

NO. 35657-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

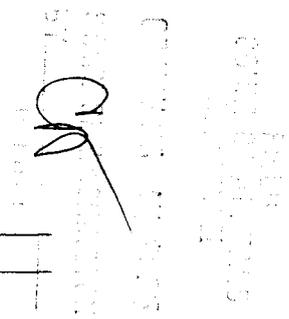
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In re the Personal Restraint of

JOHNATHON K. MONTA,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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A. ASSIGNMENTS OF ERROR

1. The Department of Corrections' failure to provide petitioner copies of relevant documentary evidence denied him due process.

2. The hearing officer improperly relied on confidential information in finding petitioner guilty of the charged infraction.

3. The evidence was insufficient to support the guilty finding.

Issues pertaining to assignments of error

1. Petitioner was charged with the serious infraction of conspiring to introduce illegal drugs into a correctional facility. The charge was based on money orders mailed from a Spanaway address which was allegedly linked to petitioner. Petitioner requested copies of the money orders and the envelopes in which they were mailed, but DOC failed to produce the requested documents. Where DOC's arbitrary and capricious denial violated petitioner's due process right to present documentary evidence in his defense, must the infraction be vacated and petitioner's good time credit be restored?

2. Where the record contains no factual information from which the hearing officer could reasonably conclude that the source of confidential information was reliable, did the hearing officer's reliance on that information deny petitioner due process?

3. Where the record contains no evidence connecting petitioner to the alleged conspiracy, must the infraction be vacated and the sanctions reversed?

B. STATEMENT OF THE CASE

1. Procedural History

Petitioner Johnathon Monta is incarcerated at the Washington State Penitentiary pursuant to a judgment and sentence entered in Pierce County Superior Court Cause Number 97-1-04388-5. Response of DOC, at 1. On April 7, 2006, while Monta was an inmate at the McNeil Island Corrections Center, a Serious Infraction Report was filed alleging a violation of WAC 137-28-260(603). Petition, Exhibit 5. Monta was provided notice of the infraction hearing on April 18, 2006. Petition, Exhibit 1. Two continuances were granted so that Monta could obtain witness statements and copies of documentary evidence and prepare a defense. Petition, Exhibits 3A, 3B, 3C.

The infraction hearing was held on May 22, 2006, and Monta was found guilty. The hearing officer imposed a sanction of 30 days confinement to quarters and loss of 90 days good time credit. Petition, Exhibit 6A. Monta appealed, and the hearing officer's decision was affirmed. Petition, Exhibits 7-8. Monta then filed this personal restraint petition. This Court determined the issues Monta raised are not frivolous

and appointed counsel to represent him. Order Referring Petition to Panel, Appointing Counsel, and Setting Briefing Schedule.

2. Substantive Facts

On April 7, 2006, Corrections Officer George Gilbert filed an initial serious infraction report charging Monta with violation of WAC 137-28-260(603), possession, introduction, or transfer of any narcotic controlled substance, illegal drug, unauthorized drug, or drug paraphernalia. Petition, Exhibit 5. The report indicates that the charged incident occurred at 8:00 a.m. on February 21, 2006, at McNeil Island Corrections Center. No witnesses were listed. Id. The report describes the incident as follows:

MICC IIU obtained several envelopes that contained money orders, which were mailed to a person in the Lakewood Washington area from offenders and offender's [sic] family members. The person in the community who received the money orders turned them over to the Lakewood Police Department. Additional envelopes were received and turned over to MICC IIU. One envelopes [sic] received from the person in the community was post marked January 24, 2006, with a return address of 18829 Pacific Ave. Spanaway WA 98387. During the course of this investigation, I was able to link the return address to inmate Jonathan Monta # 743150. The envelop [sic] contained two \$50.00 money orders. One dated November 21, 2005 and the other dated January 10, 2006. Information received from a confidential informant states the address in Lakewood Washington was for inmates to send money to, which was payment for drugs that were being brought into the facility. Inmate Jonathan Monta # 743150 had a family member send money to an address in the Lakewood Washington area, which information received indicates the address to be a money drop for drugs. Inmate Jonathan Monta #743150

took substantial steps with another person to conspire, promote and facilitate the introduction of illegal drugs into a correctional facility.

The above information is a summary of confidential information which was received and deemed reliable and creditably [sic].

