the deputies told me, if this is the source of the positive tests, it’s not illegal for us to use, but using it and transferring it to correspondence going to the prisons/jails creates headaches not only for Corrections staff, but for us, investigators, and the Court. Plus, it results in incarcerated litigants not getting correspondence from the Court in a timely manner, thereby negatively effecting [sic] their cases.”

Complainant 2 received a photocopy of his legal paperwork on January 6, 2023, several weeks after the originals were confiscated.

Case 3

On December 19, 2022, Complainant 3 at the Omaha Correctional Center submitted a written complaint to the OIG after he had been found guilty of drug or intoxicant abuse. Staff had found a bottle of liquid in his room which tested “positive” for “possible substances” including amphetamines, synthetic cannabinoids, cathinones, and BZP, but which he contended was perfume oil used for Muslim religious practice. His guilty finding was later upheld on appeal.

On January 18, 2023, after the OIG inquired about this case, Deputy Director Madsen responded:

“I reviewed the matter and requested additional in-house testing of the evidence with other testing technology. These additional tests came back negative and inconclusive. If these tests would have come [sic] back confirming the original test results, we would have sent the evidence to the State Lab as such would qualify for a felony offense. Based on the additional results, I spoke with Warden Lewien and this misconduct report will be dismissed. We will look at current policy/procedures to determine if we can

clarify directions for situations such as this and I will discuss with all wardens later this week at a schedule [sic] meeting.”

Madsen later clarified that the additional testing was conducted using a TruNarc device as well as a different DetectaChem test. These are both screening tests that are not intended for confirmatory purposes.

Case 4

On January 3, 2023, Complainant 4 was removed from the Community Corrections Center-Omaha and transferred to the Omaha Correctional Center after receiving a misconduct report for possessing a suspected intoxicant. The misconduct report alleged that tea bags soaked in synthetic cannabinoids were found in his property. Complainant 4 was found guilty and appealed, requesting an independent test at his own expense.

The NDCS Appeals Board denied the appeal, stating as follows:

“The record indicates that the teabags in inmate [Complainant 4’s] locker tested positive for synthetic cannabinoids. This is sufficient evidence of a Rule 5-I-H violation. The Incident Report (IR) with the results of the Detectachem test, clearly indicates the result as ‘Positive Detection’; Independent confirmation testing for the substance is not a right under Title 68 Chapter 6 of the Nebraska Administrative Code. If any of the tea bags tested positive for synthetic cannabinoids, the standard is met for a Rule 5-I-H violation.”

While the result of the DetectaChem MobileDetect test state a “Positive Detection,” it only indicates “Possible Substances Detected.” Complainant 4 further appealed this decision in Douglas County District Court; however, the case was dismissed due to a procedural issue (improper service).

Complainant 4 remained at the Omaha Correctional Center. He was reclassified in June 2023, but was not returned to work release status. According to NDCS, he was kept at a higher custody level due to being within two months of his scheduled parole hearing in August 2023. However, he was not paroled at that time, and is now scheduled for a new hearing in March 2024.

NDCS DRUG TESTING AND RELATED ISSUES

At the time of this investigation, NDCS policy specifically mentioned three technologies used by departmental staff for testing suspected drug contraband: DetectaChem’s MobileDetect, TruNarc, and “Dual Swab, Multi-Substance Detect Kits” (NIK kits). All three are brands of screening tests. The policy allows the Director or designee to provide for the use of other testing technologies; however, as of early 2023, Deputy Director Madsen stated the three listed above were the only field testing technologies used by NDCS. Of these, MobileDetect was the most widely used within the Department.

MobileDetect

As explained earlier, MobileDetect pouches are presumptive, colorimetric tests which identify possible substances based on a color change that results from a chemical reaction. The color which indicates a presumptive positive result varies by the specific type of test. For example, the test for synthetic cannabinoids (K2) turns a yellowish color.

