

No. 50785-4-II

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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In re the Personal Restraint of

PAUL SAMUEL BUFALINI,

*Petitioner.*

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PETITIONER UNDER RESTRAINT OF A SENTENCE IMPOSED BY  
PIERCE COUNTY SUPERIOR COURT, AND THEREAFTER  
REVOKED BY THE DEPARTMENT OF CORRECTIONS

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**PETITIONER'S REPLY BRIEF IN SUPPORT OF PERSONAL  
RESTRAINT PETITION**

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## I. INTRODUCTION

According to the Department of Corrections (the “DOC”), Petitioner had no liberty interest that was affected by the revocation of the community custody portion of his DOSA sentence. By artificially and erroneously divorcing the work release infraction hearing from the second stage hearing on reclassification and revocation of the suspension of more than three years of prison time, the DOC mischaracterizes this case as a case that is *solely* about work release infractions and prison placement. It then couples that erroneous factual portrayal with this legally correct proposition: “[T]he Constitution does not guarantee a prisoner the right to remain in any particular institution within any particular state.” *Response to PRP* at 9, citing *Meachum v. Fano*, 427 U.S. 215, 224 (1976). Putting these two assertions together, the DOC asserts that (1) since the *only* issue decided here was whether Bufalini would remain in a work release facility, (2) he never had a liberty interest sufficient to trigger the Due Process Clause, and therefore (3) he never had any due process right to the assistance of a lawyer, or to any other due process procedural safeguard.<sup>1</sup>

This line of argument simply ignores the holding of *In re Schley*.<sup>2</sup>

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<sup>1</sup> The DOC summarizes its argument in this blunt statement: “Bufalini had no right to reside in any particular place of confinement, and the hearing did not affect a liberty interest triggering a right to counsel.” *Response to PRP*, at 8.

<sup>2</sup> 197 Wn. App. 862, 392 P.3d 1099, *rev. granted*, 189 Wn.2d 1001 (2017).

Instead of attempting to persuade this Court that *Schley* was incorrectly decided, the DOC simply notes the Supreme Court has granted review in *Schley* and asserts that it will surely either overrule *Schley*, or limit it some way so that it has no application to this case. Ignoring the fact the work release infractions in *Schley* and *Bufalini* lead to an automatic DOC decision to revoke the suspended portions of their DOSA sentences, the DOC urges this Court to rule that it *never* has to provide counsel to assist an indigent offender to oppose the DOC's efforts to revoke a DOSA on the ground that he committed a work release infraction.<sup>3</sup>

The DOC also argues that Bufalini had no due process right to insist that the Department must make a factual finding that he “willfully” committed an infraction of a work release rule before it can revoke the suspended portion of his DOSA sentence. However, in making this argument the State simply ignores controlling precedent from both the U.S. and State Supreme Courts. Ignoring *Morrissey v. Brewer*,<sup>4</sup> *Gagnon v. Scarpelli*,<sup>5</sup> and the *actual* nuanced holding of *State v. McCormick*,<sup>6</sup> the DOC blithely urges this Court to rule that it can reclassify a DOSA-sentenced defendant and take away more than three years of conditional

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<sup>3</sup> “Simply put, Bufalini had no right to counsel at the work release infraction hearing.” *Response to PRP*, at 11.

<sup>4</sup> 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

<sup>5</sup> 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973).

<sup>6</sup> 166 Wn.2d 689, 213 P.3d 32 (2009).

liberty living in the community, *without* having to find that the offender willfully committed any act of misconduct. According to the DOC, it can do this based solely on a *false* positive urinalysis test that *incorrectly* indicates that the offender consumed a controlled substance.

## II. ARGUMENT IN REPLY

### A. A GRIEVOUS LOSS OF LIBERTY TRIGGERS THE DUE PROCESS CLAUSE. RECLASSIFICATION OF A DOSA OFFENDER IS A GRIEVOUS LOSS THAT TRIGGERS THE MINIMAL DUE PROCESS REQUIREMENTS OF *MORRISSEY v. BREWER* AND *GAGNON v. SCARPELLI*, INCLUDING THE QUALIFIED RIGHT TO COUNSEL.

“Liberty interests may arise from either of two sources, the due process clause and state laws.” *In re Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994). While the DOC purports to recognize this proposition (*Response*, at 8), it completely ignores the first possible source: the Due Process Clause itself.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands. . . Its flexibility is in its scope once it has been determined that some process is due . . . is a recognition that not all situations calling for procedural safeguards call for the same kind of procedure.” *Morrissey*, 408 U.S. at 481. Whether any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss.’” *Id.* The U.S. Supreme Court and the Washington Supreme Court have both held that the loss of conditional

liberty, whether it be labeled “probation,” “parole,” or “community custody,” is the type of grievous loss that triggers the protections of the Due Process Clause.

**1. *Morrissey v. Brewer***

What procedures are constitutionally due depends upon the private interest at stake and the governmental function being performed. *Id.* The fact that an offender has no “right” to probation or to parole is irrelevant. *Id.*<sup>7</sup> The *Morrissey* Court made two observations that are equally applicable to this case. First, a “parolee has . . . at least an implicit promise that parole will be revoked only if he fails to live up to parole conditions. In many cases, the parolee faces lengthy incarceration if his parole is revoked.” *Id.* at 482. Second, “[parole] termination inflicts a ‘grievous loss’ on the parolee and often on others.” *Id.* Brushing aside the comment that liberty on parole is a form of “conditional freedom,” the Court concluded, “by whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.” *Id.* at 482 and n. 8.

*Morrissey* holds that due process in parole revocation proceedings requires the recognition of several rights, including the right to have *two* hearings. *Id.* at 485.

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<sup>7</sup> “[T]urn[ing] . . . to the question whether the requirements of due process in general apply to parole revocations. . . . ‘this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a ‘right’ or as a ‘privilege.’” *Morrissey*, at 481.

In analyzing what [process] is due, we see two important stages in the typical process of parole revocation. . . . The first stage occurs when the parolee is arrested and detained, usually at the direction of his parole officer. The second occurs when parole is formally revoked. There is typically a substantial time lag between the arrest and the eventual determination by the parole board whether parole should be revoked.

*Id.* at 485. At the first stage, due process requires an initial hearing “to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.” *Id.* Due Process also required a second hearing where the proof of a violation had to meet a higher standard than probable cause. *Id.* at 488. The second hearing must include “a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation.” *Id.* The *Morrissey* Court held that the parolee was constitutionally entitled to several procedural rights at these two hearings, such as notice of the accusation, an opportunity to be heard, and a qualified right to cross-examine witnesses. But the Court did not decide whether the parolee was entitled to the assistance of counsel if he was indigent. *Id.* at 489.

