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COURT OF APPEALS
DIVISION II

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Court of Appeals BY [Signature]
STATE OF WASHINGTON
DEPUTY

NO. 38796-4-II

83684-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Application for Relief From Personal Restraint
of:

VERNON JACKSON,
Petitioner,

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RONALD R. [Signature]
ENTER

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SUPREME COURT
STATE OF WASHINGTON
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MOTION FOR DISCRETIONARY REVIEW

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 SEP 28 PM 1:35

ORIGINAL

A. IDENTITY OF MOVANT

Vernon Jackson respectfully moves this court to accept review of the decision designated in Part B of this motion.

B. DECISION.

Petitioner seeks review of the Order Dismissing Personal Restraint Petition entered on August 19, 2009, by the Court of Appeals, Division II, Acting Chief Judge Joel Penoyar presiding. The decision dismissed Mr. Jackson's petition pursuant to RAP 16.11(b). A copy of the decision is attached at Appendix - 1

C. ISSUES PRESENTED FOR REVIEW

(1) Does the record of Mr. Jackson's infraction hearing for introducing contraband establish a connection between Mr. Jackson and the contraband and thus contain "some evidence" of Mr. Jackson's guilt, so as to support the finding that he violated the disciplinary rules?

(2) Where evidence at a prison disciplinary hearing consists of an overheard telephone conversation, is it a violation of the inmate's due process rights for a recording of the conversation to be withheld as evidence and not reviewed by the hearing officer?

(3) Where the Initial Serious Infraction Report states that it contains a summary of confidential information and the record indicates that the hearing officer did not review the confidential information for

credibility of the source or reliability of the information, have the inmate's due process rights been violated?

(4) Where the hearing officer's written statement finding the inmate guilty relies solely on the written conclusions of the author of the Initial Serious Infraction Report based on an overheard telephone conversation, and a special investigation, does the failure of the hearing officer to cite facts and reasons for adopting the author's conclusions violate the inmate's due process rights.

D. STATEMENT OF THE CASE

The Department of Corrections (DOC) charged Jackson with a disciplinary infraction, "606 Possession, introduction or transfer of any tobacco products, matches, or tobacco paraphernalia." PRP

Exhibit 2¹ The "Initial Serious Infraction Report" described the infraction:

During the course of a HQ Special Investigation Unit (SIU) investigation of staff misconduct at MICC, information was received and evidence recovered that the staff member under investigation was introducing contraband into MICC. This staff member turned over one carboard (sic) box of contraband to the SIU unit that contained eight (8) large Top tobacco boxes. 10 (10) cans of Grizzly chew tobacco, one (1) large Tin of Top tobacco, five bags of plastic wrapped tobacco and five packages of rolling papers. This staff member stated that she had been wired several hundred dollars for contraband she was to introduce to MICC. I, knowing offender Jackson's voice overheard offender Jackson

¹ Unless otherwise noted, all referenced exhibits are in the Court of Appeals record from the personal restraint petition (PRP).

and his sister ex-DOC offender Sheila Henley #951670 talking about how this staff had picked up the money and were mad that the deal had not been completed by the staff. Offender Jackson and Ms. Henley were also overheard talking about other money sent to Ms. Henley by at least 6 other offenders at MICC adding up to hundreds of dollars. PRP Exhibit 5

The Infraction Report form indicated that "This Infraction serves as both notice and summary of confidential information." Id.

Jackson was found guilty of the infraction, based on "the infraction report, SIU investigator stating that he heard and could identified (sic) the offenders (sic) voice conspiring to introduce contraband." PRP Exhibit 3, "Disciplinary hearing Minutes and Findings" The hearing officer sanctioned him to 5 days loss of good conduct time. Id.

At the hearing, the hearing officer (H/O) advised Jackson that Jackson had the right to review all related reports and confidential information. He indicated that the written report would serve as the confidential information. PRP Exhibit 6², Hearing Transcript at 2

The hearing officer told Jackson that "[The infraction is based on Mr. Baxter's³ verifying that's your voice, that you were the one talking about conspiring to bring in contraband." Id. at 18

² The Transcript shows the incorrect date for the hearing. It should read "12/12/07."