In a user manual for the MobileDetect tests, manufacturer DetectaChem repeatedly warns about the limitations of these tests and the possibility of inaccurate results. In a section titled “Interpreting Pouch Results,” the manual notes (with emphasis added by the OIG):

*“A positive detection indicates that a substance is **presumed present** and **proper procedure should be followed for collecting evidence for further testing and confirmation with an accredited laboratory.**”*

In a section titled “False Negatives/Positives,” the manual notes (with emphasis added by OIG):

*“As with any detection test, there is no guarantee that positive results are ultimately defining. False negatives and positives can occur in real-world testing. The National Institute of Justice has published reports of colorimetric testing and what substances can test positive. As colorimetric reactions are intended, substances that contain the same basic reactant component will generate a positive detection. These reactions are limited, but **a forensic laboratory should be used to identify and confirm unknown substances.**”*

In a section titled “Pouch Warning”:

*“Positives [sic] results can occur with components contained in both legal and illegal substances. Tests and drug identification **should be confirmed with approved analytical equipment or laboratory.**”*

In a section titled “Use Disclaimer”:

“Test Results are not guaranteed and color formed can vary with substance, amount, temperature, or other external factors. Both False Positives and False Negatives are possible, results should be confirmed by a Forensic Laboratory as required.”

*“This product has inherent limitations both in terms of accuracy and longevity. Any screening result **should be confirmed through the use of confirmatory testing process. This product is not to be used as the sole means of detection and DetectaChem is not responsible for any inaccuracies.**”*

All NDCS staff and administrators who use MobileDetect field tests should be aware of these disclaimers. Departmental policy allows only “authorized and trained persons” to conduct testing of suspected illicit substances. The MobileDetect user manual further states that the tests “should only be used by persons trained to use the product, who have fully read this operating manual, and who have a thorough understanding of its operation and risks.”

However, in interviews and conversations with the OIG, NDCS staff exhibited widely differing understandings of the reliability of these tests. Many staff expressed surprise when informed the tests are not definitive, including those involved in the disciplinary process. Others shared examples of clearly inaccurate test results they had encountered. For example, staff discovered that one type of MobileDetect test often returned positive results on a certain shade of yellow paper, regardless of whether it was tainted with drugs, due to the paper matching the color which results from a positive test. In another instance, staff dismissed misconduct reports after learning that receipt-type paper could interfere with the tests. A facility administrator who tested cash from their own pocket received a presumptive positive result for contraband.

Despite these inconsistencies, NDCS regularly uses these tests for investigative and disciplinary purposes without conducting confirmatory testing.

In a March 14, 2023 email, Deputy Director Madsen shared the following with the OIG:

“When NDCS imposes discipline based on a charge of drug or intoxicant abuse, there is other context that establishes substantial evidence of the offense. If you are aware of a misconduct report based solely on a single presumptive test, please let me know. If an incarcerated individual’s privileged mail has been screened with a positive test result, that mail would not be destroyed as it is possible evidence of a crime. Such evidence will be handled in accordance with the established procedures.”

In two of the cases investigated by the OIG — Cases 1 and 3 in this report — when the OIG brought them to the Deputy Director’s attention, the suspected contraband was retested and the results conflicted with the original test results. This led to disciplinary action being dismissed in both cases. Case 3 had previously been upheld on appeal through the Department’s internal disciplinary process.

In Case 2, the individual’s misconduct reports were dismissed early on, but he did not receive photocopies of his court-related papers until more than a month after the originals were confiscated. The original mail remained in evidence as of May 2023, but was not referred to law enforcement and was set to be destroyed. This is despite the mail apparently coming from a district court clerk’s office, which would be a significant concern if the mail actually contained an illicit substance.

Other Field Tests

NIK kits, another screening technology used by NDCS, is a form of colorimetric test similar to MobileDetect. Deputy Director Madsen said when the Department began using MobileDetect, it was to replace NIK kits. At the time, NDCS did not have specific NIK kits to test for synthetic cannabinoids.

TruNarc, the third testing technology used by NDCS, is a portable device which tests a sample using scattered light through a technique called Raman spectroscopy. In a laboratory setting, Raman spectroscopy is considered a more reliable form of test than color tests like MobileDetect, because it is more selective.⁵ However, departmental policy does not allow

⁵ In this context, selectivity refers to a test’s ability to identify a substance without interference.