## 2. *Gagnon v. Scarpelli*

A year later, in *Gagnon v. Scarpelli, supra*, the Court rejected the idea that there was “any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation”

since both “result in a loss of liberty.” 411 U.S. at 782. The court further rejected the contention that a probationer could be denied due process on the ground that probation is an “act of grace.” *Id.* at n.4. The *Gagnon* Court then tackled the issue that it had not decided in *Morrissey*, and concluded that in some cases a probationer was entitled to the assistance of counsel. “In some cases, ... the probationer’s or parolee’s version of a disputed issue can fairly be represented only by a trained advocate,” and therefore, cases would arise “in which fundamental fairness – the touchstone of due process – will require that the State provide at its expense counsel for indigent probationers or parolees.” *Id.* at 788, 790. In reaching this conclusion, the *Gagnon* Court again stressed the connection between the two stages of the revocation process and the fact that *both* the probationer and the State had an interest in “accurate” fact-finding:

***Both the probationer or parolee and the State have interests in the accurate finding of fact and the informed use of discretion – the probationer or parolee to insure that his liberty is not unjustifiably taken away and the State to make certain that it is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community.***

*Gagnon*, 411 U.S. at 785 (emphasis added).

The parties’ joint interest in accurate fact-finding and the probationer’s inability to litigate disputed factual questions as well as a skilled lawyer led the Court to reject the State’s argument that due process

*never* required the State to provide counsel:

[T]he effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite . . . the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee *may well have difficulty in presenting his version of a disputed set of facts* . . . .

*Gagnon*, 411 U.S. at 786-87 (emphasis added).

The *Gagnon* Court held that “presumptively” a lawyer “should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation . . . ; or (ii) there are substantial reasons which . . . make revocation inappropriate. . .” *Id.* at 790. Under the *Gagnon* presumption, counsel clearly should have been appointed to represent Bufalini at the infraction hearing since: (1) Bufalini immediately proclaimed his “innocence”; (2) his claim was far more than merely “colorable”; and (3) when he learned that he had been erroneously told by a CCO that he did not have the right to request counsel, he made a timely request for counsel.

### 3. *In re Blackburn*

Ignoring *Morrissey* and *Gagnon*, the DOC argues that the revocation of the community custody portion of a DOSA sentence is different than the revocation of probation or parole. The DOC asserts that Bufalini did not have any due process right to be provided with a lawyer to

help him contest the State's factual contention that he must have used an illegal drug substance because his urinalysis test result was positive. But the Washington Supreme Court has already rejected this contention in *In re Restraint of Blackburn*, 168 Wn.2d 881, 232 P.3d 1091 (2010).

Like Petitioner Bufalini, the Petitioner Blackburn was convicted of drug crimes and received a DOSA sentence. *Id.* at 882-83. The DOC accused Blackburn of violating a condition of community custody that required him to "obey all laws." "A hearing officer found Blackburn [committed a crime] and he entered an order reclassifying him to serve the remainder of his sentence as a term of total confinement." *Id.* at 883. The same thing happened to Bufalini.

The issue in *Blackburn* was whether the notice of violation sent to Blackburn was sufficient to meet the minimal requirements of due process. The *Blackburn* Court first held that the due process standards of *Morrissey* and *Gagnon* were equally applicable to offenders with DOSA sentences who faced revocation of the community supervision portion of their DOSA sentence:

Under *Morrissey* [citation omitted], the minimum requirements of due process for revocation of parole are . . . . These due process requirements apply with equal force to a revocation of probation, *Gagnon v. Scarpelli*, and to the imposition of a sentence that has been suspended under the special sex offender sentencing alternative. ***We think they also apply to a DOC reclassification of an offender serving a sentence in community custody.***

*Blackburn*, 168 Wn.2d at 884 (emphasis added) (citations omitted).

Thus, contrary to the State's legal contention, it is settled law in this State that the minimum due process requirements of *Morrissey* and *Gagnon* apply to DOC reclassifications of DOSA offenders that revoke the previously suspended portion of their prison sentences.

**B. THE MINIMUM REQUIREMENTS OF DUE PROCESS CANNOT BE AVOIDED BY BIFURCATING A DOSA REVOCATION PROCEEDING INTO TWO STAGES.**

- 1. The DOC asserts that due process doesn't apply to the first stage infraction hearing -- the hearing at which all the disputed facts are resolved. It argues that due process only applies to the second hearing at which an indisputable fact is "determined."**

The DOC portrays the initial fact-finding hearing of December 20, 2016 as just a work release infraction hearing. It argues that since Bufalini "had no liberty interest in remaining in work release," he had no due process rights at the hearing at which that infraction was adjudicated. *Response to PRP*, at 9-10. In an effort to divert attention from the fact that this infraction hearing resulted in the only finding of fact on a disputed issue and that this factual finding led to reclassification and loss of the community supervision portion of Petitioner's DOSA sentence, the DOC refers to RCW 9.94A.728(1)(e), the statute that "authorizes the Department to allow an offender to serve '[n]o more than the final six months of the offender's term of confinement' in work release." *Response*,

at 10. Citing to *In re Mattson*, 166 Wn.2d 730, 737-41, 214 P.3d 141 (2009), the DOC argues that RCW 9.94A.728 does not create a protective liberty interest in placement in a work release facility. *Response*, at 10. But this observation is irrelevant since Bufalini never relied on this statute as the source of his due process rights. In fact, Bufalini is not relying on any *statute* as the source of his liberty interest in the community custody portion of his DOSA sentence. He relies instead on the cases, *Morrissey*, *Gagnon* and *Blackburn*, all of which recognize that any “grievous loss” of liberty is sufficient to trigger the protections of the due process clause without there having to be any statutory entitlement to the type of conditional liberty at issue (be it loss of probation, or parole, or community supervision, or whatever the State chooses to call it). In *Blackburn* the Court specifically held that putting “[a]n end to this liberty is surely a ‘grievous loss,’ and ‘the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.’” *Blackburn*, 168 Wn.2d at 885, quoting *Morrissey*, 408 U.S. at 482.

In a further attempt to belittle the magnitude of Bufalini’s loss, the State comments that the work release infraction hearing did not result in much of an injury to Bufalini:

The work release infraction hearing concerned only a limited liberty interest because the hearing resulted in a sanction of loss of good time. *See In re Gronquist*, 138 Wn.2d 388, 397, 978 P.2d 1083 (1999) (limited liberty interest at issue where a hearing

results in the loss of good time).

*Response*, at 11. Ignoring the fact that this particular work release infraction hearing “resulted in” far more than the loss of good time,<sup>8</sup> the DOC concludes, “Simply put, Bufalini had no right to counsel at the work release infraction hearing.” *Response*, at 11.

