

NO. 82194-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

JAMES W. GRANTHAM,

Petitioner.

**RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO
PETITIONER'S MOTION FOR DISCRETIONARY REVIEW**

ROBERT M. MCKENNA
Attorney General

PETER W. BERNEY
Assistant Attorney General
WSBA #15719
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

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I. IDENTITY OF RESPONDENT

The Respondent is the State of Washington Department of Corrections (DOC).

II. DECISION BELOW

The decision below is an order by Acting Chief Judge Joel Penoyar of the Washington State Court of Appeals, Division II, entered on August 29, 2008, dismissing the Personal Restraint Petition of James W. Grantham, a copy of which is attached to this response as Appendix 1.

III. ISSUES FOR REVIEW

Whether Petitioner has made a showing that he is entitled to discretionary review of the order dismissing his Personal Restraint Petition.

IV. STATEMENT OF THE CASE

The following Statement of the Case is from Respondent's Response to Personal Restraint Petition of James W. Grantham, pp. 2-4. In June, 2007, Steven Baxter, an investigator employed by the DOC in the Special Investigations Unit at DOC, learned of allegations that a Corrections Officer (CO) was introducing contraband at the McNeil Island Corrections Center (MICC) on behalf of some offenders there. When Baxter interviewed the CO, she admitted the allegations were true and provided him with a phone number of the contact person that she would

meet and obtain the contraband from which she would then bring into the prison. She did not know this man's name but she provided Baxter with his description.

The CO also turned over a large plastic bag of contraband that she was going to introduce into MICC. In it were found several tobacco products and a jar of instant coffee. Inside the coffee jar, another plastic bag was found wrapped in duct tape. The contents of this bag were later verified as being marijuana.

As all offender phone calls are monitored and recorded at every prison, Baxter entered the phone number the CO gave him into his computer records and found that James Grantham had called it. The number belonged to his brother, Richard Grantham. Furthermore, the description the CO had given Baxter of the individual who brought her the contraband matched the description from Richard Grantham's photo contained in his application to visit his brother in prison.

Baxter listened to the tape of the conversation between the Granthams. With his 12 years experience as a DOC investigator, Baxter could tell the Granthams were using code words for introducing contraband such as getting the "other" and making sure it was wrapped correctly. James Grantham also instructed his brother to buy the coffee and make sure it was ready for a Sunday drop off. After this, Baxter went

to MICC and interviewed James Grantham who denied any involvement in the plan. He then went back and listened to the tape again to confirm that the voice on the taped phone conversation matched that of James Grantham.

On December 1, 2007, Baxter drafted an Initial Serious Infraction Report charging Mr. Grantham with violation of WAC 137-25-030(603), Possession or Introduction of a Controlled Substance, and WAC 137-25-030(606), Possession or Introduction of Tobacco Products. On December 7, 2007, the infraction report was served upon Mr. Grantham along with the Disciplinary Hearing Notice/Appearance Waiver. This document informed Mr. Grantham of his rights and that he could obtain witness statements in his defense. Mr. Grantham did not request any witness statements.

The hearing was held on December 12, 2007. Mr. Grantham pleaded not guilty to the infractions and provided a written statement. In it, Mr. Grantham claimed he never mentioned drugs or tobacco in any conversations of his that were overheard and that Baxter did not attach any "supporting fact finding documents" like a phone record to his report. He also contended Baxter could not recognize his voice because he had only spoken with him for about 15 minutes.

At the conclusion of the hearing, the Hearing Officer, Lt. James Allen, found Mr. Grantham guilty of both infractions “Based on the infraction report, officers statement, SIU investigator stating he indentified the offenders voice making transaction with his brother over the telephone to introduce contraband.” As sanctions, Lt. Allen imposed 7 days loss of yard privileges, 90 days loss of good conduct time and 25 days in disciplinary segregation with credit for time served.

On August 29, 2008, Acting Chief Judge Joel Penoyar entered an order dismissing Mr. Grantham’s petition. He found that Mr. Grantham had received the minimal due process to which he was entitled to in a prison disciplinary hearing. Order, p. 5. Mr. Grantham filed a Motion for Reconsideration with the Court of Appeals, however, the file was transferred to this Court which re-designated the motion as a Motion for Discretionary Review. Mr. Grantham moved to amend his motion and the court granted his request on October 7, 2008.

