

NO. 82194-1

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, WSBA #15719
Assistant Attorney General
JAY D. GECK, WSBA # 17916
Deputy Solicitor General
Corrections Division
PO Box 40116
Olympia, WA 98504-0116
(360) 586-1445

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 AUG 28 P 3:57

BY TONY L. A. C. [unclear]

h/h

ORIGINAL

TABLE OF CONTENTS

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE..... 3

III. ARGUMENT 5

A. A PERSONAL RESTRAINT PETITION
CHALLENGING A PRISON DISCIPLINARY
SANCTION EXAMINES WHETHER THE SANCTION
IS ARBITRARY AND CAPRICIOUS OR VIOLATES
DUE PROCESS 6

1. Comparing The Standard Of Review In Prison
Discipline To *Cashaw* And Cases That Do Not
Involve Prison Discipline 8

B. GRANTHAM’S HEARING FOLLOWED DUE
PROCESS REQUIREMENTS FOR PRISON
DISCIPLINARY HEARINGS..... 13

1. The General Requirements Of Due Process – Notice,
Being Heard, And A Written Decision..... 15

2. The Infractions Are Based On Evidence...... 15

3. Due Process Does Not Require Providing
Transcripts Of Phone Calls And Grantham Did Not
Ask For Call Records. 16

4. Due Process Does Not Require The Infraction
Report To Give The Date And Time Of Grantham’s
Phone Call. 17

5. Due Process Did Not Require Naming the Officer
Who Introduced Contraband. 18

6. Summary – No Showing That The Disciplinary
Sanction Resulted From The Denial Of Due Process. 18

C.	THERE IS NO BASIS FOR RELIEF BASED ON THE PROCEDURAL REGULATIONS.....	19
1.	<u>The Petitioner Has Not Claimed Violation Of The Procedural Regulations Alone Justifies PRP Relief.....</u>	19
2.	<u>The Infraction Report Complies With The Regulation.....</u>	20
3.	<u>The Alleged Non-Compliance With The Regulation Is Not Arbitrary And Capricious And Grantham Did Not Show Any Actual Harm Or Prejudice.....</u>	21
4.	<u>There Is No Separate Liberty Interest In Compliance With WAC 137-28-270.....</u>	21
IV.	<u>CONCLUSION.....</u>	23

TABLE OF AUTHORITIES

Cases

<i>Arment v. Henry</i> , 98 Wn.2d 775, 658 P.2d 663 (1983).....	10
<i>Bono v. Saxbe</i> , 450 F.Supp. 934 (D. Ill. 1978).....	18
<i>In re Hagler</i> , 97 Wn.2d at 818, 650 P.2d 1103 (1982).....	8, 9
<i>In re Pers. Restraint of Anderson</i> , 112 Wn.2d 546, 772 P.2d 510 (1989).....	7, 10
<i>In re Pers. Restraint of Burton</i> , 80 Wn.App. 573, 910 P.2d 1295 (1996).....	12
<i>In re Pers. Restraint of Bush</i> , 164 Wn.2d 697, 193 P.3d 103 (2008).....	10
<i>In re Pers. Restraint of Cashaw</i> , 123 Wn.2d 138, 866 P.2d 8 (1994).....	9, 11, 12, 22
<i>In re Pers. Restraint of Gronquist</i> , 138 Wn.2d 388, 978 P.2d 1083 (1999).....	7, 8, 12, 14
<i>In re Pers. Restraint of Higgins</i> , 152 Wn.2d 155, 163, 95 P.3d 330 (2004).....	6, 7, 10
<i>In re Pers. Restraint of Isadore</i> , 151 Wn.2d 294, 88 P.3d 390 (2004).....	8, 9
<i>In re Pers. Restraint of Mattson</i> , 81324-8, 2009 WL 2579357 (Wash. August 20, 2009).....	22
<i>In re Pers. Restraint of Mines</i> , 146 Wn.2d 279, 45 P.3d 535 (2002).....	11, 12