**2. In *Schley* this Court rejected the DOC’s attempt to limit due process protections to a later stage of the proceedings where the end result had already been inexorably determined by a prior factual determination.**

The DOC simply ignores the holding of *In re Schley*, 197 Wn. App. 862, 392 P.3d 1099, *rev. granted* 189 Wn.2d 1001 (2017), that due process protections *do* apply to infraction hearings where the facts decided at that hearing lead “inexorably” to the revocation of a DOSA sentence. In *Schley*, this Court flatly rejected the DOC’s suggestion that bifurcation of the adjudication process into an infraction stage and a revocation stage eliminated the need to provide due process at the first stage:

Here, the Department bifurcated Schley’s hearings process, considering the infraction at one hearing and the DOSA revocation at a later hearing. ***But the inevitable result*** of a finding of guilt at Schley’s infraction hearing ***was revocation of his DOSA***. . . . [] The DOSA revocation hearing did not resolve any genuine issue of fact . . . ***The essential fact for DOSA revocation was resolved at the infraction hearing*** . . . Schley’s DOSA was functionally revoked once he was found guilty of [his infraction of] fighting . . .

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<sup>8</sup> If the only result of the infraction finding was to take away some of Bufalini’s good time credits, Bufalini would not have bothered to file a PRP at all. Had he merely suffered the loss of a week or two of good time credit, he would be not be in prison now; he would be serving the community supervision portion of his DOSA sentence.

*Schley*, 197 Wn. App. at 868 (emphasis added). The DOC simply chooses to ignore this holding of *Schley*. Instead, it limits its comment about *Schley* to noting that “the Supreme Court has just granted review of the *Schley* decision,” and implying that the Supreme Court will probably overrule it. *Response*, at 12, 14.

Petitioner also notes that the DOC’s bifurcation argument is completely inconsistent with the holdings in *Morrissey* and *Gagnon* that the probationer is entitled to two hearings, and that the protections of due process apply to both stages, and particularly to any stage where factual disputes are being considered, because both the probationer and the State have an interest “in the accurate finding of fact.” *Gagnon*, 411 U.S. at 785. Accurate fact-finding “insure[s] that [the probationer’s] liberty is not unjustifiably taken away” and that the State is not “unnecessarily interrupting a successful effort at rehabilitation.” *Id.* Unfortunately, in Petitioner Bufalini’s case, both of these important interests were sacrificed when the DOC refused to “go back” and hold a new infraction hearing at which Bufalini had a lawyer to help him litigate the disputed facts.

**C. THERE ARE THREE SOURCES OF A LIBERTY INTEREST IN HAVING A DETERMINATION MADE OF WHETHER A VIOLATION WAS “WILLFULLY” COMMITTED: THE DUE PROCESS CLAUSE ITSELF, A STATUTE, AND THE DOC’S OWN FORMAL POLICY FOR RESOLVING WORK RELEASE INFRACTIONS.**

The DOC claims there is no liberty right to a determination of

whether an infraction was willfully committed. It contends that in *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009), the Court held that the due process clause does not create such an entitlement, and that no statute creates such an entitlement either. The DOC is wrong on both counts, and ignores the fact that it created a third source of such an entitlement when it created a substantive right to a determination of willfulness.

**1. Dicta in *Blackburn***

As a preliminary observation, Petitioner draws this Court's attention to this portion of the *Blackburn* decision:

Upon finding that Blackburn *willfully* violated a condition of community custody, DOC had *discretion* to reclassify him and return him to total confinement "to serve the remaining balance of the original sentence.

*Blackburn*, 168 Wn.2d at 883 (italics added). While the issue of whether a finding of willfulness was constitutionally required was not before the Court, it is noteworthy that in *Blackburn* the DOC Hearing officer did find a *willful* violation in a case where the offender, like Bufalini, was a drug offender who had received a DOSA sentence which the DOC revoked without affording the prisoner the minimum requirements of due process.

**2. The DOC's reliance on *State v. McCormick* is misplaced.**

The DOC argues that the Due Process clause *never* requires it to prove that a violation of a DOSA sentence condition was willfully committed. In this case, Bufalini's drug treatment program was

administratively terminated because Bufalini had a false positive urinalysis drug test, and his DOSA was revoked because his drug treatment program had been administratively terminated. Bufalini himself did not conduct the urinalysis test, and he did not make the decision to terminate himself from the drug treatment program. The only act that Bufalini indisputably committed was to submit a urinalysis sample when he was ordered to do so, and that act is not the act alleged to be a violation. The dispute was whether Bufalini willfully ingested a controlled substance. He said he did not do that and the DOC never found that he willfully did that. Nevertheless, the DOC takes the position that it acted legally and constitutionally when it revoked the community supervision portion of his DOSA sentence

- (1) *without* finding that Bufalini *willfully* failed to comply with any sentencing condition; and
- (2) *without* finding that Bufalini *willfully* ingested a controlled substance.

*Response to PRP*, at 15. According to the State, it just doesn't matter whether the urinalysis test gave a false positive result. Even if Bufalini is entirely innocent of any wrongdoing, the DOC contends that doesn't matter because it is a "violation" to "receive" the erroneously positive results of a drug test. It purports to rely on *State v. McCormick*, 166 Wn.2d 689, 213 P.3d 32 (2009) as authority for the sweeping proposition

that “due process allows revocation [of Bufalini’s DOSA sentence] upon proof that [he] failed to comply with the terms of his sentence,” *without* finding that Bufalini committed *any willful act* of misconduct.

- (a) ***McCormick* held that proof of willfulness was not required by due process because McCormick’s crime was rape of a child and he posed a great danger to children unless his liberty was strictly circumscribed. Bufalini’s crimes pose no similar danger of assault.**

*McCormick* does not support these sweeping assertions. *McCormick* actually supports the conclusion when a court decides “what procedural safeguards should be afforded when the State seeks to revoke an offender’s probation or suspended sentence,” it must consider several factors. *McCormick*, 166 Wn.2d at 700.

[T]he issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into such factors as “the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, [and] the existence of alternative means for effectuating the purpose ....”

*McCormick*, at 700, quoting *Bearden v. Georgia*, 461 U.S. 660, 666-67, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983).

The *McCormick* Court recognized that in the context of a failure to pay a fine or fee, the U.S. Supreme Court held that a finding of willfulness *was* constitutionally required. But “[t]he *Bearden* court did not address whether a finding of willfulness was required in other settings . . . .” *McCormick* at 701. The “setting” in *McCormick* was radically different

from the “setting” in this case.

In *McCormick*, based upon a finding that the defendant had violated a condition of his SSOSA sentence,<sup>9</sup> a judge revoked the SSOSA sentence that he had previously imposed upon an offender convicted of First Degree Rape of a Child for raping his 11 year old developmentally disabled granddaughter. *Id.* at 693. The “setting” in this case involves the revocation of the suspended portion of a sentence imposed for drug offenses, identity theft and forgery. While Petitioner does not mean to suggest that these were petty offenses, he does maintain that the danger posed to the community by these types of offenses are simply not in the same class as the dangers posed by a child rapist convicted of a Class A felony offense.