³ The investigator who signed the Initial Serious infraction Report.

The transcript of the hearing (and submitted written statement) indicates that the essence of Jackson's defense was that he had entered into a financial arrangement with another inmate for the production of his, Jackson's, webpage. See PRP Exhibit 6, Exhibit 9, Declaration of Vernon Jackson. The investigation cited in the Initial Serious Infraction Report discovered that the other inmate was running a contraband scheme with the staff member, a corrections officer, alluded to in the Initial Serious Infraction Report narrative. See PRP Exhibit 10. Money paid to the other inmate's associates for the webpage project ended up in the hands of the staff member who was running the contraband scheme. PRP at 5

At the hearing, Jackson asked several times for the audio recordings of the "overheard" conversation⁴ to be produced as evidence for his defense, to show that his conversations had nothing to do with the contraband scheme.

Jackson claimed that "you could listen to my phone recordings you won't hear none of that at all of me stating anything about staff supposed to be picking up some money." PRP at 6 Jackson stated, in his defense,

⁴ Contrary to the Court of Appeals "Order Dismissing Petition", at all times Jackson was requesting only the audio recording(s) constituting the subject of the Infraction Report narrative.

that any reference to his discussing “staff” or referring to “staff in any conversation with his sister was a lie. Id.

The hearing officer stated that “all I have to have is some evidence ...some evidence simply says if staff said you did this.” PRP at 7. At the conclusion of the hearing, the hearing officer found Jackson guilty.

Jackson appealed the decision. A Disciplinary Hearing Appeal decision was issued on 1/23/08. PRP Exhibit 4 The superintendent’s designee indicated that confidential information had been submitted and reviewed by the hearing officer. Id.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted under RAP 16.14(c), and RAP 13.5A, RAP 13.4(b) as the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; is in conflict with another decision of the Court of Appeals; a significant question of law under the Constitution of the State of Washington or of the United States is involved; and the petition involves an issue of substantial public interest that should be determined by the Supreme Court. and the decision of the Court of Appeals substantially limits the freedom of a party to act.

- a. **The decision of the Court of Appeals is in conflict with a decision of the Supreme Court.**

RAP 13.4(b)(1) provides that discretionary review will be accepted only "if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

In the present case, the Court of Appeals' Order dismissing Mr. Jackson's personal restraint petition conflicts with the Supreme Court's decision in In re Reismiller, 101 Wn.2d 291, 678 P.2d 323 (1984)

Where no connection is made between an offender and the contraband, a finding of guilt for possession of the contraband is arbitrary and capricious. In re Reismiller, . 101 Wn.2d at 296-7 In Reismiller, an apparent marijuana cigarette was found in the offender's cell and he was written up for an infraction. At the hearing, other than the report, no evidence was introduced that clearly connected the cigarette to the offender and therefore the court found that the "some evidence standard was not met and the finding of guilt was arbitrary and capricious. Id. at 297

In the instant case, no evidence, direct or circumstantial, linked Jackson, to the introduction of tobacco products or contraband.

The hearing record consists of the Initial Serious Infraction Report and the Disciplinary Hearing Minutes and Findings. In addition, the

Disciplinary Hearing Appeal Decision summarized the evidence from the record and Jackson's defense. Those documents contain no evidence establishing a connection between Jackson and contraband.