TruNarc to be used for testing trace elements on paper. This is a significant limitation because drug-soaked paper is a widespread problem in correctional systems, in Nebraska and elsewhere.

The Scientific Working Group for the Analysis of Seized Drugs (SWGDRUG), which advises the U.S. Drug Enforcement Administration and the Office of National Drug Control Policy, places color tests like MobileDetect in its lowest tier of testing methods in terms of selectivity.⁶ A SWGDRUG representative who spoke with the OIG for this investigation said results from portable instruments of any kind, including Raman spectroscopy, should still be confirmed by an accredited lab.

Toxicology Tests

For comparison purposes, the OIG also reviewed the NDCS processes for toxicology screening, or testing of bodily fluids of individuals suspected of being under the influence of banned substances. State law entitles incarcerated people to confirmatory testing of these samples, and these tests are the subject of far fewer complaints to the OIG.

Neb. Rev. Stat. § 83-4,114.02 entitles inmates to receive independent confirmation testing of urine samples prior to disciplinary measures being taken for drug or alcohol violations. The law allows the Department to require an inmate to pay the cost of the additional testing if the result remains positive. This statute was enacted in 1999 in response to complaints similar to those examined in this report.

Departmental rules and regulations further specify:

“The point of discovery of a drug violation based on a laboratory drug test is when the result of the laboratory test is received by the facility’s designated staff member. The report shall be placed in the files of the facility and logged in facility records. The report shall be logged within 24 hours after the report is filed, which commences the investigation.”⁷

⁶ SWGDRUG Recommendations Edition 8.1, August 19, 2022. <https://www.swgdrug.org/approved.htm>

⁷ Title 68, Nebraska Administrative Code, Chapter 6.

The toxicology testing process is further detailed in departmental policy, which recently underwent significant changes.

Unlike testing of suspected contraband, toxicology tests are conducted on a routine, random basis for the entire NDCS population. Each month, the Department's drug testing coordinator uses a computer program to generate a random list which includes at least 10 percent of the population in each of the Department's facilities. Facility-level drug testing coordinators are then responsible for ensuring the samples are collected.

As of summer 2023, initial toxicology screening tests could be conducted using either an oral swab or a urine sample. If an incarcerated person received an oral swab test that was positive for a prohibited substance, the person could either accept the findings of the test or challenge the findings and provide a urine specimen for testing.

Samples that required further testing were sent to the NDCS laboratory at the Reception and Treatment Center.⁸ Under this process, samples could take a month to collect and another month – sometimes longer – to be tested by NDCS. If an individual then requested an independent confirmatory test from an outside lab, it could take an additional month or more to receive the results. The implications of these delays varied by facility. At secure facilities, staff told the OIG that people who were nearing the end of their sentences often requested confirmatory testing as a stalling tactic so they could be released without receiving punishment. Because the penalties for drug intoxication can include the loss of good-time sentence reductions, many of these individuals might otherwise have been sanctioned with an additional month or more in prison. At community corrections centers, on the other hand, confirmatory tests were perceived as rarer because people were held back from work or educational release pending the results. This was viewed as a disincentive for obtaining confirmatory testing.

NDCS revised its toxicology testing process in September 2023 to eliminate the use of oral swabs and conduct all confirmatory testing using an outside laboratory under contract with the Department. In early August, the NDCS drug testing coordinator indicated this new process

⁸ This lab is capable of performing confirmatory tests of urine, but not of actual suspected drug contraband, which involves more complicated processes and requires more sophisticated equipment.

would provide faster results – within just a few days – because the outside lab could process the tests within 48 hours of receiving the samples and post the results on an online portal. This is potentially an improvement, although the OIG has not reviewed this process since the change was implemented.

Consequences for Drug-Related Infractions

Under NDCS rules, those found guilty of drug or intoxicant abuse can lose up to six months of good time.⁹ According to departmental policy, the recommended sanctions for second or subsequent drug offenses range from 45 to 90 days of lost good time, although institutional disciplinary committees (IDCs) are instructed to use their discretion.¹⁰ Individuals who lose good time may appeal guilty findings to the NDCS Appeals Board and then to the District Court through the Administrative Appeals Act.¹¹

However, these individuals have no clear ability to appeal the collateral consequences of this kind of misconduct charge, which are often more significant than the formal punishments. These can include:

- Removal from work release or work detail;
- Removal from clinical programming;
- Demotion to a more secure/restrictive facility;
- Confinement to one's room or cell for a period of weeks, with limited out-of-cell time;
- Loss of canteen and other privileges; and
- Confiscation of property.