*McCormick* actually supports Petitioner’s argument, for it discusses the extreme danger to children that a sex offender poses: “[*Bearden*] . . . indicated a finding of willfulness would not be required if the condition is a threat to the safety or welfare of society.” *Id.* at 701.

[T]he government has an important interest in protecting society, particularly minors, from a person convicted of raping a child. That interest is rationally served by imposing stringent conditions

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<sup>9</sup> *McCormick* concerned the sentencing judge’s 2006 decision to revoke the defendant’s SSOSA. On two prior occasions, the judge found that McCormick had violated his SSOSA conditions. *Id.* at 693. In 2006, the judge found McCormick in violation for a third time because “McCormick ha[d] been a regular visitor at the St. Vincent de Paul Food Bank located on the premises of the Immaculate Conception Grade School.” *Id.* at 794.

related to the crime McCormick committed. The condition forbidding McCormick from frequenting areas where minors congregate serves as a way to prevent McCormick from being in a situation where he would have an opportunity to again harm a child.

*McCormick*, at 702. The Court’s conclusion that proof of willfulness was not constitutionally required was explicitly based upon the strength of the State’s interest in protecting children from sexual assault:

McCormick’s rights are already diminished significantly as *he was convicted of a sex crime* and, only by the grace of the trial court, allowed to live in the community subject to stringent conditions. *Those conditions*, like the one at issue, serve an important societal purpose in that they are limitations on McCormick’s rights that *relate to the crimes he committed*. [Citations omitted]. *Given the strength of that interest* and McCormick’s diminished rights as someone on a suspended sentence, *the balance tips heavily in favor of not requiring a finding of willfulness*.

*McCormick*, at 702-03 (emphasis added). In this case, the societal interests are *not* as strong as they were in *McCormick* and thus the balance does *not* “tip[] heavily in favor of not requiring a finding of willfulness.” *Id.*

**(b) The *McCormick* Court also based its decision on the specific wording of the sentencing condition which did not say anything about willful or knowing conduct.**

The sentencing condition at issue in *McCormick* was imposed by the sentencing judge. It was *not* a condition which was required by the SSOSA statute, but the sentencing judge chose to impose it. Because the knowledge requirement in the sentencing condition was written in the passive voice, the actual meaning of the condition was a subject of debate.

The opinion states:

In imposing the SSOSA sentence, the trial court set a number of conditions, including that McCormick “not frequent areas *where minor children are known to congregate*, as defined by the supervising Community Corrections Officer” . . . .

*Id.* at 693 (emphasis added). But while some kind of knowledge on the part of someone was required, this wording did *not* specifically state that the condition applied to places that *the defendant* knew were the type of areas where children tend to congregate. On the contrary, the wording chosen indicated that it was up to the CCO to define what areas were included within the prohibition. Thus, it was the CCO’s knowledge about specific areas which controlled, *not* the defendant’s knowledge. The opinion states that the CCO had expressly told McCormick what areas were included after an earlier violation hearing:

The CCO informed the Court that, after McCormick had received the 120 days confinement for the 2005 violations and because of McCormick’s possible learning difficulties, *the CCO told McCormick specific places he could not go pursuant to the conditions of his SSOSA sentence. The CCO specifically instructed McCormick that places he cannot frequent include, “parks, schools, churches, day cares, movie theaters, . . . et cetera.”* . . . The CCO also stated the high school McCormick had been sanctioned for visiting in the second violation was located across the street from the same food bank.

*McCormick*, at 693-94.<sup>10</sup>

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<sup>10</sup> McCormick admitted that he visited the food bank but denied seeing any minors there or knowing that it was on school property. *Id.* at 694. But he did not deny knowing that the food bank was being operated by a church, and the evidence was that he visited  
(Footnote continued next page)

Relying in part on its earlier decision in *State v. Riles*, 135 Wn.2d 326, 957 P.2d 655 (1998), the Court held that the wording “known to congregate” referred to “commonly known places” places and did not require proof that the defendant himself had such knowledge.<sup>11</sup> In the “Conclusion” section of its opinion, the *McCormick* court held:

*We hold the wording of the condition* that McCormick not frequent areas where minors are known to congregate does not require the State to prove McCormick acted willfully.

*McCormick*, at 706 (emphasis added).

In its *Response*, the DOC ignores the limited scope of the *McCormick* decision by simply failing to acknowledge the reliance on the fact that no words specifically required proof of willfulness.

**(c) In this case, however, both the applicable statute and the DOC’s own specifically requires willfulness.**

In this case, however, both the pertinent statute and the DOC’s own formal agency policy governing major infraction hearings *explicitly* require proof of willfulness before any violation can be found. The statute

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the food bank before it was open for business. *Id.* at 794. The food bank was operated in the same building as the second grade and the art and music classes. *Id.* at 695.

<sup>11</sup> “[O]ur case law analyzing the wording of the condition does not support McCormick’s argument. . . . [I]n . . . *Riles* . . . [we held] ‘The restriction applies only to places where children commonly assemble or congregate.’ [*Riles*, at 349]. Given our interpretation that the prohibition applies to *commonly known places* where children assemble or congregate, *the wording* of the condition *did not require the State to prove* McCormick frequented a place where *he knew* children congregated. The trial court did not err.” *McCormick*, at 698-99 (emphasis added).

that designates what a “prison-based drug offender sentencing alternative” shall include, specifically states: “*If the department finds* that conditions of community custody have been *willfully violated*, the offender may be reclassified to serve the remaining balance of the original sentence. . . .” RCW 9.94A.662(3) (emphasis added).

The DOC argues that this willfulness requirement does not apply to the initial determination of whether there has been a major infraction of work-release rules. But this contention is untenable because the DOC’s own formal policy requires its hearing officers to decide if there has been a *willful* commission of a major infraction. In Section VII(A)(2) the DOC’s policy entitled “*Disciplinary Procedures for Work Release*” explicitly states: “The Hearing Officer *will*: . . . (2) *Decide if the offender willfully committed the conduct* and whether the conduct constitutes a major infraction.” DOC Policy No. 460.135 (emphasis added) (attached to *Third Declaration of James E. Lobsenz*).<sup>12</sup>

Thus, whenever it is alleged that a DOSA program participant

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<sup>12</sup> In this case, “the conduct” that Petitioner is charged with is “Receiving a positive test for use of unauthorized drugs . . .” *Decl. Lobsenz*, Exh. 7. The sentencing judge is statutorily required to order a DOSA defendant to “submit” to drug testing (RCW 9.94A.662(1)(d)); Petitioner Bufalini *did* submit; and Bufalini had no control over whether he would “receive” the test results. Thus, it is virtually impossible for this particular type of work release infraction to be committed “willfully”. The only way to construe this particular infraction as one that could be committed “willfully” is to interpret it as requiring proof that the inmate “willfully” consumed an illegal drug that then caused the urinalysis test to produce an accurate positive result. But in this case, no such finding was ever made.

committed an infraction, both by statute, and by formal agency policy, Washington has created *an entitlement to a determination* of whether the infraction was “willfully committed.” The State has acknowledged that a state law can create a liberty interest if it contains a “substantive predicate” by providing that a particular outcome must follow. *Response*, at 8. In this case, both by statute and by virtue of DOC *Policy No. 460.135: Disciplinary Procedures for Work Release*, when a work release infraction is alleged, and when a violation of a DOSA condition is alleged, the DOC *must* decide if the violation was committed willfully. They are substantive predicates for the imposition of *either* a work release sanction or reclassification of a DOSA offender and revocation of the community custody portion of his sentence. In sum, due process, as well as a statute, as well as the DOC’s own policy, requires a finding of willfulness.