The entire record of the hearing consists of the infraction report. That report indicates that an MICC staff member, CO Hopkins, was being investigated for introducing contraband. The staff (Hopkins) turned over tobacco products, including five bags of plastic wrapped tobacco that "she was to introduce to MICC." PRP Exhibit 5 There is no link to Jackson there. There is no indication that tobacco went to Jackson or was purchased by Jackson or sent by Jackson. Hopkins stated that she was wired money for contraband. She does not state from whom got the money. Since she was involved in a contraband scheme with other inmates, the wired money could have come from anyone. The investigation reports indicate a direct connection between another inmate (Grantham) and Hopkins. PRP Exhibit 10 There is no link to Jackson. Jackson and Henley are heard talking about money being picked up by staff and an uncompleted deal. There is no indication of what the deal or context is. Jackson and Henley talk about money from other offenders. There is no indication of what that refers to. There is no connection to tobacco. Id.

Standing alone, the facts contained in this Infraction Report do not constitute any evidence that Jackson committed a "606" infraction, introducing or conspiring to introduce tobacco. The only evidence at the hearing indicated that a staff member introduced tobacco. This staff member was also wired money, but it is not indicated by whom. There is no mention of another inmate in the infraction report. Jackson testified that he was only dealing with another inmate for another project and that he discovered that someone named Hopkins had cashed a money order.⁵

Just as in Reismiller, where a cigarette found in the offender's cell could not be connected to that offender, the tobacco brought into MICC by Hopkins could not be connected to Jackson.

Where no connection is made between an offender and the contraband, a finding of guilt for possession of the contraband is arbitrary and capricious, resulting in actual prejudice. In re Reismiller, 101 Wn.2d 291, 296-7, 678 P.2d 323 (1984).

⁵ See Jackson's Declaration, PRP Exhibit 9, describing his project and including documents showing that Jackson had been working on it over a period of years.

b. **The decision of Division II the Court of Appeals is in conflict with a decision of Division I.**

RAP 13.4(b)(2) provides that discretionary review will be accepted if “the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals.”

The court’s decision in Jackson’s case, conflicts with a new decision in Division I, In re Malik, No. 62840-2-I (7/20/09) ⁶ Attached at Appendix 2

In Malik, the inmate was infraacted on the basis of an overheard telephone conversation. DOC failed to acknowledge or address his requests to present a defense, including the audio recording (Id. at 6), and DOC relied on confidential information without sufficient notice and facts indicating reliability. (Id. at 9) The offender repeatedly requested that the recording be presented as evidence at the disciplinary hearing or reviewed by the hearing officer. There was a reference to confidential information by the hearing officer, but there was no written reference to confidential information on the Initial Serious Infraction Report. (Id. at 8) On the DOC form 21-962 (checklist) on the inmate’s appeal the boxes indicating confidential information where not checked. (Id. at 4) In light of the inconsistent information regarding the existence of confidential

⁶ Originally an unpublished opinion, the motion to publish was granted on 8/31/09, see Appendix - 2.

information, the court found that there was confidential information and that the hearing officer improperly failed to indicate what she reviewed at the end of the evidentiary part of the hearing. (Id. at 9) The court also found a violation of due process where production of the recordings was denied and where no reasons for institutional safety or correctional goals were given by the hearing officer for denial of the recordings and statements. (Id. at 7) The Court, in Malik, concluded that a statement by the hearing officer that releasing confidential information could jeopardize the safety and security of the institution is a conclusory and inadequate statement where it appears that only DOC employees could have supplied the details. (Id. at 9)

Malik stands for the proposition that when an infraction is based on an overheard telephone conversation and other confidential evidence, and the offender asks for production of the evidence, due process requires more than accepting the Infraction Report as written.. Due process also requires that the offender be allowed the opportunity to present documentary evidence and an explanation as to why evidence is withheld..