As this case does not present one of the considerations set forth in RAP 13.4(b) for the acceptance of discretionary review, DOC opposes Mr. Grantham’s motion and asks that it be denied. He has not shown that the decision of the Acting Chief Judge is in conflict with either a decision by this Court or another division of the Court of Appeals; that the decision raises a significant question of law under the Constitution of either

Washington or the United States; or that the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

V. ARGUMENT

A. STANDARD OF REVIEW

In deciding whether to accept a motion for discretionary review of an order dismissing a personal restraint petition, this Court considers the criteria outlined in RAP 13.4(b). RAP 13.5A(b). Those criteria include: the decision of the Court of Appeals is in conflict with either a decision by the Supreme Court or in conflict with another division of the Court of Appeals; the decision by the Court of Appeals raises a significant question of law under the Constitution of either Washington or the United States; or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b).

B. PETITIONER DOES NOT MEET THE REQUIREMENTS FOR ACCEPTANCE OF DISCRETIONARY REVIEW

Mr. Grantham's motion is completely devoid of any argument or authorities that address the criteria for this Court to accept review of the Acting Chief Judge's order dismissing his petition. He simply argues again here, what he argued in the Court of Appeals; that his prison disciplinary hearing did not afford him sufficient due process for various reasons.

Motion, pp. 4-12. He asks this Court to reach a different conclusion than the Acting Chief Judge without citing to any conflict between that order and decisions of either this Court or another Court of Appeals. Nor does he argue that there is an issue of substantial public interest or that there is a significant question of law under the United States or Washington Constitutions.

To the contrary, the law concerning prison disciplinary hearings is well settled. In order to maintain a personal restraint petition, Mr. Grantham must prove actual and substantial prejudice resulting from constitutional error or non-constitutional error that inherently results in a complete miscarriage of justice. In re Myers, 91 Wn.2d 120, 122, 687 P.2d 532 (1978), cert. denied, 442 U.S. 912 (1979), overruled on other grounds, In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983); In re Gronquist, 138 Wn.2d 388, 978 P.2d 1083 (1999), cert. denied, 528 U.S. 1009 (1999). Mr. Grantham must not only be presently restrained, that restraint must be due to a constitutional error. Myers, 91 Wn.2d at 122; RAP 16.4. Mr. Grantham must present evidence that is more than speculation, conjecture or inadmissible hearsay to support his contentions. Gronquist, 138 Wn.2d at 395; In re Rice, 118 Wn.2d 876, 828 P.2d 1086, cert. denied, 506 U.S. 958, 113 S. Ct. 421 (1992).

After establishing the appropriateness of collateral review, Mr. Grantham still has the ultimate burden of proof. He must show both the existence of an error, and establish by a preponderance of the evidence that he was prejudiced by the asserted error. In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Lord, 123 Wn.2d 296, 303, 868 P.2d 835 (1994), cert. denied, 513 U.S. 849 (1994); In re Williams, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); State v. Kitchen, 110 Wn.2d 403, 413, 756 P.2d 105 (1988); State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986).

In Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), the Supreme Court set forth the due process rights of a prison inmate at a disciplinary proceeding where a state created liberty is at issue. Although the court held that such prisoners do not enjoy the full panoply of due process safeguards, it also held that a prisoner is entitled to: (1) written notice of the charges against him at least 24 hours in advance of the hearing; (2) an opportunity to call witnesses and present documentary evidence in his defense, provided that doing so will not be unduly harmful to institutional safety or correctional goals; and (3) a written statement setting forth the disciplinary board's findings of fact. Wolff, 418 U.S. at 563-66.

Implicit in the due process requirement that an inmate receive a written decision is the requirement that the disciplinary finding be supported by "some evidence in the record." Superintendent v. Hill, 472

U.S. 445, 455, 105 S. Ct. 2768, 2773-74, 86 L. Ed. 2d 356 (1985). Ascertaining whether the “some evidence” standard is satisfied does not require examination of the entire record, independent assessment of witnesses, or weighing of the evidence. Id. Instead, the relevant question is whether there is *any* evidence in the record that could support the conclusion reached by the disciplinary board. Id. (emphasis added). The “some evidence” standard was further refined by this Court in In re Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984). Reismiller held that when a prison disciplinary committee finds an inmate guilty of the infraction, that finding must be based on some evidence which links the inmate to the infraction. Id. at 297. See also, In re Burton, 80 Wn. App. 573, 585, 910 P.2d 1295 (1996).