**D. *In re Johnston* is distinguishable. It involved the loss of 30 days or less of good time, not the loss of 3 years in the community and replacement with three more years of prison.**

The DOC contends that this Court should reject Bufalini’s third claim on the ground that *In re Restraint of Johnston*, 109 Wn.2d 493, 745 P.2d 864 (1987) is dispositive of this case. *Response*, at 19-20. But *Johnston* involved the loss of something between 15 and 30 days of good time credit. *Id.* at 495. It did not involve the loss of several *years* of liberty. As noted above, due process is “a flexible concept” that “calls for

such procedural protections as the particular situation demands.” *Morrissey*, 408 U.S. at 481. Generally speaking, a “grievous loss” is sufficient by itself to trigger the due process clause. Loss of a month of good time credit is not a grievous loss. Loss of more than three years of conditional liberty living in the community and not in total confinement in a prison clearly is a “grievous loss.” *Johnston* is not controlling.

**E. The Department obliquely concedes that it has failed to preserve the urine sample and asserts that Bufalini has not shown that this was done in bad faith. Petitioner submits that the failure to preserve the *only* evidence of whether a controlled substance was consumed, is itself strong proof of bad faith, and the DOC has offered nothing to rebut this.**

Inexplicably, the DOC has not submitted any declaration or other evidence that sheds any light on what happened to Bufalini’s urine sample. David Bufalini was told at one point that it was destroyed. The DOC offers nothing to contest this. Instead, it asserts that there is no evidence of bad faith as required by *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).

The DOC’s argument simply ignores the fact that an inference of bad faith is easy to draw from the mere fact that failure to prove the *only* evidence that could *ever* resolve the question of whether Bufalini consumed an illegal drug was destroyed. This is not a case where the evidentiary value of the unpreserved evidence was not immediately apparent. Nor is this a case where the burden of preservation is

exceptionally burdensome. The DOC was not being asked to store radioactive plutonium for thousands of years; or to find a storage place where temperatures below -100° Fahrenheit could be maintained. Since the DOC offers no explanation for its failure to preserve the urine sample, “the thing speaks for itself” and “bad faith” is the only logical conclusion.

By failing to offer any explanation, Bufalini submits that the DOC has waived the right to request a reference hearing so that it can rebut Bufalini’s evidence. If the Court feels differently, or if the Court feels that Bufalini must show something more than he has already shown, then Petitioner asks this Court to either authorize him to take a 30(b)(6) deposition of the DOC official who knows why and how the urine sample was destroyed, or to remand to Superior Court for a reference hearing.

**F. THE POWER TO REVOKE A JUDICIALLY IMPOSED SENTENCE IS A JUDICIAL POWER. THE LEGISLATURE CANNOT GIVE AWAY A JUDICIAL POWER TO THE EXECUTIVE.**

The DOC reasons that there cannot be any separation of powers violation because the Legislature granted it the power to revoke a DOSA.

*Response*, at 25-26. Six observations are in order.

- First, what qualifies as a judicial power is itself a constitutional question which *only* the judiciary can decide. The Legislature has no power to decide this question.<sup>13</sup>

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<sup>13</sup> For example, while the Legislature could pass a law that said that the Department of Ecology would hear and decide all trespass cases, or that the Department of Licensing  
(Footnote continued next page)

- Second, the State concedes that the initial decision to impose a DOSA sentence – a treatment oriented sentence – is a judicial act, but claims that the decision to *continue* a treatment oriented sentence is not a judicial act. That assertion cannot be squared with the holding of *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 776, 779, 621 P.2d 115 (1980) (evaluation of a treatment plan and making a disposition “are judicial acts” and the process of choosing a treatment oriented sentence is “fundamentally a sentencing alternative” entrusted to the court). See also RCW 9.94A.703(2)(c) (judge has discretion to waive condition to refrain from using drugs).
- Third, inexplicably the Legislature has expressly given *both* the judicial branch (the sentencing judge) *and* the Department of Corrections, the power to revoke the community supervision portion of a DOSA sentence. See RCW 9.94A.660(7)(c) and RCW 9.94A.662(3).<sup>14</sup> While the Legislature may believe that it is a good idea to have two branches of government sharing a judicial power, that does not mean it has the power to do this. The power to do a judicial act cannot be vested in both the judiciary and the executive at the same time.
- Fourth, when a Superior Court judge makes a decision, the avenue of appellate review provides a ready procedural safeguard. When the Department of Corrections makes a decision, this procedural safeguard is not available. While a PRP can be brought, an indigent convicted prisoner has no right to the assistance of counsel, and if he cannot afford to pay a lawyer it will be extremely difficult for him to bring a well drafted PRP that can cogently make the argument that the Department has acted arbitrarily or illegally.

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would decide all damages actions brought as a result of car crashes, such laws would be clearly unconstitutional.

<sup>14</sup> The DOC mistakenly relies on *State v. Roy*, 126 Wn. App. 124, 107 P.3d 750 (2005) and *In re Restraint of McKay*, 127 Wn. App. 165, 110 P.3d 856 (2005). But when these cases were decided in early 2005, RCW 9.94A.660 vested the authority to revoke a DOSA solely in the DOC. Later in the year, the Legislature amended the statute, possibly in response to these cases, and gave the sentencing judge the power to revoke as well. Laws of 2005, ch. 460, § 10, eff. October 1, 2005.