In Jackson's case, the Court of Appeals was also faced with inconsistent evidence of the existence of confidential information. However, the Court held that there was no confidential information despite the fact that the Initial Serious Infraction Report contained an

explicit statement that “This Infraction serves as both notice and summary of confidential information.” PRP Exhibit 5 The court also indicated that under no circumstances could a telephone recording be presented as evidence at hearing due to RCW 0.73.095(3)(b) which prohibits DOC from divulging an inmate’s recorded conversation. Under this logic, as opposed to In re Malik, no explanation would ever be required for denial of producing the recording as evidence. The Court failed to acknowledge that pursuant to policy, DOC 450.200, when an overheard telephone conversation is used as evidence, the “hearing officer may listen to the call prior to the hearing.” See Appendix – 3 Jackson made repeated requests, prior to, during and after the hearing, that the audio recording, on which the infraction was based, be listened to, because the report of the overheard conversation was inaccurate and a review of that recording would exonerate Jackson. The hearing officer, at all times, refused to review the hearing and stated at the hearing and in the Disciplinary Minutes and Findings that he blindly accepted the written infraction report as sufficient evidence. PRP Exhibit 3 Rather than review potentially exculpatory documentary evidence, the hearing officer told Jackson to make a public disclosure request for the recordings.

The Court of Appeals decision acknowledges that RCW 9.73.095(3)(b) prohibits direct disclosure of recordings to the offender;

therefore, the only way for that documentary evidence to be considered would be for the hearing officer to follow DOC policy and listen to it.

The Court of Appeals also held, in conflict with Malik, that the hearing officer's written statement of findings, indicating that the Infraction Report was sufficient, without citing facts, and that there is no requirement for the hearing officer to make independent findings regarding confidential evidence. The Court of Appeals, Jackson's case, essentially holds that, contrary to the court in Malik, the hearing officer, without reviewing for reliability and credibility, can accept whatever statements are contained in the infraction report, regardless of whether the report states that there is confidential information. The court also holds that under no circumstances can an overheard telephone conversation be reviewed by the hearing officer, because the recording is not disclosable under RCW 9.73.095(3)(b). This constitutes a clear violation of an offender's minimal due process rights to present documentary evidence and the requirement that for adequate written findings. The decision is in conflict with In re Malik.

c..

This case involves a significant constitutional issue, because the conduct of the disciplinary hearing was fundamentally unfair and a violation of due process because the offender was not provided the opportunity to present documentary evidence and the hearing officer did not review, admit or explain reasons for denial of all documentary evidence.

RAP 13.4(b) provides that discretionary review will be accepted “if a significant question of law under the constitution of the State of Washington or of the United states is involved.”

The action taken at Jackson’s disciplinary hearing was so arbitrary and capricious as to deny him a fundamentally fair hearing.

The serious nature of the due process violations that occurred in Jackson’s case can be summarized by a statement from Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988), referring to the rationale of the minimum due process requirements of Wolff v. McConnell (citation omitted):

Since the accuser is usually protected by a veil of confidentiality that will not be pierced through confrontation and cross-examination, an accuser may easily concoct the allegations of wrongdoing . Without a bona fide evaluation of the credibility and reliability of the evidence presented a [disciplinary hearing] would thus be reduced to a sham which would improperly subject an inmate accused of wrongdoing to an arbitrary determination.

Hensley, 850 F.2d at 274, citing Kyle v. Hanberry, 677 F.2d 1386 (11th Cir., 1982)

“A prisoner’s statutory right to earn good time credits is a ‘protected liberty interest in those credits which prevents their deprivation absent observation of minimum due process requirements.’” In re Leland 115 Wn.App. 517, 534, 61 P.3d 357, 365, (2003) (rev’d on other grounds) citing In re Gronquist, 138 Wn.2d 388, 396, 978 P.2d 1083 (1999) (quoting In re Johnston, 109 Wn.2d 493,497, 745 P.2d 864 (1987)). Thus, Washington prisoners are entitled to minimum due process in serious infraction hearings where the sanctions include loss of good time credits. Id., citing In re Gronquist at 397 In the context of prison disciplinary hearings, minimum due process 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 security and correctional goals; and (3) after the hearing, receipt of a written statement of the evidence relied on for the disciplinary action. In re Gronquist, 138 Wn.2d at 396-397, citing Wolff v. McDonnell, 418 U.S. 539, 563-566, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)

The evidentiary requirements of due process are met if there is “some evidence”, i.e. any evidence that the infraction occurred. In re Leland, 115 Wn.App. 517, 534-35 supra, citing Superintendent v. Hill, 472 U.S. 445, 455-56,105 S.Ct. 2768, 86 L.Ed. 2d 356 (1985).

