

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 FEB 23 P 3: 21

NO. 82194-1

BY RONALD R. CARPENTER

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

JAMES W. GRANTHAM,

Petitioner.

**SUPPLEMENTAL BRIEF OF THE DEPARTMENT OF
CORRECTIONS**

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

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT2

 A. THE RELAXED STANDARD OF REVIEW APPLIED
 IN ISADORE DOES NOT APPLY TO PRISON
 DISCIPLINARY PROCEEDINGS.2

 B. PROCEDURAL REGULATIONS REGARDING
 ADMINISTRATION OF PRISON DISCIPLINARY
 HEARINGS DO NOT CREATE A LIBERTY
 INTEREST IN PETITIONER.5

III. CONCLUSION8

TABLE OF AUTHORITIES

Cases

<u>Arment v. Henry,</u> 98 Wn.2d 775, 658 P.2d 663 (1983).....	4
<u>In re Burton,</u> 80 Wn. App. 573, 910 P.2d 1295 (1996).....	1, 3
<u>In re Cashaw,</u> 123 Wn.2d 138, 866 P.2d 8 (1994)	2, 3, 4, 5, 6, 7
<u>In re Gronquist,</u> 138 Wn.2d 388, 978 P.2d 1083 (1999).....	1, 3
<u>In re Isadore,</u> 151 Wn.2d 294, 88 P.3d 390 (2004).....	1, 2, 4, 5
<u>In re Reismiller,</u> 101 Wn.2d 291, 678 P.2d 323 (1984).....	4, 5
<u>Superintendent v. Hill,</u> 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).....	6
<u>Wolff v. McDonnell,</u> 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).....	6, 7

Rules

RAP 16.4(b).....	2
RAP 16.4(c).....	2

Regulations

WAC 137-28-270(1).....	5
WAC 137-28-300(7).....	7

I. INTRODUCTION

On January 30, 2009, a ruling was entered by the Supreme Court Commissioner directing Respondent to file a supplemental memorandum discussing the appropriate standard of review in prison disciplinary hearings. Respondent had argued below that Petitioner must prove actual and substantial prejudice resulting from constitutional error or non-constitutional error that inherently results in a complete miscarriage of justice citing In re Gronquist, 138 Wn.2d 388, 978 P.2d 1083 (1999). Brief of Respondent, p. 5. In its Order Dismissing Petition, the Acting Chief Judge of Division II of the Court of Appeals used this standard as well citing In re Burton, 80 Wn. App. 573, 910 P.2d 1295 (1996). Order, p. 1.

In its January 30, 2009, ruling, the Commissioner cites to In re Isadore, 151 Wn.2d 294, 88 P.3d 390 (2004) for the proposition that a relaxed standard of review applies in situations where a petitioner had no prior opportunity for judicial review. In such situations, Isadore held that a petitioner need not show actual and substantial prejudice but only that he was being unlawfully restrained. Id. at 299. Because all prison disciplinary hearings do not have a prior opportunity for judicial review prior to the filing of a personal restraint petition (PRP), the Commissioner's ruling asserts that the relaxed standard enunciated in

Isadore is the appropriate standard of review and directs the Respondent to address this issue in this supplemental brief.

II. ARGUMENT

A. **THE RELAXED STANDARD OF REVIEW APPLIED IN ISADORE DOES NOT APPLY TO PRISON DISCIPLINARY PROCEEDINGS.**

Initially the Respondent disagrees with the Commissioner that the relaxed standard of review enunciated in Isadore is applicable to PRPs involving prison disciplinary proceedings. The court in Isadore relied on the holding in In re Cashaw, 123 Wn.2d 138, 866 P.2d 8 (1994), that, where there has not been a prior opportunity for judicial review, a petitioner need only show he is restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c). Cashaw, 123 Wn.2d at 148. However, neither Cashaw nor Isadore involved prison disciplinary proceedings. Cashaw involved a parolability hearing before the Indeterminate Sentence Review Board (ISRB), and Isadore addressed the voluntariness of a guilty plea where the petitioner was not informed he would be subject to mandatory community placement after he served his prison sentence.

In In re Burton, the Court of Appeals addressed this exact issue of whether the Cashaw standard of review applied to prison disciplinary hearings. There the court noted:

Prison disciplinary proceedings also result in decisions “from which the inmate generally has had no previous or alternative avenue for obtaining state judicial review.” Thus, we must decide whether Cashaw applies to make a showing of actual and substantial prejudice unnecessary in this context as well or whether the case is limited to parolability hearings like the one at issue there. Neither Cashaw nor Shepard, the only Supreme Court case applying Cashaw to date, addressed or considered the question whether the Supreme Court intended that the Cashaw holding apply in the context of prison disciplinary proceedings.

Burton, 80 Wn. App. at 581 (citation omitted).

The court held “we conclude that the Supreme Court did not intend Cashaw to apply to prison disciplinary proceedings because that decision is in direct conflict with the line of recent Supreme Court decisions which have directly addressed what standard of review applies to prison disciplinary actions.” Id.

While the four cases cited by the Burton court predated the 1994 decision in Cashaw, it is important to note that the Supreme Court continued to use the actual and substantial prejudice standard of review for prison disciplinary proceedings well after Cashaw was decided. Gronquist, 138 Wn.2d at 396. As noted by the Burton court “Nothing in Cashaw even alludes to overruling this line of cases, nor is that consequence in any way acknowledged or considered.” Burton, 80 Wn. App. at 581-82.