- Fifth, the DOC maintains that whenever there is a work release infraction, RCW 9.94A.662(3) *always* requires it to terminate an offender from a treatment program, and to revoke the community supervision portion of a DOSA sentence. RP I, 25. Yet at the same time, the DOC claims that the statute provides adequate standards to guide it when making the *discretionary* decision of whether to revoke. But if the statute mandates revocation, then there are no standards to guide it in making a discretionary decision because it has no discretion at all. And if the DOC is wrong – if it *does* have discretion to decide *not* to revoke – then there still are no standards set forth in RCW 9.94A.662(3) that provide any guidance as to how to make that discretionary decision.
- Sixth, the DOC takes inconsistent positions. First, it claims that *Blackburn* supports its position because it recognizes the DOC’s power to revoke a DOSA and reclassify a prisoner. But no separation of powers argument was ever raised in *Blackburn*, so there was no occasion to decide this issue. There is a sentence in *Blackburn* that relies upon the statute – RCW 9.94A.660(3) – as support for the proposition that the “DOC had *discretion* to reclassify [Blackburn].” 168 Wn.2d at 883 (italics added). But that sentence is inconsistent with DOC’s position in this case *that it does not have any discretion*, and that revocation and reclassification is mandatory once an infraction is found.

For all of these reasons, the DOC’s effort to evade the holding of *Schillberg* simply fails. A statute such as RCW 9.94A.660(3) that permits the DOC to veto a treatment oriented sentencing alternative to more incarceration, and which provides no standards whatsoever for deciding when to exercise that veto, violates the doctrine of separation of powers.

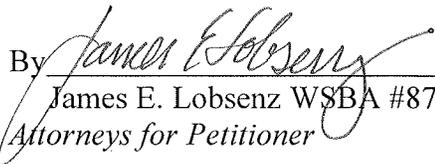
### III. CONCLUSION

Petitioner asks this Court to grant him the relief he requested in his opening brief, on pages 72-74.

Respectfully submitted this 23th day of October, 2017.

**CARNEY BADLEY SPELLMAN, P.S.**

By

  
James E. Lobsenz WSBA #8787

*Attorneys for Petitioner*

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class mail/Email to the following:

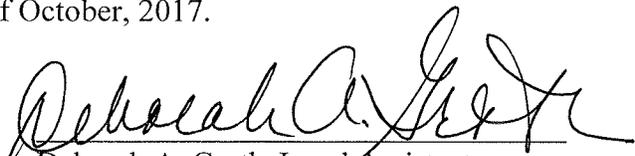
**Petitioner**

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DATED this 23<sup>rd</sup> day of October, 2017.

  
Deborah A. Groth, Legal Assistant

No. 50785-4-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Personal Restraint of

PAUL BUFALINI,

*Petitioner.*

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PETITIONER UNDER RESTRAINT OF A SENTENCE IMPOSED BY  
PIERCE COUNTY SUPERIOR COURT, AND THEREAFTER  
REVOKED BY THE DEPARTMENT OF CORRECTIONS

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**THIRD DECLARATION OF JAMES E. LOBSENZ IN SUPPORT  
OF PERSONAL RESTRAINT PETITION**

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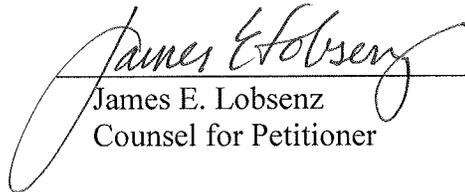
James E. Lobsenz WSBA #8787  
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Telephone: (206) 622-8020  
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*Attorneys for Petitioner*

I, JAMES E. LOBSENZ, do hereby declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

1. I am counsel for Petitioner. I have personal knowledge of the facts set forth here.

2. Attached as Appendix A is a true and correct copy of the Washington State Department of Corrections Policy No. 460.135 entitled *Disciplinary Procedures for Work Release*. In Section VI, entitled *Major Infraction Decision*, the Policy states that “The Hearing Officer will . . . Decide if the offender willfully committed the conduct and whether the conduct constitutes a major infraction.”

Dated thus 23<sup>th</sup> day of October, 2017.

  
James E. Lobsenz  
Counsel for Petitioner

## CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

First-class mail/Email to the following:

**Petitioner**

Mr. Paul Bufalini  
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**Attorneys for Respondent**

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DATED this 23<sup>rd</sup> day of October, 2017.

  
Deborah A. Groth, Legal Assistant

# APPENDIX A



STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS

APPLICABILITY  
**WORK RELEASE**  
OFFENDER MANUAL

REVISION DATE  
5/24/16

PAGE NUMBER  
1 of 10

NUMBER  
DOC 460.135

# POLICY

TITLE  
**DISCIPLINARY PROCEDURES FOR WORK RELEASE**

## REVIEW/REVISION HISTORY:

Effective: 7/31/06  
 Revised: 7/31/07  
 Revised: 1/19/10  
 Revised: 9/3/10  
 Revised: 5/2/11  
 Revised: 12/1/12  
 Revised: 4/1/13  
 Revised: 7/1/14  
 Revised: 1/12/15  
 Revised: 1/8/16  
 Revised: 3/29/16  
 Revised: 5/24/16

## SUMMARY OF REVISION/REVIEW:

Removed Directive IX. That an offender found guilty of an 882 violation will lose telephone privileges with the exception of legal calls

## APPROVED:

Signature on file

**RICHARD "DICK" MORGAN**, Secretary  
Department of Corrections

5/16/16

Date Signed

 <p>STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS</p> <p><b>POLICY</b></p>	APPLICABILITY <b>WORK RELEASE OFFENDER MANUAL</b>		
	REVISION DATE 5/24/16	PAGE NUMBER 2 of 10	NUMBER <b>DOC 460.135</b>
	TITLE <b>DISCIPLINARY PROCEDURES FOR WORK RELEASE</b>		

**REFERENCES:**

DOC 100.100 is hereby incorporated into this policy; RCW 9.94A; RCW 72.09.130; RCW 72.09.500; WAC 137-25; WAC 137-56; ACA 3A-01; ACA 6A-03; ACA 6C-01; ACA 6C-02; ACA 6C-03; ACA 6C-04; PREA Standards 115.278(b)-(d)

**POLICY:**

- I. Each Work Release will have a defined disciplinary process that provides appropriate procedural safeguards, treats offenders fairly, and holds them accountable for their actions. Offenders will not be subjected to corporal or unusual punishment, humiliation, mental abuse, or punitive interference with the daily functions of living, such as eating or sleeping. [6A-03]

**DIRECTIVE:**

- I. General Requirements
  - A. Offenders will be required to abide by the facility rules, which will be published in the facility handbook or otherwise conspicuously posted in the facility for all employees, contract staff, and offenders. [3A-01] Violation of facility rules may result in an infraction.
    1. The facility will review all rules and regulations at least annually and update if necessary.
  - B. Each Work Release will have a process for both formal and informal resolution of infractions. [6C-01]
  - C. Per the Offender Accountability Act, as of July 1, 2000, the Department Hearings Unit will be responsible for conducting all major infraction hearings.
  - D. Community Corrections Officers (CCOs) will be responsible for taking action on known offender violations.
- II. Minor Infraction Disciplinary Process
  - A. [6C-03] The disciplinary process includes providing an offender with:
    1. Written notice of the alleged violation using DOC 17-079 Minor Infraction Report, [6C-02]
    2. Written notice of the scheduled time of review,
    3. Reasonable time to prepare for the review,
    4. Assistance if there is a language or communication barrier, and
    5. The opportunity to present evidence.