<i>In re Pers. Restraint of Reismiller</i> , 101 Wn.2d 291, 678 P.2d 323 (1984).....	7, 8, 10
<i>In re Pers. Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086	8
<i>In re Rights to Waters of Stranger Creek</i> , 77 Wn.2d 649, 466 P.2d 508 (1970).....	13
<i>Munson v Arkansas Dept of Corrections</i> , --- S.W.3d ----, 375 Ark. 549, 2009 WL 348202 (2009).....	22
<i>Sandin v. Conner</i> , 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995).....	11, 22
<i>Spellman-Bey v. Lynaugh</i> , 778 F.Supp. 338 (E.D. Tex. 1991).....	18
<i>Superintendent v. Hill</i> , 472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985).....	14
<i>Wolff v. McDonnell</i> , 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974).....	passim
<i>Young v. Kahn</i> , 926 F.Supp. 1396 (3 rd Cir. 1991).....	18

Statutes

RCW 72.09.130	7, 9
RCW 9.94A.728.....	9
RCW 9.94A.728(1).....	7
RCW 9.95.070	1

Rules

RAP 16.4(c)	9
-------------------	---

Regulations

WAC 137-25-030.....	3
WAC 137-28-160.....	1
WAC 137-28-270.....	21
WAC 137-28-270(1).....	2, 19, 20
WAC 137-28-270(1)(c)	13, 21
WAC 137-28-270(1)(d)	13
WAC 137-28-290.....	1

I. ISSUES PRESENTED

An investigator for the Department of Corrections (Department) at the McNeil Island Correction Center (MICC) discovered that a guard at MICC was smuggling in tobacco and marijuana. When confronted, the guard provided the investigator with the phone number of a person who provided the contraband, which belonged to Petitioner James Grantham's brother. Next, the investigator determined that Offender James Grantham had called the number. The investigator listened to recordings of a call between Grantham and his brother where they discussed the smuggling. Based on this evidence, a Department hearing officer determined that Grantham violated two serious infraction rules. The Department sanction included a loss of 90 days of good conduct time.¹

The acting chief judge of the Court of Appeals, Division II, held that the prison disciplinary proceeding met the requirements of procedural due process and sufficient evidence supported Department determination. Grantham's Motion for Discretionary Review raised two issues:

1. Grantham argued he was denied due process because the written infraction notice did not provide the specific time and place of a phone conversation reported by the investigator, and because he was given

¹ "Serious infractions" may result in a loss of good conduct time credits, which is the portion of a inmate's potential reduction to minimum term authorized by RCW 9.95.070 and 72.09.130. See WAC 137-28-160. More extensive process is afforded inmates on serious infractions. See WAC 137-28-290 and 300.

no copy of phone records nor a transcript of the recording. Did this prison disciplinary hearing comply with due process requirements?

2. Grantham claims the findings of infraction were unsubstantiated or false. Is there sufficient evidence to support the finding of infractions, consistent with due process standards?

The Commissioner issued a Ruling on January 30, 2009. The Ruling suggests the serious infraction report did not comply with a procedural regulation for such reports, WAC 137-28-270(1). As a result of this ruling, Grantham may be raising the following additional issues:

1. When a personal restraint petition challenges a prison discipline sanction, is review limited to examining whether the discipline lacks any supporting evidence or violated procedural requirements of due process?

2. May a petitioner challenging a prison discipline sanction seek relief based merely on a violation of a department procedural regulation, where the regulation creates no liberty interests?

3. May a petitioner challenging a prison discipline sanction seek relief based merely on a violation of a department procedural regulation without showing actual and substantial prejudice?

II. STATEMENT OF THE CASE

In June 2007, Steven Baxter, an investigator employed by the Department in the Special Investigations Unit in Tumwater, Washington, learned of allegations that a Corrections Officer was introducing contraband at MICC. Response to PRP, Ex 2, Decl. of Baxter. When interviewed, the officer turned over a large plastic bag of contraband she was going to introduce into McNeil Island. It included tobacco products and a jar of instant coffee containing a plastic bag of marijuana wrapped in duct tape. *Id.* The officer admitted the allegations and provided the phone number of the person supplying the contraband and his physical description. *Id.* Baxter determined the number belonged to Offender Grantham's brother Richard. *Id.*; see also DOC Response to PRP, Ex. 3, Att A (Serious Infraction Report).