These sanctions are determined by NDCS employees but also appear on records available to the Board of Parole, therefore impacting parole decisions, as well.

⁹ 68 NAC 6.

¹⁰ NDCS Policy 211.02, Process for Drug Testing (2022).

¹¹ Neb. Rev. Stat. § 83-4,123.

During the legislative hearing on the 1999 bill which established the right to confirmatory urine tests, Senator Dwight Peterson of Elkhorn provided an example of the real-life impacts of one false positive test while expressing his concerns about the Department's toxicology testing protocol:

“This person was given a misconduct report in March of 1998 for a drug offense although he insisted that he had not used drugs. He reported certain irregularities in the collection and reading of his urine sample by the test cup method. The Ombudsman’s Office was contacted and they requested that the department provide a confirmation test but the department refused to do so. The inmate was demoted in custody and transferred from the community custody status to a more secure facility. Because he had no other recourse, the inmate appealed the case in the district court and won. The problem, however, is that it took nearly a year for his case to go through the legal channels. In the meantime because he had a misconduct report for a drug violation, the Parole Board automatically laid him down for a year. Due to intervention from the Ombudsman’s Office and my office, the Parole Board agreed to review his case next month. But the fact of the matter is that he has lost nearly a year of his life as a result of a false reading on a urinalysis test. I simply believe that when we are taking away up to a year of a person’s life for a violation that the violation should be confirmed by a qualified personnel in their own laboratory or an outside setting.”¹²

Those who are caught in actual possession of suspected illicit substances are more likely to face stiff penalties, such as removal from community corrections. This assessment is based on the OIG’s ongoing monitoring of the system and conversations with administrators, staff, and incarcerated individuals. In other words, while the consequences for being in actual possession of suspected drugs are often more significant than those for being high or intoxicated, people caught with suspected drugs have far less ability to mount a defense because they have no access to confirmatory testing.

Policy v. Rules and Regulations

NDCS rules and regulations are adopted pursuant to the Administrative Procedure Act (APA). This process includes formal public notice of the proposed rule(s), and the ability for the public to review the draft language and comment at a public hearing. Under the APA, rules and

¹² Hearing on LB 493, Legislature’s Judiciary Committee, January 28, 1999.

regulations do “not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public, (b) guidance documents . . . , and (c) forms and instructions developed by an agency.”¹³ A separate statute requires the Department to make its internal procedural documents publicly available “unless the safety and security of a correctional institution would be placed at imminent and substantial risk by such publication.”¹⁴

Most procedure and guidance related to drug testing within NDCS is set in policy, not rules and regulations. The specific policy which describes drug testing procedures is marked “For Official Distribution Only” and is not made available to the incarcerated population or to the public via the department’s website. While some of this information might be sensitive to the safety and security of NDCS facilities, it is also highly relevant to the disciplinary process and the due process rights of incarcerated individuals. **This makes it even more important that these testing procedures are fair and align with best practices in forensic science.**

Procedural Justice

The complainants in this investigation know the field tests used by NDCS are not definitive, yet these individuals lacked the ability to secure testing from a more reliable source. In some cases, but not all, when the OIG began asking questions about specific cases with the goal of better understanding the process, NDCS conducted further field testing and retroactively dismissed disciplinary cases. This additional testing is not provided for in policy, is not offered to everyone, and is subject to the same potential inaccuracies as the initial field tests.

This all raises an issue of procedural justice. Procedural justice is “the perceived fairness with which one is treated by an authority figure.”¹⁵ Significant evidence supports this theory that “when people identify a process of punishment to be fair, trustworthy, legitimate, and affording

¹³ Neb. Rev. Stat. § 84-901.