Here, all requisite due process requirements were met. Mr. Grantham was notified of the hearing on December 7, 2007, and the hearing was held over 24 hours later, on December 12, 2007. Mr. Grantham was afforded the opportunity to have witness statements made in his defense but he declined. He did, however, provide his own written statement. At the conclusion of the hearing, Mr. Grantham was given a written statement setting forth Lt. Allen’s findings.

Regarding the evidence that Lt. Allen relied upon, he specifically found that “Based on the infraction report, officers statement, SIU

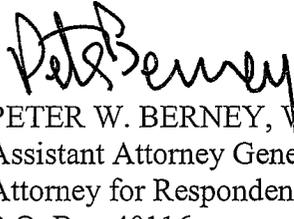
investigator stating he indentified the offenders voice making transaction with his brother over the telephone to introduce contraband,” there was sufficient evidence that he had in fact committed the infraction. Thus, all due process requirements were met at Mr. Grantham’s hearing.

VI. CONCLUSION

Respondent respectfully requests that this Court deny Petitioner’s Motion for Discretionary Review. The decision of the Acting Chief Judge properly adhered to established law regarding personal restraint petitions. Discretionary Review is therefore not appropriate.

RESPECTFULLY SUBMITTED this 6th day of November, 2008.

ROBERT M. MCKENNA
Attorney General



PETER W. BERNEY, WSBA #15719
Assistant Attorney General
Attorney for Respondent
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

I certify that I served a copy of RESPONSE OF THE DEPARTMENT OF CORRECTIONS TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW on all parties or their counsel of record on the date below as follows:

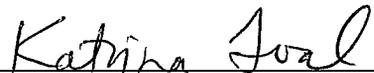
X U.S. Mail, Postage Prepaid
United Parcel Service, Next Day Air
ABC/Legal Messenger
State Campus Delivery
Hand Delivered by: _____
Facsimile

TO:

JAMES W GRANTHAM #703436
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY WA 98326-9723

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

EXECUTED this 6th day of November, 2008, at Olympia, Washington.



KATRINA TOAL

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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ATTORNEY GENERAL'S OFFICE
CORRECTIONS DIVISION

In re the
Personal Restraint Petition of

JAMES W. GRANTHAM,

Petitioner.

No. 37396-3-II

ORDER DISMISSING PETITION

James W. Grantham has filed a personal restraint petition challenging disciplinary infractions he received for possessing or introducing a controlled substance and possessing or introducing tobacco products in violation of WAC 137-25-030(603) and WAC 137-25-030(606). Grantham was sanctioned with the loss of 7 days of yard privileges and 90 days of good conduct time as well as 25 days in disciplinary segregation with credit for time served. Grantham contends that he did not receive the minimal due process to which he was entitled during the disciplinary proceedings and that there was insufficient evidence to support the infractions.

In challenging a prison disciplinary action, a petitioner must show that he is "presently restrained due to constitutional error and that the error worked to his actual and substantial prejudice." *In re Burton*, 80 Wn. App. 573, 585 (1996) (citing *In re Reismiller*, 101 Wn.2d 291, 293 (1984)). We review prison disciplinary proceedings to determine whether the disciplinary action was so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding. *Reismiller*, 101 Wn.2d at 294. In doing so,

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we look to whether the petitioner received the due process protections afforded him under *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974). *Burton*, 80 Wn. App. at 585. These protections include: (1) advance written notice of the charged violations; (2) the 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. *Burton*, 80 Wn. App. at 585. In addition, the disciplinary finding must be supported by some evidence in the record. *Superintendent v. Hill*, 472 U.S. 445, 455 (1985). A prison disciplinary hearing is arbitrary and capricious only if no evidence supports the action taken. *Burton*, 80 Wn. App. at 588.