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- B. [6C-03] When a minor infraction is contested, a review will be conducted in a timely manner, generally within 5 working days of the service of notice of review and report of alleged violations, unless the Community Corrections Supervisor (CCS) authorizes a continuance.
- C. [6C-03] Designated facility employees/contract staff will hear minor infractions and make decisions in a fair and impartial manner. The offender will be provided written notice of the decision on DOC 17-079 Minor Infraction Report.
- D. [3A-01] [6C-01] [6C-04] Upon a guilty finding, the following progressive sanctions may be imposed:
1. Verbal warning,
  2. Written warning,
  3. Completion of a written apology,
  4. Thinking Report or essay,
  5. Extra duty up to 16 hours,
  6. Facility restriction or loss of privileges for up to one week,
  7. Loss of phase level,
  8. Loss of social or visiting privileges, or
  9. Other sanctions as designated in the facility handbook.
- E. [6C-03] Offenders have the right to appeal any sanctions imposed for minor infractions. Appeals must be submitted in writing to the CCS/designee within 3 working days. Sanctions will not be postponed pending an appeal.

### III. Stipulated Agreements

- A. If the behavior constitutes a violation of facility rules, the offender admits to committing the alleged behavior, and it is determined that a Stipulated Agreement is appropriate, DOC 09-226 DOC Jurisdiction Only Notice of Violation/Stipulated Agreement will be written and signed in a face-to-face meeting with the offender.
1. The Stipulated Agreement will:
    - a. List all infraction behaviors,
    - b. List the specific actions/measures that the offender will take to address or repair the harm done by the infraction behavior,
    - c. Include specific timeframe requirements, and
    - d. Be approved by the CCS.



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2. The appropriate Stipulated Agreement will be written and applied with regard for the offender's crime of conviction, the infraction(s) committed, the offender's risk of re-offending, and community safety.
  3. The CCO/designee will enter the Stipulated Agreement infraction(s) and agreed upon sanction in the offender's electronic file.
- B. Failure to comply with the terms of a Stipulated Agreement constitutes an infraction.
- C. Stipulated Agreements will not be used to impose any loss of good conduct time.
- IV. Major Infraction Hearing Preparation
- A. Timeframes will begin when the CCO/designee becomes aware of the infraction. S/he will:
1. Investigate alleged infraction behavior and ensure evidence exists to substantiate the infraction before serving DOC 20-437 Work Release Major Infraction Report, [6C-03]
  2. **Serve DOC 20-437 Work Release Major Infraction Report within one working day of discovering the infraction behavior if the offender has been incarcerated as a result, and [6C-03]**
  3. **Serve the offender DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver no later than 24 hours before the hearing. [6C-02] [6C-03]**
- B. The CCO/designee will be responsible for requesting a Work Release disciplinary hearing.
1. The CCO/designee will contact Hearings Records Unit to schedule the hearing and will provide the following information:
    - a. Offender name and DOC number, and
    - b. Location of hearing.
  2. The Hearings Records Unit will notify the CCO/designee of the hearing time and place no later than the next business day following the request. [6C-03]
- C. To prepare for a hearing, the CCO/designee will:



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**DISCIPLINARY PROCEDURES FOR WORK RELEASE**

1. Ensure DOC 20-437 Work Release Major Infraction Report and DOC 09-186 Order of Suspension, Arrest and Detention if appropriate, is completed.
2. Arrange availability of witness(es) and/or statements, if applicable.
3. Obtain certified interpretive services for offenders with language or communication barriers, if necessary, when serving hearing documents and for the hearing. [6C-03]

### V. Major Infraction Hearing Process

- A. [6C-03] The Hearing Officer will conduct the Work Release major infraction hearing, assess the evidence, and render decisions in a fair and impartial manner in accordance with statute, case law, Washington Administrative Code, and Department policy.
  1. Unless waived by the offender, Hearing Officers may not preside over a hearing in which they have personal involvement with any party or issue under consideration.
  2. Hearing Officers may not preside over a hearing in which they are unable to exercise fair judgment and render a fair and impartial decision for any reason. Hearing Officers will recuse themselves by notifying their supervisor and the hearing will be rescheduled with a different Hearing Officer.
  3. A Hearing Officer assigned to preside over a hearing may be replaced upon request and showing of good cause by the offender.
  4. Except during the hearing, Hearing Officers may not communicate directly or indirectly with the offender, CCO, CCS, other employees, or witnesses participating in the hearing or involved in preparing for the hearing regarding any issue related to the hearing other than communications necessary to maintaining an orderly process without notice and opportunity for all parties to participate.
  5. If the Hearing Officer receives an ex parte communication prior to rendering a decision, the Hearing Officer must disclose on the record the communication, the response, and identities of each person the Hearing Officer communicated with. All parties must be offered an opportunity to rebut the communication on the record.



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6. CCOs, CCSs, and Hearing Officers will ensure that hearings are conducted as safely as possible based on knowledge of the offender's behavior.
    - a. The CCO, CCS, and Hearing Officer will collaborate to plan for potential safety/security issues and will address them as needed throughout the hearing.
  7. Hearing Officers will control the conduct of the hearing and maintain orderly decorum.
  8. Hearings will be recorded electronically, which will be retained per the Records Retention Schedule.
  9. Hearing Officers will consider only the evidence presented at the hearing and will determine if the evidence meets the preponderance of the evidence standard.
    - a. The Hearing Officer will specify on the record the evidence considered and the basis for the findings and decision.
  - B. The CCO will state the infraction(s) alleged, present supporting evidence, and offer a sanction recommendation and the basis thereof at the hearing.
    1. The CCO may use the Negotiated Sanction process to address infraction behavior, which may include recommending loss of good conduct time.
      - a. The CCO will record the infraction(s) and agreed upon sanction on DOC 11-001 Negotiated Sanction for the CCS's approval.
  - C. The alleged infractions may be amended and/or new alleged infractions added before the disciplinary hearing, provided the offender is given notice of such amendments at least 24 hours before the hearing, unless such notice is waived in writing by the offender.
  - D. If an offender waives his/her right to be present at the hearing, a Hearing Officer will determine if the waiver was knowingly, intelligently, and voluntarily given. If the Hearing Officer accepts the waiver, the hearing may be conducted in the offender's absence.
- VI. Major Infraction Hearing Decision
- A. The Hearing Officer will:
    1. Consider only the evidence presented when making a decision, [6C-03]