On December 7, 2007, the Department served Grantham with the Serious Infraction Report. See DOC Response, Ex. 3, Attachment A. The Report charged Grantham with violating WAC 137-25-030(603), Possession or Introduction of a Controlled Substance, and WAC 137-25-030(606), Possession or Introduction of Tobacco Products. In the infraction report, Baxter summarized the investigation of the guard, the guard's admission and the phone number she had given him, and then explained that he had listened to a recording of a conversation between

Offender Grantham and his brother on the outside, confirming that he recognized Offender Grantham's voice. Baxter recognized the Granthams using code words for introducing contraband such as getting the "other;" making sure it was wrapped correctly; buying "the coffee and make sure it was ready for Sunday". *See* Serious Infraction Report.²

On December 7, Grantham also received a Hearing Notice/Appearance Waiver form informing him of his rights and that he could obtain witness statements in his defense. DOC Response to PRP, Ex. 3, Att. B (Hearing Notice/Appearance Waiver). Grantham did not request any witness statements and refused to sign. *Id.* Notably, Grantham had already been notified of the investigation when he was put in segregation on November 8, 2007, for "conspiring with other offender and people in the community to introduce tobacco and drugs to the facility." *See* PRP, App. B (Segregation Authorization).

The department held a hearing on December 12, 2007. DOC Response to PRP, Ex. 3, Att. C (Disciplinary Hearing Minutes and Findings). Grantham pleaded not guilty to the infractions and provided a written statement denying any conversation; saying the guard provided the contraband to other inmates, not him; saying the Department failed to

² Baxter's Declaration explains he went to McNeil Island 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. Response to PRP, Ex 2, ¶ 5.

offer phone records or transcripts to support Baxter's statements that he listened to a phone recording; saying Baxter could not recognize his voice; and asking to review any recording being used against him. DOC Response to PRP, Ex. 3, Att. D (Grantham Statement).

The Hearing Officer issued a written decision finding Grantham had committed both infractions. The decision was "[b]ased 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." DOC Response to PRP, Ex. 3, Att. E (Written Findings). The sanction included 7 days loss of yard privileges, 90 days loss of good conduct time, and 25 days in disciplinary segregation with credit for time served. *Id.* Grantham appealed and on December 20, 2007, the designee of the McNeil Island Superintendent upheld the findings. DOC Response to PRP, Ex. 3, Att. F (Disciplinary Hearing Appeal Decision).

III. ARGUMENT

Grantham's petition alleged insufficiency of the evidence and a violation of due process. *See* COA Order Dismissing Petition at 1. His Motion for Discretionary Review similarly argued due process: (1) claiming the infracting report did not state clear times, dates, or places for the misconduct; (2) claiming he was wrongly denied a request for a copy

of phone records; (3) claiming the findings were arbitrary and capricious; and (4) claiming the findings were false and not supported by evidence. See Amended Motion Discretionary Review at 1-2. The threshold issue, however, is what standard of review applies in this type of personal restraint petition.

A. A PERSONAL RESTRAINT PETITION CHALLENGING A PRISON DISCIPLINARY SANCTION EXAMINES WHETHER THE SANCTION IS ARBITRARY AND CAPRICIOUS OR VIOLATES DUE PROCESS

“Prison disciplinary proceedings are not criminal prosecutions or judicial proceedings but are civil and remedial in nature.” *In re Pers. Restraint of Higgins*, 152 Wn.2d 155, 163, 95 P.3d 330 (2004), citing *Wolff v. McDonnell*, 418 U.S. 539, 556, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974). “[T]he fundamental priority in a prison setting is to maintain the peace.” *Higgins*, 152 Wn. 2d at 164.

