

NO. 33684-1

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Personal Restraint Petition of:

VERNON JACKSON,

Petitioner.

**ANSWER OF THE DEPARTMENT OF CORRECTIONS TO
MOTION FOR DISCRETIONARY REVIEW**

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TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT1

II. COURT OF APPEALS DECISION1

III. ISSUES PRESENTED FOR REVIEW.....1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT2

A. STANDARD OF REVIEW.....2

B. MR. JACKSON IS NOT ENTITLED TO DISCRETIONARY REVIEW PURSUANT TO RAP 13.4(b).....3

C. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT MR. JACKSON RECEIVED ALL REQUISITIE DUE PROCESS AT HIS DISCIPLINARY HEARING.....3

1. The Record Clearly Demonstrates That Mr. Jackson Was Not Denied The Right To Present A Defenses.....4

2. The Court Of Appeals Properly Applied The Some Evidence Standard......7

VI. CONCLUSION8

TABLE OF AUTHORITIES

Cases

In re Cook,
114 Wn.2d 802, 792 P.2d 506 (1990)..... 4

In re Krier,
108 Wn. App. 31, 29 P.3d 720 (2001)..... 4

In re Reismiller,
101 Wn.2d 291, 678 P.2d 323 (1984)..... 4, 8

Superintendent v. Hill,
472 U.S. 445, 105 S. Ct. 2768, 86 L. Ed. 2d 356 (1985)..... 7

Wolff v. McDonnell,
418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)..... 4

Statutes

RCW 9.73.095(3)(b) 5, 7

Rules

RAP 13.4(b) 2

RAP 13.5A 2

RAP 16.14(c) 2

I. IDENTITY OF RESPONDENT

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

II. COURT OF APPEALS DECISION

Mr. Jackson seeks review of the Order of Dismissal entered by Acting Chief Judge Penoyar of the Court of Appeals, Division II, Case No. 38796-4-II, entered on August 19, 2009.

III. ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals correctly determined that Mr. Jackson received all the required due process at his disciplinary hearings?

IV. STATEMENT OF THE CASE

Mr. Jackson filed a Personal Restraint Petition (PRP) challenging a prison disciplinary hearing based on infractions he received while housed at the McNeil Island Corrections Center (MICC). *See* Response of the Department of Corrections (Response), Exhibit 1. In his PRP, Mr. Jackson alleged that he was denied due process, in that he was denied the opportunity to prepare a defense; confidential information was improperly admitted during his hearing; the evidence was insufficient to support the guilty finding; and the written statement finding him guilty was inadequate. *See* PRP. The Acting Chief Judge upheld the disciplinary hearing, and dismissed Mr. Jackson's request for relief. *See* Order of

Dismissal. The Court found that Mr. Jackson received all the due process he was entitled, including the ability to present a defense, that the hearing officer did not rely on evidence from a confidential source, that there was “some evidence” to support the guilty finding and that the written statement finding Mr. Jackson guilty was sufficient. *Id.* Therefore, the Court of Appeals, ruled that Mr. Jackson failed to show that he was denied a fundamentally fair hearing and dismissed Mr. Jackson’s PRP. *Id.* Mr. Jackson’s Motion for Discretionary Review followed (Motion).¹

V. ARGUMENT

A. STANDARD OF REVIEW.

RAP 16.14(c) states that if a personal restraint petition is dismissed by the Chief Judge of the Court of Appeals, the dismissal may be reviewed by the Supreme Court only by a motion for discretionary review in compliance with RAP 13.5A. In ruling on motions for discretionary review pursuant to RAP 13.5A, this Court will apply the considerations set out in rule 13.4(b). The standards for discretionary review under RAP 13.4(b) are as follows:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in

¹ Mr. Jackson did not timely file his Motion for Discretionary Review. The Department has filed a separate Motion to Dismiss discussing the untimely filing of Mr. Jackson’s Motion for Discretionary Review.

conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

B. MR. JACKSON IS NOT ENTITLED TO DISCRETIONARY REVIEW PURSUANT TO RAP 13.4(b).

As this case does not present one of the circumstances set forth in RAP 13.4(b), the State opposes Mr. Jackson's Motion for Discretionary Review and asks that it be denied. Mr. Jackson has not shown that the Court of Appeals decision is in conflict with another Court's decision, or a significant question of law, or of substantial public interest thereby warranting review. As the claims set forth in Mr. Jackson's PRP were properly rejected by the Court of Appeals based upon the facts as applied to the governing law Mr. Jackson cannot and does not demonstrate that review by this Court is warranted.

C. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT MR. JACKSON RECEIVED ALL REQUISITIE DUE PROCESS AT HIS DISCIPLINARY HEARING.

The Court of Appeals correctly dismissed Mr. Jackson's PRP, as the record reveals that all requirements for due process were met at his disciplinary hearings. *See* Response and Order of Dismissal. An inmate is

only entitled to minimum due process at prison disciplinary hearings. *Wolff v. McDonnell*, 418 U.S. 539, 563-566, 94 S. Ct. 2963, 2978-2980, 41 L. Ed. 2d 935 (1974). This low standard only requires the inmate to be given written notice of the infraction within 24 hours of the hearing, be provided an opportunity to call witnesses and present documentary evidence, and receive written notice of the decision and the reasons for it. *In re Krier*, 108 Wn. App. 31, 37-38, 29 P.3d 720 (2001) (citing *In re Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). Additionally, if any due process violations are found, the inmate must actually be prejudiced by the error. *In re Reismiller*, 101 Wn.2d 291, 293, 678 P.2d 323 (1984).