Grantham was infracted after Steven Baxter, an investigator with the Department of Corrections Special Investigations Unit, questioned a corrections officer suspected of introducing contraband into McNeil Island Corrections Center. The corrections officer admitted to Baxter that the allegations were true and gave him the phone number of the person who was giving her the contraband. She did not know the person's name but described him to Baxter.

The corrections officer also turned over a bag of contraband that she was going to bring into the prison. The bag contained several tobacco products and a jar of instant coffee. The jar contained a plastic bag wrapped with duct tape, and the plastic bag contained marijuana.

Baxter entered the phone number from the corrections officer into the prison computer records and found that Grantham had called it. The number belonged to Grantham's brother Richard. The corrections officer's description of the person who

brought her the contraband matched the description from Richard's application to visit his brother in prison.

Baxter listened to the tape of the Granthams' phone conversation and concluded that they were using code words for introducing contraband. Grantham instructed his brother to buy the coffee and make sure it was ready for a Sunday drop off. They also talked about getting the "other" and making sure it was wrapped correctly. After listening to the tape, Baxter interviewed Grantham. When he denied any involvement in the plan, Baxter listened to the tape again to verify that the voice on the tape matched Grantham's.

Grantham now contends that his due process rights were violated because the resulting infraction report did not contain the time and place of the alleged phone conversation or the names of the witnesses, victims and other persons involved, as required by WAC 137-28-270(1)(c) and (d). In his written response to the infraction report, however, Grantham stated that he never mentioned drugs or tobacco in any phone conversation that was overheard, and he also asserted that the corrections officer had already pointed out that she was involved with an inmate other than Grantham.

It is unclear, given the fact that the corrections officer disclosed his brother's phone number and described a person who resembled his brother, and given the single conversation traced to that number, what additional defense Grantham could have mounted had he been informed of the time and place of the conversation. Furthermore, his response to the infraction report indicated that he knew the persons involved, and he did not request any witness statements before his hearing. Thus, even if the infraction

report did not fully satisfy the requirements of WAC 137-28-270, Grantham does not show that he was actually or substantially prejudiced by that deficiency.

Grantham also contends that he was entitled to either listen to the phone conversation himself or be informed of its contents. As support, he cites WAC 137-28-290(2)(f) and WAC 137-28-300(3). The first rule provides that an inmate must have access to non-confidential reports used by a hearing officer but adds that confidential records and reports may be withheld, with the inmate receiving only a summary of the confidential information. WAC 137-28-290(2)(f). The second rule provides that a hearing officer may consider relevant evidence presented outside the hearing, so long as the inmate is informed of that evidence and allowed to rebut it. WAC 137-28-300(3). Baxter concluded that the tape of the phone conversation was confidential and summarized its contents in the infraction report. Grantham does not show that the hearing officer considered any other relevant evidence during his disciplinary hearing. Rather, the hearing officer relied on Baxter's statement that he overheard Grantham conversing with his brother about introducing contraband. It is unclear whether Baxter testified in person at the hearing, but if not, his written statement was sufficient. *See In re Hunter*, 43 Wn. App. 174, 176 (1986) (written statement insufficient where it provided only general allegations and no evidence implicating specific inmates). Grantham does not establish that he was entitled to hear the taped phone conversation during his disciplinary hearing.

Grantham was given notice of the charged infractions, an opportunity to present witness statements, and a written statement of the evidence relied on and the reasons for the disciplinary action. There was also some evidence to support the infractions, and

contrary to Grantham's assertions, that evidence connected him to the violations charged.

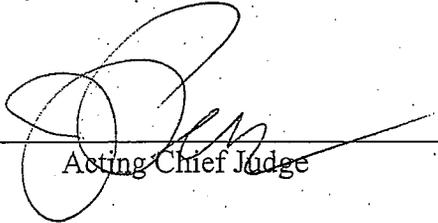
See In re Anderson, 112 Wn.2d 546, 549 (1989) (there must be some reasonable connection between the evidence and inmate to support prison disciplinary actions).

Grantham was therefore afforded the minimal due process to which he was entitled.

Grantham does not succeed in showing that he is entitled to relief. Accordingly, it is hereby

ORDERED that this petition is dismissed under RAP 16.11(b).

DATED this 29th day of August, 2008.


Acting Chief Judge

cc: James W. Grantham
Department Of Corrections
Peter W. Berney