Petition, Exhibit 5.

When Monta was provided notice of the infraction hearing, he requested witness statements from Officer Gilbert and the confidential informant, and a continuance was granted to obtain these statements. Petition, Exhibits 1, 3B. Monta's request for a statement from the confidential informant was denied on April 25, 2006, and on April 26, 2006, Officer Gilbert responded that the infraction report would serve as his witness statement. Petition, Exhibits 1, 2A.

Monta then moved for a second continuance and requested that he be provided any and all reports and/or evidence, with the names of confidential informants redacted to comply with WAC 137-28-270(1)(g). He specifically asked that the money orders and the envelopes they were mailed in be provided for his review. Petition, Exhibit 3A. This continuance was granted on May 2, 2006. Petition, Exhibit 3C.

The Department did not provide the requested documents but instead instructed Monta to file a "Public Disclosure" to see any and all evidence. Petition, Attachment A, at 2. As directed, Monta filed a request

for public records disclosure, addressed to the Washington State Penitentiary public disclosure officer; the hearing officer; and designees of those officers. He requested evidence pertaining to the charged infraction, including envelopes, money orders, and any and all documents relevant to the hearing. Response of DOC, Exhibit 2, Attachment D.

In response, Monta received a letter from the DOC Office of Correctional Operations, noting that his request was being forwarded to the department which retained those records. Petition, Exhibit 4A. He received a second letter, from the DOC Public Disclosure Coordinator, stating that he would be able to review the evidence, if any, at the scheduled hearing and that he would receive a summary of confidential information. The coordinator indicated that she would obtain copies of the documents after the hearing and could then make arrangements to provide the copies to Monta. Petition, Exhibit 4B.

Monta did not receive copies of the money orders or envelopes, but he did receive a copy of the infraction report and summary of the confidential information. Petition, Attachment A, at 2. On May 3, 2006, the hearing officer completed a "Confidential Information Review Checklist" on which he indicated he had reviewed the confidential information and the circumstances surrounding its receipt. Response of

DOC, Exhibit 2, Attachment N. On this preprinted form, the hearing officer checked boxes to indicate that

2. The confidential source(s) had no apparent motive to fabricate the information;
3. The confidential source(s) received no benefit from providing the information;
4. The confidential source(s) are providing first-hand information;
5. The confidential information is internally consistent and is consistent with other known facts;
6. Other evidence corroborates the confidential information; and
7. Safety concerns justify nondisclosure of the source(s) of confidential information.

Id. Not checked was the box next to the statement, “The confidential source(s) had previously given reliable information”. Id.

At the hearing on May 22, 2006, Monta presented affidavits from Larry Monta and Johnna Hibdon. Both witnesses testified in their affidavits that they lived at the Spanaway address mentioned in the infraction report. That address is a trailer court with many residents. Although they had never sent any money orders to a Lakewood address, they had sent several letters to Monta, a member of their family, at MICC. Both testified that there were no money orders sent from their address for Monta to any address. Petition, Exhibits 2B, 2C. Hibdon also testified that the only money orders sent from her address were sent to Monta in prison. Petition, Exhibit 2C.

The hearing officer also considered the infraction report and the confidential information, finding that the source of the confidential information works at another facility and was unable to attend the hearing. Petition, Exhibit 6. The hearing officer also noted that in his review of the confidential information, he determined that (1) the sources would not be revealed to protect their safety and well being; (2) the information was credible, reliable, and consistent; and (3) a summary of the confidential information was provided to Monta. Id.

Monta stated for the record that there was no information that his name appeared on the money orders or envelopes, the return address is a trailer court with many residents, and there was nothing in the record that connected him to the money orders other than family members living in the trailer court. Id. Monta stated that he had no involvement with any drugs at MICC. Id.

The hearing officer found Monta guilty, reasoning that Monta conspired to introduce drugs into MICC. Due to the seriousness of the conspiracy, he imposed a sanction of 30 days confinement to quarters and loss of 90 days good time credit. Id. Monta appealed the decision, and the decision was affirmed. Petition, Exhibits 7, 8.

After the hearing, Monta received a second letter from Public Disclosure Coordinator stating she had located nine pages of documents.

Since he had an appeal pending on the infraction, however, the documents were exempt from disclosure under RCW 42.17.310(1)(d). Petition, Exhibit 4C.