The Appellate Court correctly held that Mr. Jackson received all the procedural due process he was entitled. *See* Order of Dismissal. The record clearly shows that Mr. Jackson received the proper notice, was given the opportunity to provide witness statements, and was provided written notice of the decision and reasons for it. *See* Response, ¶¶ 2 -12, Exhibit 2, Attachments A – K.

1. **The Record Clearly Demonstrates That Mr. Jackson Was Not Denied The Right To Present A Defenses.**

The Court of Appeals, in determining that Mr. Jackson received all the due process required under *Wolff*, correctly determined that Mr. Jackson was allowed to prepare a defense. In support of the Court of

Appeals' decision, the record shows that Mr. Jackson was given a summary of the claims against him, including a summary of the telephone call overheard by the investigator, and that he was more than able to prepare a defense in response.² See Response, Exhibit 2, Attachment B; PRP, Exhibit 6. Therefore Mr. Jackson's Motion should be denied, as the Court of Appeals, applying the evidence before it correctly determined that Mr. Jackson had sufficient opportunity to address the phone call, in that he was provided a summary of the call to which he presented a written and verbal statement in defense, and that the Department correctly withheld the phone call pursuant RCW 9.73.095(3)(b). See Order of Dismissal, ¶¶ 2

In his Motion, Mr. Jackson claims that the Court of Appeals decision was in error because he was denied his due process rights in that he was not allowed to present a defense. See Motion ¶¶ 10 – 18. Specifically, Mr. Jackson claims that the Court of Appeals erred because he was denied the opportunity to listen to the phone calls or as an alternative, the hearing officer did not listen to the telephone call. *Id.*

² In his Motion, Mr. Jackson argues that he was denied due process by the use of confidential information. As there is no evidence that confidential information was used in this case, other than the one reference contained on the initial serious infraction report which was made in error, and the Court of Appeals properly held that no confidential information was used, this Response will not address Mr. Jackson's claims regarding confidential information.

In support of his Motion, Mr. Jackson argues the Court's decision in this case is in conflict with the decision in *In re Malik*, entered by Division I of the Court of Appeals. *See* Motion at 10 – 13. However, this argument fails, as the *Malik* decision is not in conflict with the decision in this case.

The Court's decision in *Malik* does not conflict with the decision in this case, as the Court in *Malik* did not rule or even discuss whether the Department withholding copies of telephone conversations used as evidence in a disciplinary hearing violated a prisoner's due process rights. *See* Motion at Appendix 2. The Court in *Malik*, along with only discussing Mr. Malik's request for telephone recordings in passing, only determined that Mr. Malik's rights were violated because the hearing officer failed to address Mr. Malik's request for a copy the telephone calls along with a host of other failures. *See* Motion at Appendix 2. Unlike in *Malik*, the Hearing officer in this case addressed Mr. Jackson's request for copies of the telephone conversation and all other rights were provided for. *See* PRP Exhibit 6, ¶¶ 12 – 13.

Mr. Jackson also tries to argue that because under RCW 9.73.095(3)(b) an offender will never be allowed to obtain copies of telephone conversations used as evidence in infraction hearings, that this creates a significant issue of public concern. *See* Motion at 15 – 18. This

argument fails, as while offenders will not be provided actual copies of the conversations, as was the case here, they are provided a summary of the conversations. As demonstrated by Mr. Jackson, a summary of the telephone call was more than enough for an offender to present a defense. *See* PRP, Exhibit 6. Therefore, the withholding of copies of telephone conversations in compliance with RCW 9.73.095(3)(b) does not present a significant public issue.

As the facts of the case support the Court of Appeals' decision, and Mr. Jackson fails to demonstrate any error by the Court warranting review, Mr. Jackson's Motion should be denied.

2. **The Court Of Appeals Properly Applied The Some Evidence Standard.**

The Court in upholding the guilty findings correctly applied the "some evidence standard." This standard requires that a disciplinary finding 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 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 the Washington State Supreme Court in *In re Reismiller, supra*. *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.

Here, the Court of Appeals correctly determined that the record was sufficient to uphold the disciplinary proceedings, as the guilty findings were supported by the information received by Investigator Baxter as contained in the infraction report. See Response to PRP, Exhibit 2, Attachment B - I. As the disciplinary decision was supported by “some evidence” the Court of Appeals correctly dismissed Mr. Jackson’s PRP.

Therefore, Mr. Jackson fails to show any violation of his due process rights at his disciplinary hearing and offers no evidence beyond bare assertions to support his claim that the Court of Appeals erred in reaching the decision below.

VI. CONCLUSION

Mr. Jackson fails to demonstrate that the Court of Appeals erred in its decision and he has pointed to no error warranting discretionary review.

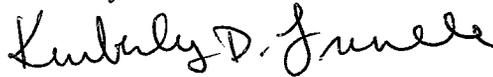
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Therefore, Respondent respectfully requests that this Court deny Mr. Jackson's Motion for Discretionary Review.

RESPECTFULLY SUBMITTED this 29th day of October, 2009.

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CERTIFICATE OF SERVICE

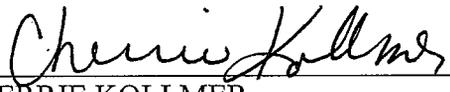
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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED this 29th day of October, 2009 at Olympia, WA.



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