In this case, DOC provided no opportunity for Jackson to present documentary evidence. No finding was made that admission or review of the audio recording would be hazardous to the institutional security and correctional goals.

In this case, a review by the hearing officer of the recorded conversations (and investigative notes) would have allowed him to make a determination as to the reliability and credibility of the confidential information summarized in the infraction report. The narrative on the infraction report did, in fact, indicate that confidential information was used in this case and that information, contained on the recording and in the investigative notes, should have been reviewed and determined to be credible and reliable by the hearing officer.

Although by statute and DOC policy, the inmate cannot gain access to the recording, it is undisputed that a DOC staff member ran a contraband scheme and that DOC policy allows the hearing officer to listen to the primary evidence that could have defeated the allegations in the infraction report. Under these circumstances, refusal on the part of DOC to allow admission or review of the recordings, constitutes a violation of the due process requirement that the offender be allowed to present documentary evidence.

This disciplinary hearing was fundamentally unfair, and a violation of due process rights, because the infraction consisted of no evidence connecting Jackson to the introduction of tobacco.

The hearing officer said in the middle of the hearing, “if staff says it happened, it happened.” PRP, Exhibit. 6 at 18 The hearing officer exercised no judgment or discretion. Clearly, the hearing officer did not allow Jackson the opportunity to present evidence and Jackson’s due process rights were violated.

d. This case involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b) (4) provides that discretionary review will be accepted “if the petition involves an issue of substantial public interest that should be determined by the Supreme Court.”

The court’s decision is of general public interest. Prison disciplinary hearings occur repeatedly and daily in the Department of Corrections. Sanctions frequently include loss of early release credits and therefore, cumulatively, the hearing officer decisions affect duration of

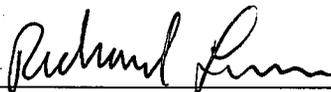
confinement and monetary costs to DOC and the public. In addition, clarification of the use of overheard audio recordings in disciplinary proceedings and reconciling RCW 9.73.095(3)(b) (prohibited disclosure of audio recordings) and DOC 450.200 (audio recordings as evidence that may be reviewed by the hearing officer) with respect to the conduct of these hearings is of general public importance.

F. CONCLUSION

This court should accept review for the reasons indicated in Part E and reverse the Court of Appeals' Order Dismissing Personal Restraint Petition.

Respectfully submitted this 18th day of September, 2009.

LAW OFFICE OF RICHARD LINN, PLLC

By 
Richard Linn, WSBA #16795
Attorney for Petitioner

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DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

CERTIFICATE OF SERVICE

On this day, the undersigned sent to the Attorney(s) of Record for the Department of Corrections listed below, a copy of this document (Motion for Discretionary Review) via Mail, 1st class prepaid. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Kimberly D. Frinell
Assistant Attorney General
Corrections Division
P.O. Box 40116
Olympia, WA 98504-0116

Richard J. [Signature] Bellevue, WA 9/18/09
Signed Place Date

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

VERNON JACKSON,

Petitioner.

No. 38796-4-II

ORDER DISMISSING PETITION

Vernon Jackson seeks relief from personal restraint imposed following his "606" infraction for conspiring to smuggle tobacco into prison. He argues that: (1) the Department of Corrections did not allow him to present exculpatory, documentary evidence; (2) confidential evidence was improperly admitted in his hearing; (3) the evidence was insufficient to support the infraction; and (4) the written statement finding him guilty was inadequate. We dismiss this petition.