¹⁴ Per Neb. Rev. Stat. § 83-1,135.04: “If any guidance document or internal procedural document is not made available to the public, notice shall be given to the deputy public counsel for corrections and to the Inspector General of the Nebraska Correctional System. The notice shall identify all documents not publicly available by title, number of pages, and date adopted.” Prior to the attorney general’s opinion mentioned earlier in this report, NDCS provided copies of its updated policies to the OIG on a monthly basis. Since the opinion, this has not taken place.

¹⁵ Ryan, C., & Bergin, M. (2022). Procedural Justice and Legitimacy in Prisons: A Review of Extant Empirical Literature. *Criminal Justice and Behavior*, 49(2), 143–163. <https://doi.org/10.1177/00938548211053367>

of the opportunity to present their side of the story, they are more likely to accept a decision as fair,” regardless of the outcome.¹⁶

The theory is mostly based on research in policing and court settings, not correctional environments. However, there is some good evidence that procedural justice is related to compliance and better outcomes among incarcerated people. Ryan and Bergin (2022) offer examples:

“[One study] analyzed monthly panel data covering a 7-year period from a formal grievance system used in U.S. federal prisons, to examine whether procedural justice in grievance management (i.e. rejections and timing of decisions) affected rates of prison violence. Distributive justice (complaint outcomes as granted or denied) did not significantly predict fluctuations in prison violence, though measures of procedural justice did. That is, violence within prisons was found to increase significantly with the number of late replies and rejections of complaints.”

In another study:

“(T)hose who reported that they were treated in a procedurally fair manner at Time 1 were less likely to report engaging in misconduct or receive a disciplinary report at Time 2 ... Interestingly, anger fully mediated the effect of procedural justice on misconduct, indicating that perceptions of unfairness led to anger, which in turn led to misconduct.”

Additional studies cited by Ryan and Bergin found connections between prisons exercising their authority more fairly having lower rates of violent or nonviolent rule violations; better cooperation and compliance by incarcerated people; a possible reduction in risk of rearrest and recidivism outside of prison; and greater likelihood of “collaborating with others to plan for reenter and reduced likelihood of violent rearrest”

¹⁶ Campbell, C. M., Labrecque, R. M., Schaefer, R. L., Harvis, M., Zavita, K. R., Reddy, L., & Labranche, K. (2020). Do Perceptions of Legitimacy and Fairness Matter in Prison? Examining How Procedural and Distributive Justice Relate to Misconduct. *Criminal Justice and Behavior*, 47(12), 1630–1653. <https://doi.org/10.1177/0093854820916901>

Confirmatory Testing Options

Nebraska prisons' reliance on field testing technology is not unique, and concerns about similar practices have been raised in other states:

- In 2021, the Iowa Office of Ombudsman, which is part of that state's legislative branch of government, raised concerns about the presumptive tests being used in Iowa prisons: "The agency admitted the field tests are not perfect; we know of one false-positive that was triggered by a prison's own printer ink."¹⁷
- Also in 2021, a state judge ordered the Massachusetts Department of Correction to stop "imposing any punitive, disciplinary, or other measures against incarcerated persons in the custody of DOC based solely on 'positive' NARK 20023 test results."¹⁸
- In 2022 and 2023, the State of New York Office of the Inspector General issued a pair of reports highlighting issues with the New York state prison system's urinalysis testing process and its drug contraband testing program.^{19 20}

[The New York OIG's 2023 report](#) is particularly relevant. In that report, the office concluded that the New York State Department of Corrections and Community Supervision (DOCCS) had relied "on mere screening tests as the basis for disciplinary action despite such reliance being directly contrary to the test manufacturers' guidance." **Notably, DOCCS has already implemented many of the New York OIG's initial recommendations, "including the securing of an independent outside laboratory to confirm all preliminary positive drug test results."**

Just like with urinalysis tests, there are commercial options available for confirmatory testing in administrative cases involving suspected drug contraband. The Nebraska State Patrol Crime Laboratory could also serve as a resource for the Department in identifying a commercial lab partner.

¹⁷ <https://www.legis.iowa.gov/docs/publications/CA/1313183.pdf>.