C. ARGUMENT

1. DOC'S REFUSAL TO PROVIDE MONTA WITH REQUESTED DOCUMENTARY EVIDENCE DENIED HIM DUE PROCESS.

A prisoner's statutory right to good time credit is a protected liberty interest. Thus, serious infraction hearings where the sanctions include loss of good time credit must comport with minimum due process requirements. In re Personal Restraint of Gronquist, 138 Wn.2d 388, 397, 978 P.2d 1083, cert. denied, 528 U.S. 1009 (1999).

This Court reviews a prison disciplinary hearing to determine whether the action taken was so arbitrary and capricious that it denied the petitioner a fundamentally fair proceeding. In re Personal Restraint of Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984). A disciplinary action is arbitrary and capricious if the petitioner was not afforded the due process protections applicable to the proceedings or if the decision is not supported by some evidence in the record. In re Anderson, 112 Wn.2d 546, 548-49, 772 P.2d 510, cert. denied, 493 U.S. 1004 (1989). In the context of a prison disciplinary proceeding, due process requires that the inmate receive (1) adequate notice of the alleged infraction before a

hearing, (2) an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals, and (3) a written statement of the evidence relied on and the reasons for the disciplinary action. Wolff v. McDonnell, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); Gronquist, 138 Wn.2d at 396-97.

Monta was denied the opportunity to present documentary evidence at the disciplinary hearing when he was not permitted access to documents relevant to the charged infraction. A prisoner subject to a disciplinary proceeding on a serious infraction cannot arbitrarily and capriciously be denied access to relevant documentary evidence. See In re Personal Restraint of Leland, 115 Wn. App. 517, 535, 61 P.3d 357, review denied, 149 Wn.2d 1025 (2003)<sup>1</sup>; see also In re Personal Restraint of Adams, 132 Wn. App. 640, 654, 134 P.3d 1176 (2006) (before DOC may cancel previously determined early release date, inmate is entitled to minimal due process, including access to relevant information in file on which DOC relied).

In Leland, the petitioner received notice of a serious infraction, and he requested several witness statements. None of the requested statements was produced for the disciplinary hearing, however. Leland, 115 Wn.

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<sup>1</sup> Overruled on other grounds in In re Personal Restraint of Higgins, 152 Wn.2d 155, 95 P.3d 330 (2004).

App. at 522-23. Leland appealed the finding of guilty, arguing that his constitutional rights were violated because he was denied the requested statements. Id. at 523. The decision was affirmed, and Leland filed a personal restraint petition alleging he was denied his due process right to present evidence in his defense. Id. at 524. The Court of Appeals agreed. Because DOC did not show that production of the witness statements would be unduly hazardous to institutional safety and correctional goals, denial of those statements was arbitrary and capricious. Violation of Leland's due process right to present documentary evidence denied him a fundamentally fair hearing. Id. at 535.

As in Leland, DOC's arbitrary and capricious denial of Monta's request for access to relevant information violated his due process right to present documentary evidence in his defense. See Gronquist, 138 Wn.2d at 396-97; Young v. Kann, 926 F.2d 1396, 1402 (3<sup>rd</sup> Cir. 1991) (prisoner's due process right to present documentary evidence violated by refusal to produce letter confiscated from prisoner and used to discipline him).

The initial infraction report indicates that MICC IIU received several envelopes containing money orders mailed from offenders and their family members, and that these money orders and envelopes were evidence of a conspiracy to introduce illegal drugs into the correctional facility. The investigating officer concluded that Monta was linked to

these documents and thus the conspiracy. Petition, Exhibit 5. Monta repeatedly requested copies of the money orders and envelopes, as well as any and all documentary evidence relevant to the charged infraction. He also requested a continuance so he could obtain these documents in order to prepare his defense. DOC failed to provide copies of the requested documents, however, even though WAC 137-28-270(1)(g) requires that such evidence be attached to the infraction report.<sup>2</sup> Monta therefore had no opportunity to use that evidence in preparing his defense.

Under case law, a prisoner's right to produce evidence in his or her defense is limited only by the demands of safety and institutional order, as determined by the sound discretion of the prison authorities.