A petition challenging a prison disciplinary sanction is reviewable only for whether the DOC's action was "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding." *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 294 (1984). 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 Gronquist*, 138 Wn.2d 388, 386 (1999). Minimum due process in these cases means that the prisoner (1) received notice of the alleged violation; (2) was provided an opportunity to present documentary evidence and call witnesses when not unduly

hazardous to institutional safety and correctional goals; and (3) received a written statement of the evidence relied upon and the reasons for the disciplinary action. *Dawson v. Hearing Comm.*, 92 Wn.2d 391, 397 (1979). The DOC's factual determinations must stand if there is "some evidence" in the record to support the decision. *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 455-56 (1985).

Jackson first argues that he was denied the right to present a defense because the DOC denied his requests to obtain and present at the hearing an audio recording of a telephone call by another inmate regarding the tobacco contraband scheme. The DOC responded to Jackson's requests by stating that he must file a public records request for the recording. This claim fails. First, the DOC merely followed the mandatory statute, RCW 9.73.095(3)(b), which prohibits it from divulging an offender's recorded telephone call unless "necessary to safeguard the orderly operation of the correctional facility, in response to a court order, or in the prosecution or investigation of any crime." None of these exceptions applies here. Second, the DOC provided Jackson with a summary of the telephone conversation and he presented a defense to this evidence in a written statement. The actual telephone conversation was not evidence at the hearing, only the summary. Jackson's lack of access of this telephone recording did not deny Jackson the right to present a defense.

Second, Jackson argues that the hearing officer improperly relied on evidence from a confidential source without investigating the veracity of that source. The hearing officer did not rely on evidence from a confidential source, however. The only evidence the hearing officer relied on was evidence of a telephone call between Jackson and his sister in which they discussed their plan and evidence by someone familiar with

Jackson's voice who could identify him as the party to the telephone call. As the hearing officer did not rely on confidential evidence, he had no duty to investigate the veracity of such evidence.

Third, Jackson asserts that insufficient evidence supports the infraction. To reiterate, the DOC's factual determinations must stand if there is "some evidence" in the record to support the prison disciplinary decision. *Hill*, 472 U.S. at 455-56. For Jackson's infraction, there must be some evidence that he conspired to introduce tobacco into the prison. WAC 137-25-030 ("606" infraction). The primary evidence was contained in a serious infraction report, stating that an investigator found evidence that a DOC staff member possessed a large amount of tobacco and admitted that someone had sent her several hundred dollars to introduce the tobacco into the prison. The report also detailed that a DOC investigator overheard Jackson tell his sister that a member of the DOC staff picked up money, but that she had not completed the deal. This is "some evidence" that Jackson conspired to introduce tobacco into the prison through the staff member and, therefore, committed a "606" infraction.

Finally, Jackson argues that the written statement finding him guilty was inadequate because it purported to rely on only the infraction report, rather than independent findings regarding the confidential evidence or further evidence. Jackson does not explain why the hearing officer was required to rely on evidence beyond the infraction report. The evidence in the infraction report was sufficient to support the hearing officer's conclusion and the written statement is sufficient to satisfy the due process requirement of a written statement of evidence relied upon. *See Dawson*, 92

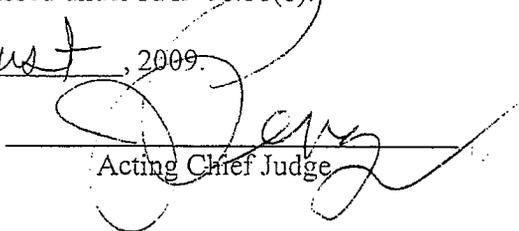
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Wn.2d at 397. This argument has no merit and Jackson has not demonstrated any grounds for relief.

Accordingly, it is hereby

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

DATED this 19th day of August, 2009.


Acting Chief Judge

cc: Vernon Jackson
Dept. of Corrections
DOC No. 283484
Indeterminate Sentencing Review Board
Timothy N. Lang, Department Of Corrections
Kimberly D. Frinell
Richard Linn

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of)	NO. 62840-2-1
)	
DAWUD HALISI MALIK,)	DIVISION ONE
fka DAVID RIGGINS,)	
)	ORDER GRANTING
Petitioner.)	MOTION TO PUBLISH
)	
)	
)	

Petitioner Dawud Halisi Malik, fka David Riggins, having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore it is hereby:

ORDERED that the unpublished opinion filed July 20, 2009, shall be published and printed in the Washington Appellate Reports.