“Prison disciplinary proceedings ... take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.... The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of

personal antagonism on the important aims of the correctional process.”

Higgins, 152 Wn.2d at 164, quoting *Wolff*, 418 U.S. at 561-62. An inmate, however, has a protected liberty interest in good time credits earned under the statutory system providing for earning and revoking such credits. *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 397, 978 P.2d 1083 (1999); *see also* RCW 72.09.130 (authorizing a system for “receipt and denial” of credits); RCW 9.94A.728(1) (“earned release time shall be for good behavior and good performance, as determined by the correctional agency having jurisdiction.”).

Prison disciplinary sanctions involving loss of good time credits are subject to limited and deferential review where the burden is on the inmate. “[A] PRP challenging a prison disciplinary sanction . . . is reviewable *only if* the action taken was ‘so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding.’” *Gronquist*, 138 Wn.2d at 396, quoting *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 294, 678 P.2d 323 (1984) (emphasis added). “[A] hearing is not arbitrary if some evidence supports the conclusion of the prison disciplinary board.” *In re Pers. Restraint of Anderson*, 112 Wn.2d 546, 772 P.2d 510 (1989) (“penological interests” in the discipline outweigh the “limited liberty interest in good time credits.”). Furthermore,

A prison disciplinary proceeding is not arbitrary and capricious *if the petitioner was afforded minimum due process* protections applicable in such cases. *In re Pers. Restraint of Burton*, 80 Wn. App. 573, 585, 910 P.2d 1295 (1996); *In re Pers. Restraint of Anderson*, 112 Wn.2d 546, 548-49, 772 P.2d 510 (1989), *cert. denied*, 493 U.S. 1004, 110 S. Ct. 565, 107 L. Ed. 2d 559 (1989).

Gronquist, 138 Wn.2d at 396 (emphasis added).

Finally, the burden is on the petitioner challenging a prison discipline sanction to come forward and show an error. The inmate who alleges a denial of due process must show that the denial was prejudicial. *E.g. Reismiller*, 101 Wn.2d at 297 (citing *In re Hagler*, 97 Wn.2d at 818, 825-26, 650 P.2d 1103 (1982)). The claim must be based on “facts or evidence . . . and not solely upon conclusory allegations.” *Gronquist*, 138 Wn.2d at 396. The “petitioner must present evidence that is more than speculation, conjecture, or inadmissible hearsay.” *Id.* citing *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992).

1. **Comparing The Standard Of Review In Prison Discipline To Cashaw And Cases That Do Not Involve Prison Discipline**

Based on the Commissioner’s Ruling citing *In re Pers. Restraint of Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004), Grantham filed a “Reply to the State’s Supplemental Brief”. Grantham argues he need not prove

actual prejudice from a constitutional error, and apparently contends that the above standards of review no longer apply.

Isadore is based on *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994). In *Cashaw*, the Court distinguished the burden for an inmate challenging a decision to deny parole by the Indeterminate Sentence Review Board where it reset the term to expire on the maximum expiration date, and where the Board violated its own rule in making that decision. *Cashaw* thus demonstrated he was “restrained” under RAP 16.4(b), and that the restraint was “unlawful” under RAP 16.4(c). 123 Wn.2d at 148. The Court then noted that *Cashaw* need not meet a “substantial and actual prejudice” standard applicable when a inmate collaterally attacks a final judgment and verdict.³

Prison discipline sanctions, however, are substantively different from a Sentencing Review Board decision setting a term of confinement, or a decision revoking parole. A prison discipline decision implements the prison’s authority in RCW 72.09.130 and RCW 9.94A.728(1). As a result, every discipline sanction has significant sideboards. The discipline

³ The “actual and substantial prejudice” standard appears first in *In re Matter of Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982). *Hagler* collaterally attacked his conviction pointing to an erroneous instruction at trial. To prevent the PRP process from becoming a second round of appeals, the Court recognized that the burden was now on the petitioner to show that an alleged constitutional error was actual and prejudicial. The Court expressly adopted the federal standard where a collateral attack was insufficient if it showed only “a possibility of prejudice”. Instead, the petitioner had to show an error that “worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”

cannot alter the terms of a lawfully imposed sentence—it implements the terms and conditions of the sentence. As a result, there is a “limited liberty interest,” *Anderson, supra*, triggering limited due process requirements and limited PRP review. *See generally, Higgins, Wolff, Anderson, and Reismiller, supra.*

The Court should continue to recognize the need for finality in prison discipline sanctions and the need for deference to prison administrator decisions. As this Court previously stated:

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 ...