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<sup>2</sup> WAC 137-28-270 (1) provides as follows:

(1) In the event of a serious infraction, the staff member who discovers such violation shall prepare and submit an infraction report. The infraction report shall be submitted promptly upon discovery of the incident or upon completion of an investigation. The infraction report must include:

- (a) Name, number and housing assignment of offender;
- (b) A description of the incident;
- (c) The time and place of the incident;
- (d) The names of witnesses, victims, and other persons involved;
- (e) The specific rule alleged to have been violated;
- (f) A description of any action taken;
- (g) Copies of any relevant documentation or supplemental reports. Confidential information and the identities of confidential informants shall not be included;
- (h) Name and signature of reporting staff.

Superintendent v. Hill, 472 U.S. 445, 454-55, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985); Wolff, 418 U.S. at 566-69; Gronquist, 138 Wn.2d at 396; Leland, 115 Wn. App. at 535. This discretion is not without limits, however, and this Court does not need to defer to the arbitrary denial of a prisoner's limited rights. Leland, 115 Wn. App. at 535 (where DOC gave no explanation why requested witness statements not produced, denial was arbitrary and capricious, and hearing was unfair).

DOC has never asserted that production of the money orders and envelopes would be unduly hazardous to institutional safety and correctional goals. The only reason DOC gave Monta for failing to provide the requested evidence was that the information was exempt from disclosure under the Public Records Act because the infraction investigation was still ongoing, citing Former RCW 42.17.310(1)(d)<sup>3</sup>. Petition, Exhibits 4B, 4C. That statute exempted investigative records from disclosure when nondisclosure "is essential to effective law enforcement or for the protection of any person's right to privacy." But exemptions to the Public Records Act are to be narrowly construed. RCW 42.56.030<sup>4</sup>. Monta's request for production acknowledged that names of

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<sup>3</sup> This statute has been recodified as RCW 42.56.240.

<sup>4</sup> RCW 42.56.030 provides:

The people of this state do not yield their sovereignty to the agencies that serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for

confidential informants should redacted to comply with WAC 137-28-270(1)(g), and DOC has never attempted to explain why nondisclosure of this limited information was essential to effective law enforcement. Under the circumstances, DOC has not shown that application of this narrowly construed statutory exemption overrides Monta's right to due process, and its decision to refuse access to the requested documents was arbitrary and capricious.

A prisoner charged with a serious infraction must have an opportunity to marshal the facts and prepare a defense. Wolff, 418 U.S. at 564. This helps ensure an accurate fact-finding process. Adams, 132 Wn. App. at 654. Monta was denied that opportunity. He was actually and substantially prejudiced by DOC's refusal to provide copies of the money orders and envelopes, which were the basis for the investigating officer's conclusion that Monta had committed the charged infraction. While Monta argued at the infraction hearing that the money orders and envelopes could not be linked to him, without this documentary evidence Monta was unable to present his best defense. The resulting finding of guilt was made without the benefit of an adversarial process in which each

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them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. This chapter shall be liberally construed and its exemptions narrowly construed to promote this public policy.

side's evidence and arguments are carefully scrutinized. Such a one-sided proceeding is fundamentally unfair and can only result in decisions that are arbitrary and capricious. This Court should vacate the infraction and restore Monta's good time credit.

2. THE HEARING OFFICER IMPROPERLY RELIED ON CONFIDENTIAL INFORMATION IN FINDING MONTA GUILTY OF THE ALLEGED INFRACTION.

When a disciplinary proceeding is based on confidential information, due process is satisfied only if the record contains some factual information from which the hearing officer can reasonably conclude that the confidential source is reliable. Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir. 1987), cert. denied, 487 U.S. 1207 (1988). Furthermore, the record must contain an affirmative statement from a prison official that safety considerations prevent disclosure of the informant's name. Id.

It is well recognized that

Not all prison inmates who inform on other inmates are telling the truth; some are enacting their own schemes of revenge. Requiring a reliability determination is a procedural safeguard which helps assure that the disciplinary committee conducts a full and meaningful hearing, even when the prisoner does not know and thus cannot contest the specific information to be used against him.

Wells v. Israel, 854 F.2d 995, 998-99 (7<sup>th</sup> Cir. 1988) (internal citations omitted). Thus, assessment of an inmate informant's reliability is an

“essential prerequisite” to imposing discipline for an infraction established through that informant’s testimony. *Id.* at 999. “[N]o meaningful due process can be accorded, if accusations are accepted at face value, with no consideration of their source.” *Id.* (quoting Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988)).