DATED this 31st day of August, 2009.

For the Court:

Leach, J.
Judge

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STATE OF WASHINGTON
COURT OF APPEALS

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Personal)	NO. 62840-2-I
Restraint of)	
)	DIVISION ONE
DAWUD HALISI MALIK,)	
fka DAVID RIGGINS,)	UNPUBLISHED OPINION
)	
Petitioner.)	
)	FILED: July 20, 2009
)	

LEACH, J. — Dawud Halisi Malik, formerly known as David Riggins, is serving a life sentence under the jurisdiction of the Department of Corrections (DOC) and the Indeterminate Sentence Review Board based on his conviction in King County Superior Court Cause No. 44446. Malik has filed this personal restraint petition contending that DOC violated his due process rights in a prison disciplinary hearing. Because Malik has shown by a preponderance of the evidence that DOC failed to acknowledge or address his requests to present a defense and relied on confidential information without sufficient notice and facts indicating reliability, we grant the petition and remand to DOC for a new hearing at which Malik is afforded due process.

FACTS

On December 19, 2007, DOC served Malik with a disciplinary hearing

NO. 62840-2-1 / 2

notice charging a serious infraction of prison rule 603 for possession, introduction, use, or transfer of a controlled substance.¹ The notice states, "You have the right to review all related reports and a summary of any confidential information."

The initial serious infraction report prepared by Officer Tammy Gwin states:

At the conclusion of my investigation it has been determined Offender Riggins . . . did on November 26, 2007 attempt to introduce contraband into Stafford Creek Corrections Center via the mailroom. I heard Offender Riggins whose voice is personally known to me on a phone, on November 24, 2007 say he was waiting for his get well package to arrive, the package arrived at SCCC via the mailroom and contained 32.04 grams of marijuana.

The newspaper arrived on 11-24-07 it contained inside; 12 glove tip balloons filled marijuana, 3 glove tip balloons of rolling papers and 3 glove tip balloons of matches.

At a hearing on December 21, Malik asked Hearing Officer Johansen for witness statements submitted by other inmates on his behalf. Malik explained that he had asked Officer Gwin to obtain witness statements from an inmate who had seen someone digging through Malik's trash. Officer Johansen informed Malik that there were no witness statements and indicated that the initial infraction report, the incident reports, and the photographs were the only documents in the record. She also informed Malik that there was confidential information. She did not summarize the confidential information.

In his defense, Malik stated that he had never spoken to Officer Gwin

¹ "Possession, introduction, use or transfer of any narcotic, controlled substance, illegal drug, unauthorized drug, mind altering substance, or drug paraphernalia." WAC 137-25-030.

before November 27 when she interviewed him. He asked for the recording of the telephone conversation Gwin claimed to have overheard on November 24. He also submitted a three-page written statement, in which he (1) repeatedly requested a copy of the recording of the telephone conversation; (2) denied having knowledge of the contents of the newspaper before the investigation; (3) suggested someone was attempting to derail his parole efforts or to eliminate his presence at Stafford Creek Corrections Center; (4) indicated that Gwin should have received witness statements from inmates who saw someone taking his trash, presumably for the purpose of obtaining his mailing label; (5) claimed that he did not make the statements on the phone as reported by Gwin; (6) requested a fingerprint analysis; and (7) volunteered to take a lie detector test.

Officer Johansen prepared a hand-written Disciplinary Hearing Minutes and Findings form. The form has check boxes following the phrases "Witness statement returned" and "Witness statement denied." The "No" box is checked for each. In sections entitled "Summary of Testimony," Officer Johansen wrote the following:

I have no idea whats [sic] so ever about this stuff. I have never talked with I & I Gwin. What she heard was taken clean out of context. I'm a victim here. I was not trying to introduce contraband into the facility. I'm not guilty of this charge.