Reismiller, 101 Wn.2d at 295 (quoting *Arment v. Henry*, 98 Wn.2d 775, 778, 658 P.2d 663 (1983)). Broader PRP review of disciplinary hearings 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. This factor counsels for requiring a showing of actual prejudice from an alleged constitutional error. Conversely, where an alleged procedural violation is not prejudicial, there should be no relief. *See In re Pers. Restraint of Bush*, 164 Wn.2d 697, 706, 193 P.3d 103 (2008) (“to afford relief to a personal restraint petitioner who has shown a constitutional error, the petitioner must make a

prima facie showing that the error actually and substantially prejudiced him or her.”)

Second, the types of issues that arise in prison discipline disputes justify a limited standard of review and requirement of actual prejudice. A prison discipline case typically involves a factual allegation about an event within the prison. Such events are not conducive to normal civil litigation procedures, normal witnesses, or creating a significant record. Under the existing standard of review outlined above, an appellate court may review the record for “some evidence,” and to decide if the hearing met the limited due process requirements of *Wolff v. McDonnell*.

Finally, this Court should consider *stare decisis*. For example, in *In re Pers. Restraint of Mines*, 146 Wn.2d 279, 45 P.3d 535 (2002), this Court disavowed application of *Cashaw* to prison discipline actions. The Indeterminate Sentencing Board argued in *Mines* that *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995) had “undermined” *Cashaw*. (*Sandin* held that a mere procedural violation does not justify relief from a prison discipline sanction.) The Court distinguished *Sandin* saying *Cashaw* did not apply to review of prison discipline:

Sandin addressed the rights of prison inmates in disciplinary matters. *Sandin*, 515 U.S. at 476, 115 S. Ct. 2293. *The Court of Appeals has already rejected the*

application of Cashaw to prison disciplinary issues. See In re Pers. Restraint of Burton, 80 Wn.App. 573, 585, 910 P.2d 1295 (1996) (concluding that “*Cashaw* did not eliminate the requirement that a petitioner show actual and substantial prejudice in order to maintain a PRP challenging a prison disciplinary action”). Thus, *Sandin* simply does not affect the holding in *Cashaw*.

Mines, 146 Wn.2d at 289 (emphasis added).

Similarly, the Court’s opinion in *Gronquist* cited with favor the court of appeals in *Burton*, 80 Wn. App. 573, holding that *Cashaw* does not apply to PRP review of prison discipline sanction:

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 concludes 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.*

The doctrine of stare decisis “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). There is no showing that *Gronquist*, *Reismiller*, *Burton*, and related decisions are incorrect or cause harm.

Accordingly, when a person challenges an infraction decision, the relevant standard of review should examine whether the discipline is arbitrary and capricious in the sense that it lacks any evidence, or violated the relevant standards of due process for such hearings. Furthermore, a petitioner must show an alleged error during the prison disciplinary hearing was prejudicial; relief should not be granted for harmless errors or based on speculative possibilities of prejudice. Finally, an allegation that the Department violated a procedural rule does not, standing alone, demonstrate due process has been violated. *See generally*, Part C, below.