¹⁸ [Green v. Mass. Dep't of Corr., 2021 Mass. Super. LEXIS 521, 2021 WL 6335670.](#)

¹⁹ https://ig.ny.gov/system/files/documents/2022/01/doccs-microgenics_2764.316.2019_alb_report_20220103.pdf.

²⁰ <https://ig.ny.gov/system/files/documents/2023/11/doccs-drug-testing-program-report.pdf>.

Generally speaking, turnaround times for tests from these private labs are about 30 days. If confirmatory testing was included as part of NDCS disciplinary proceedings, this could result in manipulation of the process/delays, similar to what is seen with urinalysis testing. These tests also cost more than field tests and confirmatory urinalysis tests. Thirdly, certain confirmatory tests might not cover all potential substances indicated by a field test. The OIG took each of these issues into account in crafting the recommendations in this report.

FINDINGS

- 1. Like any field test, the drug tests used by NDCS can and do sometimes yield inaccurate results.** This is not a criticism of these tests, but an acknowledgement of their limitations.
- 2. While field tests are not conclusive, they remain a useful tool in screening for possible drug contraband.** Just like presumptive tests for COVID-19 or pregnancy, drug screening tests can be helpful for identifying possible contraband and taking steps to limit its spread in correctional facilities. The OIG sees no issue with the Department continuing to use these tests for such purposes.
- 3. Despite the potential for false positives and false negatives with field tests, NDCS generally does not obtain or allow for confirmatory testing in disciplinary cases. This raises fairness concerns and is contrary to the user manual for these field tests.** This erodes the credibility of the Department's disciplinary process, and increases the likelihood that people will be punished – including spending more time in prison – for something they did not do.
- 4. Without confirmatory testing, potential criminal activity in state correctional facilities is not being addressed to the fullest extent possible.** NDCS cannot effectively limit the flow of drugs into its facilities without knowing the difference between real contraband and items that are only suspected to be contraband. More thorough and reliable testing would help the Department better utilize its own investigative resources as well as those of outside law enforcement agencies.
- 5. A state statute which gives incarcerated people the right to confirmatory testing is specific to urine tests, not other types of tests.**
- 6. Significant penalties exist for those who are caught in possession of suspected drug contraband, but the collateral consequences for these individuals can be even greater.** Any drug infraction in prison can result in lost good time and other formal sanctions. However, collateral consequences such as demotion from work release, removal from programming, or denial of parole can lengthen a person's period of incarceration to a greater extent than lost good time.

7. **While there is no formal process for incarcerated people to request further testing of suspected contraband, some have pursued such testing through alternative channels, which resulted in dismissal of their misconduct reports. This promotes inequity in the disciplinary process.** Further testing should not be reserved for those who contact the Ombudsman or OIG. If such testing is merited in some cases, then a formal process should exist for the purpose of fairness and consistency.

RECOMMENDATIONS

As part of this investigation, the OIG makes the following recommendations for NDCS consideration:

- 1. Revise the Department’s disciplinary policy to explain the limitations of drug field tests and that misconduct reports should include “other context which establishes substantial evidence of the offense.”** This standard was communicated to the OIG by NDCS administration and is a reasonable starting point for disciplinary proceedings.
- 2. Ensure that all staff are trained regarding the aforementioned policy change and made aware of the limitations of drug field tests.** NDCS staff have shown inconsistent understanding of the reliability of these test results, and the Department’s internal appeals board has upheld guilty findings based mainly on field test results.
- 3. Revise departmental rules and regulations to provide access to confirmatory testing of suspected drug contraband, similar to what is permitted for urine tests.** To receive such testing, individuals should have to acknowledge they were in possession of the alleged contraband and that they could be subject to criminal prosecution, and agree to pay the costs of the test if it remains positive.
- 4. Identify a provider of affordable and credible confirmatory testing for administrative disciplinary cases.** This type of testing can be more expensive than urine tests, but specific costs vary by laboratory.
- 5. Present, in writing, information about the limitations of field testing and the option to request confirmatory testing to each incarcerated person who faces potential discipline following a field test.** This document should be included in the evidentiary record.
- 6. Consult independent experts in forensic analysis or forensic toxicology before adopting new field testing technologies or revising policies related to these technologies.** This would help ensure the Department’s practices are scientifically sound.