An informant’s reliability may be established by

(1) the oath of the investigating officer appearing before the committee as to the truth of his report that contains confidential information, (2) corroborating testimony, (3) a statement on the record by the chairman of the committee that he had firsthand knowledge of sources of information and considered them reliable based on the informant's past record, or (4) an in camera review of the documentation from which credibility was assessed.

Zimmerlee, 831 F.2d at 186-87. Proof that the informant previously supplied reliable information is also sufficient. *Id.*

In this case, the only evidence in the record that Monta committed the charged infraction was the investigating officer’s conclusion, based on information from a confidential source, that Monta was linked to the money orders. The infraction report states that the officer deemed the confidential information reliable and credible, but there is no indication of the factual basis on which it was so deemed. It is not even clear whether the confidential source is an inmate or someone in the community. Petition, Exhibit 5. DOC has also submitted a “Confidential Information Review Checklist” on which the hearing officer checked boxes to indicate

that he had found the confidential information reliable and credible and that safety considerations justified nondisclosure of the information. Response of DOC, Exhibit 2, Attachment N. Without facts in the record on which the necessary determinations were made, these conclusory assertions are not sufficient to support a finding of reliability.

3. BECAUSE THE RECORD DOES NOT MEET EVEN THE MINIMAL DUE PROCESS REQUIREMENT FOR SUFFICIENT EVIDENCE, THE INFRACTION MUST BE VACATED AND MONTA'S GOOD TIME CREDIT RESTORED.

In prison disciplinary hearings, due process requires DOC to show some evidence of the inmate's guilt. In re Personal Restraint of Johnston, 109 Wn.2d 493, 497, 745 P.2d 864 (1987); see also Superintendent v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L.Ed.2d 356 (1985) (appropriate evidentiary standard is examination of the record for "any evidence" that could support the conclusion reached by the disciplinary board to revoke good time credits). The Washington Supreme court has clarified the "some or any evidence" test: "[T]here essentially must be some reasonable connection between the evidence and the inmate in order to support actions taken by the prison disciplinary board." Anderson, 112 Wn.2d at 549.

Here, the record contains the investigating officer's conclusion that Monta was linked to the alleged conspiracy to introduce drugs into the

facility, but there are no facts to support that conclusion. The money orders and envelopes which supposedly established this conspiracy were never provided to Monta and were not presented as evidence at the hearing. Petition, Exhibit 6. The investigating officer claimed to have “linked” Monta to the return address on these envelopes, but the evidence showed that the address in question was a trailer court with many residents. Moreover, Monta’s family members who lived at the trailer court testified that they had never sent money orders to the Lakewood address which was identified as the money drop location. They had sent many letters to Monta at the prison, however, and other inmates could therefore have had access to their address.

Because there is no evidence in the record to support the hearing officer’s decision, the disciplinary action was arbitrary and capricious, and the infraction must be vacated and Monta’s good time credit restored. See In re Personal Restraint of Krier, 108 Wn. App. 31, 45-46, 29 P.3d 720 (2001) (remedy when petitioner establishes actual prejudice resulting from insufficient evidence is vacation of infraction and restoration of good time, without remand for further hearing).

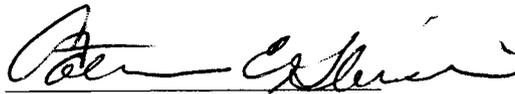
D. CONCLUSION

The failure to provide Monta access to relevant documentary evidence, the improper reliance on confidential information, and the lack

of sufficient evidence to support the guilty finding denied Monta due process. This Court should vacate the infraction and restore Monta's good time credits.

DATED this 23<sup>rd</sup> day of November, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written in a cursive style.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

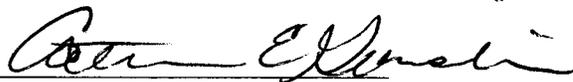
Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Brief of Petitioner in *In re the Personal Restraint of Johnathon Monta*, Cause No. 35657-1-II, directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski  
Done in Port Orchard, WA  
November 23, 2007

07:10 PM 11/23/07  
BY [Signature]  
STAMPED  
RECEIVED  
COURT CLERK  
PORT ORCHARD, WA