B. GRANTHAM’S HEARING FOLLOWED DUE PROCESS REQUIREMENTS FOR PRISON DISCIPLINARY HEARINGS

Grantham raises a variety of due process arguments. First he claimed insufficient notice of the charges against him arguing the infraction report did not state clear dates, times, and names of witnesses and that this was inadequate under WAC 137-28-270(1)(c) and WAC 137-28-270(1)(d), prison disciplinary hearing rules. Motion at 5. He also

argues he was denied due process because he was not given phone records to disprove the charges. Mr. Grantham also argues that there was not “some evidence” that he committed the infraction. Petition, pp. 6-8. As such, he claims he was denied minimal due process protections.

Wolff v. McDonnell and *Gronquist* define the minimum due process required in a prison disciplinary hearing:

Minimum due process in these cases means the inmate must (1) receive notice of the alleged violation; (2) be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals; and (3) receive a written statement of the evidence relied upon and the reasons for the disciplinary action.

Gronquist, 138 Wn.2d at 396-97. Further, the disciplinary finding must be supported by “some evidence in the record.” *Superintendent v. Hill*, 472 U.S. 445, 455, 105 S. Ct. 2768, 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 *any* evidence in the record supports the discipline. *Id.* (emphasis added). *See also In re Reismiller*, at 297 (when a prison disciplinary committee finds guilt, the finding must be based on some evidence linking inmate to the infraction).

In the instant case, all requirements for due process were met at Mr. Grantham's disciplinary hearing. Moreover, even if the process did not meet the standards of the due process clause, Grantham does not show any material or actual harm from the allegedly inadequate procedure.

1. The General Requirements Of Due Process – Notice, Being Heard, And A Written Decision.

Grantham had more than 24 hours notice of the hearing. He was provided the infraction report outlining the allegations and evidence against him on December 7, 2007, along with the Hearing Notice/Appearance Waiver, which outlined his rights at the hearing, and the hearing was held December 12, 2007. The Notice document confirms that Grantham had the opportunity to request witness statements in his defense but he declined. Grantham was allowed to offer his own written statement to the hearing officer. He was provided a written statement of Lt. Allen's findings against him. See DOC Response to PRP, Ex. 3, Att. A through E.

2. The Infractions Are Based On Evidence.

The record included substantial evidence connecting Grantham to the infractions of introducing contraband. The correctional officer admitted bringing in contraband, produced the contraband, described her source for the contraband, and gave the source's phone number, which

connected the contraband to Grantham's brother. The investigator's report then connected Grantham to smuggling the contraband by listening to the recording where Grantham discussed the contraband smuggling with his brother, and comparing the recording to Grantham's voice.

Grantham contends Baxter is not "a qualified or recognized voice identification expert," Petition at 8, but due process in a prison disciplinary hearing does not require such a foundation for evidence. Instead, the investigator's evidence is sound: he obtained the tape from prison records of Grantham's calls, listened to the tape, spoke with Grantham, and then listened again to the tape.⁴

3. **Due Process Does Not Require Providing Transcripts Of Phone Calls And Grantham Did Not Ask For Call Records.**

Grantham's claim that he should have been provided phone records has two components. First, he uses it to mischaracterize the record and imply no phone records exist to show a call between him and his brother. Grantham produces only an "Inmate Kite" from after the hearing that seeks transcriptions of phone records. PRP Appendix E. He did not seek the "phone records" of calls made and the record does not show an absence of a call.

⁴ An inmate must use a personal identification number (PIN) when making a call. This would have allowed the investigator to obtain any calls made by Grantham to the outside number provided by the correctional officer.

Second, he suggests he should have been provided a copy of the recording itself, or a transcript. But the recording was not introduced and nothing suggests a transcript exists or was used. The hearing examiner considered Investigator Baxter's statement that he had located and listened to a phone call. That call was sufficiently connected to Grantham because the Investigator took it from Department phone records of inmate calls, and because the Investigator compared it to Grantham's voice. This is substantial evidence that phone calls existed.

4. **Due Process Does Not Require The Infraction Report To Give The Date And Time Of Grantham's Phone Call.**

The infraction report informed Grantham that infractions had occurred in October 2007, that the infractions involved an officer smuggling contraband, that his brother was connected to the officer through the phone number and description, and how a phone recording showed his connection to that smuggling enterprise. He was thus given adequate notice of the charge and due process does not require notice of the precise date or time of the call. Furthermore, Grantham does not show how knowing the time of the phone call would have changed his case or

overcome the investigator's evidence about the call.⁵ *See*, Court of Appeals Order Dismissing Petition.