The same is true of the holding in Isadore, as discussed above. Like Cashaw, it did not involve a prison disciplinary hearing. And like Cashaw, there is no discussion in Isadore that the long standing line of cases involving the standard of review in prison disciplinary hearings should be overruled. As stated by the Supreme Court in In re Reismiller, 101 Wn.2d 291, 678 P.2d 323 (1984):

A lesser standard of due process is required in disciplinary proceedings when a prisoner is already incarcerated rather than on probation or parole. Not only is the sanction in prison disciplinary hearings “qualitatively and quantitatively different from the revocation of parole or probation” but the State also has a far different stake in prison disciplinary hearings ...

Id. at 295, (quoting Arment v. Henry, 98 Wn.2d 775, 778, 658 P.2d 663 (1983)).

Both Cashaw and Isadore involved parole or community placement, the current alternative to probation, issues. Those issues are far different from prison disciplinary proceedings where a prisoner is already incarcerated. As noted in Reismiller, a broader scope of review for such hearings would be undesirable because it would tend to undermine prison administrators’ decisions and lead to greater involvement by the courts in the matters of internal prison discipline. Reismiller, 101 Wn.2d at 294.

Neither Cashaw nor Isadore should be so broadly construed as to overrule by implication the entire line of cases in which the standard of review in prison disciplinary hearings are directly addressed.

B. PROCEDURAL REGULATIONS REGARDING ADMINISTRATION OF PRISON DISCIPLINARY HEARINGS DO NOT CREATE A LIBERTY INTEREST IN PETITIONER.

Using the relaxed standard of review found in Isadore, the unlawful restraint noted in the Commissioner's ruling is a failure of Respondent to follow the mandatory content requirements for serious infraction reports found in WAC 137-28-270(1). Specifically, the report did not include the time and place of the infraction beyond "Oct. 2007" and "Tacoma" and did not contain the name of the corrections officer who admitted smuggling contraband for Petitioner.

The review of prison disciplinary proceedings is properly limited to a determination of whether the action taken was so arbitrary and capricious as to deny a prisoner a fundamentally fair hearing. Reismiller, 101 Wn.2d at 294. Inmates are entitled only to minimal due process in disciplinary hearings including (1) written notice of the charges at least 24 hours in advance of the hearing; (2) an opportunity to present evidence or witnesses; and (3) a written statement of the disciplinary findings. Wolff v. McDonnell, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935

(1974). Implicit in the requirement of a written statement is that there must be “some evidence” to support the finding of guilt. Superintendent v. Hill, 472 U.S. 445, 455, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).

Due process protects against the deprivation of life, liberty or property. Cashaw, 123 Wn.2d at 143. Liberty interests may arise from either the Due Process Clause or state laws or regulations. Id. at 144.

For a state law to create a liberty interest, it must contain “substantive predicates” to the exercise of discretion and “specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow”. Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

Id. (citations omitted).

In Cashaw, the petitioner had been paroled, and had his parole revoked, numerous times. Id. at 141. Following the last revocation, the ISRB met to consider a new minimum term. Id. They set petitioner’s new minimum term to match the maximum sentence imposed by the court. Id. The petitioner was not given notice of this and was not present at the hearing as required by the Board’s own regulations. Id. at 144-45. The petitioner claimed this was a violation of his right to procedural due process and the Court of Appeals agreed. Id. at 142. The Supreme Court reversed this finding but did uphold the granting of petitioner’s petition on other grounds. Id. at 147.

The court in Cashaw cited well-settled law that procedural laws do not create liberty interests; only substantive laws do. Id. at 145. Thus, it held “For these reasons, state regulations that establish only that the procedures for official decisionmaking such as those creating a particular type of hearing, do not by themselves create liberty interests.” Id. Thus, the ISRBs own regulations on written notice and in-person parolability hearings did not create a liberty interest in the petitioner there.

Similarly, here, the Respondent’s regulations on the content of a serious infraction report are procedures for official decisionmaking and do not create a liberty interest in Petitioner. Failure to strictly follow the requirements of the regulations (there is arguably some effort to comply) does not render Petitioner’s restraint unlawful. Further, the failure to name the officer who admitted to introducing contraband into the prison was not error because use of confidential information in prison disciplinary hearings is within the sound discretion of prison officials. Wolff, 418 U.S. at 556; WAC 137-28-300(7).

As outlined in Respondent’s response below, Petitioner was provided all requisite due process of law and there was “some evidence” of his guilt. Thus, failure to list the time and place of the infraction with sufficient specificity, or to name the officer involved, did not violate

Petitioner's liberty interest and was not so arbitrary and capricious as to deny him a fundamentally fair hearing.

III. CONCLUSION

For the reasons outlined above, Respondent respectfully requests the Order Dismissing Petition be affirmed.

RESPECTFULLY SUBMITTED this 23rd day of February, 2009.

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

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 FEB 23 P 3:21

I certify that I served a copy of SUPPLEMENTAL BRIEF OF
THE DEPARTMENT OF CORRECTIONS on all parties or their counsel
of record on the date below as follows:
BY RONALD R. CARPENTER
CLERK

- 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 23rd day of February, 2009, at Olympia,
Washington.

Katrina Toal
KATRINA TOAL