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- a. The Hearing Officer may accept written or telephonic testimony, and will be responsible for weighing the credibility of this evidence.
2. Decide if the offender willfully committed the conduct and whether the conduct constitutes a major infraction, [6C-03]
3. Reduce the written major infraction to a lesser included minor, if applicable,
4. Consider factors such as the offender's overall adjustment to the facility, prior infractions, prior conduct, and mental status, and
5. [6C-04] Upon a guilty finding, impose appropriate sanctions per Disciplinary Sanction Table for Prison and Work Release (Attachment 1).
  - a. The Hearing Officer is authorized to suspend a sanction or impose a suspended sanction, if appropriate.
- B. [6C-03] The Hearing Officer will issue DOC 09-233 Hearing and Decision Summary Report at the conclusion of the hearing, unless the Hearing Officer takes a deferred decision.
- C. Hearing Officers may continue a hearing for good cause.
  1. Good cause includes, but is not limited to, the following:
    - a. A reasonable request by the CCO or the offender,
    - b. Unforeseen facility issues,
    - c. A need to determine the offender's mental status or competency,
    - d. A need to obtain:
      - 1) An interpreter,
      - 2) Witness testimony/statements,
      - 3) Reports or other documentation, and
      - 4) A replacement Hearing Officer due to a recusal.
  2. Hearing Officers who continue a hearing will ensure that the hearing is held within 5 business days and that the offender is advised in writing of the basis for the continuance and the date of the next hearing.
- D. Hearing Officers may defer a hearing decision using DOC 09-227 Deferred Decision Waiver for no more than 2 business days unless waived by the offender. The Hearing Officer will ensure that the offender is advised in writing of the reason for the deferral and the date of the deferred hearing.



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1. Hearing Officers that defer a hearing decision will ensure that the deferred hearing is held in a timely manner and on the record with the offender present unless the offender waives his/her right to be present.
  2. The hearing decision will be documented using DOC 09-233 Hearing and Decision Summary Report.
- E. At the hearing, the Hearing Officer will inform the offender of his/her right to appeal in writing within 7 days and provide him/her with DOC 09-275 Appeal of Department Violation Process. [6C-03]
- F. If the offender is found guilty of an infraction for escape, the CCO will advise the local Records Unit to prepare written notification to the Prosecuting Attorney per local practice for possible escape prosecution based on circumstances, location, and risk to the community.
- G. The Hearings Records Unit will send an email to the Headquarters Warrants Desk at [DOCRecordsHQWarrants@doc.wa.gov](mailto:DOCRecordsHQWarrants@doc.wa.gov) and to the local Correctional Records Supervisor if the offender is found not guilty of an infraction for escape.
- H. The CCO will enter new infractions on the Prison Discipline screen in the offender's electronic file.
- VII. Failing or Refusing to Maintain a Work or Education Program Assignment
- A. Per RCW 72.09.130, offenders found guilty of a 557 or 810 violation will lose good conduct time, all available earned time credits for the month in which the infraction occurred, and specified privileges determined by the Hearing Officer.
    1. Offenders found guilty of an 813 violation where a failure to work or program is involved may lose good conduct time and all available earned time credits for the month in which the violation occurred.
  - B. Sanctions will be progressive for subsequent adjudicated infraction behaviors as indicated in Work Release Mandatory Sanctioning Guidelines (Attachment 2).
- VIII. Weightlifting Restriction
- A. An offender who is found guilty of a 501, 502, 511, or 604 violation will be prohibited from participating in any form of weightlifting for a period of 2 years from the date the infraction was adjudicated. A Hearing Officer will impose this sanction upon a finding of guilt of one of the cited violations per RCW 72.09.500.
- IX. Prison Rape Elimination Act (PREA) Violations

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- A. An offender who is found guilty of a 611, 613, 635, or 637 violation may be sanctioned to a multidisciplinary FRMT review for consideration of available interventions (e.g., Mental Health therapy, Sex Offender Treatment Program, Anger Management).
- X. Major Infraction Hearing Appeal Process [6C-03]
- A. The Hearings Administrator/designee will establish appeals panels throughout the state, each consisting of:
1. One CCS, serving a 6 month term,
  2. One Hearing Officer, serving a 6-month term, and
  3. One Hearing Supervisor, serving continually as the appeals panel Chair.
- B. Appeals panels will:
1. Respond to all appeals within 15 business days of receipt.
  2. Review only the appeal, the record, and evidence presented at the hearing. The panel may not solicit or consider additional evidence and must guard against allowing personal experience to weigh into their decisions.
    - a. The panel will determine whether an error occurred, including procedural or jurisdictional error, an error in the finding of guilt, or an error in the sanction imposed.
    - b. The panel will review whether the sanction was reasonably related to the:
      - 1) Crime of conviction,
      - 2) Infraction committed,
      - 3) Offender's risk of re-offending, or
      - 4) Safety of the community.
  3. Affirm, modify, reverse, vacate, or remand the decision by majority vote using DOC 09-235 Appeals Panel Decision. The panel may not increase the severity of the sanction.
    - a. If a majority of the panel finds that the sanction was not reasonable or that any finding of an infraction was based solely on unconfirmed allegations, the appeals panel will modify, reverse, vacate, or remand the decision.



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- C. The Hearings Unit will notify the presiding Hearing Officer and supervising CCO of the outcome of the appeal.
- D. Copies of all documents related to the appeal(s) will be placed in the offender's central/Work Release file and scanned into the offender's electronic imaging file.

### **XI. Hearings Administrator Review**

- A. If after completion of the hearing or appeal process, an error is brought to the attention of the Hearings Administrator, s/he has the authority to affirm, modify, reverse, vacate, or remand the Hearing Officer/appeal panel's decision.
- B. The Hearings Administrator may not increase the severity of the sanction.
- C. The Hearings Administrator will notify the Senior Operations Administrator for Offender Change of the decision.

### **DEFINITIONS:**

Words/terms appearing in this policy may be defined in the glossary section of the Policy Manual.

### **ATTACHMENTS:**

[Disciplinary Sanction Table for Prison and Work Release \(Attachment 1\)](#)  
[Work Release Mandatory Sanctioning Guidelines \(Attachment 2\)](#)

### **DOC FORMS:**

[DOC 09-186 Order of Suspension, Arrest and Detention](#)  
[DOC 09-226 DOC Jurisdiction Only Notice of Violation/Stipulated Agreement](#)  
[DOC 09-227 Deferred Decision Waiver](#)  
[DOC 09-230 Work Release Notice of Allegations, Hearing, Rights, and Waiver](#)  
[DOC 09-233 Hearing and Decision Summary Report](#)  
[DOC 09-235 Appeals Panel Decision](#)  
[DOC 09-275 Appeal of a Department Violation Process](#)  
[DOC 11-001 Negotiated Sanction](#)  
[DOC 17-079 Minor Infraction Report](#)  
[DOC 20-437 Work Release Major Infraction Report](#)

**CARNEY BADLEY SPELLMAN**

**October 23, 2017 - 1:18 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50785-4  
**Appellate Court Case Title:** PRP of Paul Bufalini  
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