5. **Due Process Did Not Require Naming the Officer Who Introduced Contraband.**

Due process does not require disclosure of such as the name of an officer who introduced contraband. *See Wolff*, 418 U.S. at 556.

6. **Summary – No Showing That The Disciplinary Sanction Resulted From The Denial Of Due Process.**

Petitioner was afforded due process for his disciplinary hearing and there was substantial evidence of his guilt for the two infractions. *See generally*, State's Response to PRP; Order Dismissing PRP. But, even if the procedural shortcomings challenged by Grantham might violate due process, he has not shown that he was actually prejudiced. Accordingly, relief should be denied. *See Bush*, *supra*.

///

///

///

⁵ None of the cases cited by Grantham demonstrate a due process violation in this case. *Young v. Kahn*, 926 F.Supp. 1396 (3rd Cir. 1991) involves a situation where the hearing officer did not have access to exculpatory information requested by the inmate. Here, Grantham's arguments about phone records and recordings are met because the investigator's report demonstrated a review of records and listening to the recording. *Bono v. Saxbe*, 450 F.Supp. 934 (D. Ill. 1978), provides only general principles and does not demonstrate that the notice here failed to inform Grantham of the basis for the infractions. *Spellman-Bey v. Lynaugh*, 778 F.Supp. 338, 342 (E.D. Tex. 1991) involved an extremely broad description of infracting behavior, far different from the infraction report here which described the contraband importation and Grantham's connection to the infractions.

C. THERE IS NO BASIS FOR RELIEF BASED ON THE PROCEDURAL REGULATIONS.

The Commissioner's Ruling notes that the serious infraction report may not have contained all of the information called for in WAC 137-28-270(1). Specifically, the report described the time and place of the infraction as "Oct. 2007" and "Tacoma/community"; the report did not contain the name of the corrections officer who admitted smuggling contraband; the report did not provide the date the contraband was taken, or the date of the phone call that was used as evidence against Grantham.

There are four independent reasons why Grantham may not obtain relief based solely on an allegation that the serious infraction report did not comply with WAC 137-28-270(1). First, the issue is not properly raised. Second, Grantham does not show a violation of the regulation. Third, Grantham does not show prejudice. Fourth, Grantham cannot claim any separate liberty interest in the procedural regulations, nor do the regulations re-define the requirements of due process.

1. The Petitioner Has Not Claimed Violation Of The Procedural Regulations Alone Justifies PRP Relief.

An alleged violation of a procedural rule is not properly before the court. Grantham did not seek relief on that basis in his Personal Restraint Petition. Nor did he raise it in his Motion for Discretionary Review. See RAP 13.7(b) (review limited to issues raised in motion for discretionary

review). His motion mentions the regulations, but only to argue the discipline sanction violated due process, not to claim that restraint would be unlawful based on violation of the regulation. Nor did Grantham complain about any violation of this regulation at the hearing.

2. The Infraction Report Complies With The Regulation.

In any event, the infraction report is fairly consistent with WAC 137-28-270(1). A serious infraction report “must include” the following:

- (a) Name, number and housing assignment of offender;
- (b) A description of the incident;
- (c) The time and place of the incident;
- (d) The names of witnesses, victims, and other persons involved;
- (e) The specific rule alleged to have been violated;
- (f) A description of any action taken;
- (g) A summary of any confidential information;

Grantham’s constitutional argument referred to in subsection (c), claimed that it requires the time and date of his phone call to his brother, but the report here said the time was “unknown.” The relevant “incident” is the smuggling of contraband by the officer in concert with inmates. The report adequately specifies the incident, which occurred in October. The call is simply one part of the evidence of the infractions and the regulation does not require that detail.

Similarly, any failure to name the officer who admitted to introducing contraband was not error. The notice regulation contemplates

use of confidential information in prison disciplinary hearings and such use is within the sound discretion of prison officials. *See*, WAC 137-28.270(1)(g), and by WAC 137-28-300(7). *See generally Wolff*, 418 U.S. at 556 (due process allows confidential information).

3. **The Alleged Non-Compliance With The Regulation Is Not Arbitrary And Capricious And Grantham Did Not Show Any Actual Harm Or Prejudice.**

The alleged non-compliance with WAC 137-28-270(1)(c) is not shown to have any effect on the decision in the infraction hearing. Grantham does not show that if he was given the time of the call, he could have overcome the investigator's evidence, which relied on prison records to find recordings of Grantham's calls and then the investigator listened to the recordings twice to confirm it was his voice.

4. **There Is No Separate Liberty Interest In Compliance With WAC 137-28-270.**

When Grantham argues that his right to due process was violated because the department did not follow its procedural rule, he is essentially claiming a liberty interest in having the department staff follow the procedures. As this Court's recent rulings make clear, Grantham has no separate liberty interest in the procedures.

“‘A liberty interest may arise from the Constitution,’ from ‘guarantees implicit in the word “liberty,”’ or ‘from an expectation or interest created by state laws or policies.’” *In re Pers. Restraint of Bush*, 164 Wn.2d 697, 702, 193

P.3d 103 (2008) (internal quotation marks omitted) (quoting *In re Pers. Restraint of McCarthy*, 161 Wn.2d 234, 240, 164 P.3d 1283 (2007)). “There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.” *Greenholtz v. Prisoners of Neb. Penal & Corr. Complex*, 442 U.S. 1, 7, 99 S. Ct. 2100, 60 L. Ed. 2d 668 (1979); . . . *In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 144, 866 P.2d 8 (1994). For a state law to create a liberty interest, it must place substantive limits on official decision making in the form of “‘specific directives to the decisionmaker that if the regulations’ substantive predicates are present, a particular outcome must follow.’”⁷ *Cashaw*, 123 Wn.2d at 144 (quoting *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 463, 109 S. Ct. 1904, 104 L. Ed. 2d 506 (1989)).

In re Pers. Restraint of Mattson, 81324-8, 2009 WL 2579357 (Wash. August 20, 2009).⁶ As a result, “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.” *Cashaw*, 123 Wn.2d at 145.

The Department regulations on written notice created no separate liberty interest for Grantham. Therefore any failure to follow the requirements of the regulations does not cause an unconstitutional restraint. Similarly, the regulations do not define what is required by due

⁶ The United States Supreme Court has held that state inmates do not have a liberty interest in the procedural rights created by internal prison disciplinary regulations unless the punishment “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. at 483-84, 115 S. Ct. at 2300; see also *Munson v Arkansas Dept of Corrections*, --- S.W.3d ----, 375 Ark. 549, 2009 WL 348202 (2009) (no liberty interest in procedural rules governing prison discipline).

process. The regulations simply guide official decisionmaking in a fashion that meets the separate requirements of due process under *Wolff* and cases defining due process for prison infractions.

IV. CONCLUSION

For the reasons outlined above and in its response to the Motion for Discretionary Review, the Department respectfully requests that this Court affirm the Court of Appeals.

RESPECTFULLY SUBMITTED this 28th day of August, 2009.

ROBERT M. MCKENNA
Attorney General



PETER W. BERNEY, WSBA #15719
Assistant Attorney General
JAY D. GECK, WSBA #17916
Deputy Solicitor General,
Attorneys for Respondent
P.O. Box 40116
Olympia, WA 98504-0116
(360) 586-1445

CERTIFICATE OF SERVICE

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:

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

TO:

NANCY COLLINS
WASHINGTON APPELLATE PROJECT
1511 3RD AVENUE SUITE 701
SEATTLE WA 98101-3635

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

EXECUTED this 28th day of August, 2009, at Olympia, Washington.


KIMBERLY SOBOL