See attached statement.

Confidential information is credible and reliable and releasing this information could jeopardize the safety and security of the institution. The confidential information does contain enough information that offender Riggins was expecting the package to come in and he was going to

introduce the marijuana into the facility.

Officer Johansen found Malik guilty and wrote in the "Reason" box: "Staff written testimony and confidential information does substantiate the violation. Offender was trying to introduce marijuana into the facility." Officer Johansen imposed a sanction of 270 days good time credit, 270 days earned time, and 30 days segregation.²

Malik submitted an appeal of the finding of guilt. Superintendent Pacholke affirmed the decision of the hearing officer on a Disciplinary Hearing Appeal Decision form. The form contains the following statements with two check boxes:

If confidential information was submitted, I have confirmed:

The Hearing Officer made an independent determination regarding reliability of the confidential source(s), credibility of the information and, safety concerns that justify non-disclosure of the confidential source(s) of information.

The above information was documented on DOC form 21-962, Confidential Information Review Checklist.

Neither of the check boxes corresponding to the two statements is checked.

ANALYSIS

To prevail here, Malik must establish (1) that he is currently being restrained, and (2) that the restraint is unlawful.³ It is undisputed that Malik is

² The hearing officer later amended the sanction, removing the earned time loss based on Malik's sentence.

³ RAP 16.4 (providing in pertinent part: "A petitioner is under a 'restraint' if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.").

under restraint as a result of the serious infraction decision at issue here because he lost 270 days of good time credits.⁴

We review prison disciplinary proceedings to determine whether the action taken was "so arbitrary and capricious as to deny the petitioner a fundamentally fair proceeding."⁵ If the petitioner is not afforded the minimum due process protections applicable in prison disciplinary hearings or if the decision is not supported by at least some evidence, the resulting action is so arbitrary and capricious as to deny the petitioner a fundamentally fair hearing.⁶

Due process requires that an inmate facing a prison disciplinary hearing resulting in a loss of good time credits: "(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."⁷

Malik first contends that he was not allowed to present documentary evidence and call witnesses in violation of his due process rights. Relying solely on the hearing notice that Malik did not sign, DOC argues that Malik did not

⁴ In re Pers. Restraint of Krier, 108 Wn. App. 31, 37, 29 P.3d 720 (2001).

⁵ Krier, 108 Wn. App. at 38 (quoting In re Pers. Restraint of Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984) (citing In re Pers. Restraint of Burton, 80 Wn. App. 573, 582, 910 P.2d 1295 (1996))).

⁶ Krier, 108 Wn. App. at 38 (citing In re Pers. Restraint of Anderson, 112 Wn.2d 546, 548-49, 772 P.2d 510 (1989); Burton, 80 Wn. App. at 585).

⁷ In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999).

request any witness statements or documents for his hearing.⁸ But the record demonstrates that, both in his written statement and orally during the hearing, Malik requested production of witness statements provided to Officer Gwin as well as a review of the recordings of his telephone conversations.⁹ The record also indicates that on November 29, Inmate Barth submitted the following statement to Officer Gwin:

On or about Nov. 18th 2007, I was on my way to dump my trash can in the main trash can of H2-A-pod at S.C.C.C. While waiting in line I witnessed a white inmate, that was in line behind Inmate Riggins, pull a brown wrapper out of the trash and fold it up and put it in his pocket right after Inmate Riggins had dumped his trash. Thinking that it might be Mr. Riggins trash, I informed him later that week about what I had seen.

The hearing officer did not produce the statement and apparently did not review it. In fact, nothing in the record before this court indicates that the hearing officer ever acknowledged, considered or addressed any of Malik's requests for witness statements and recordings of telephone conversations. DOC has not offered any explanation for ignoring Malik's requests for statements and recordings and has not contended that such would be unduly harmful to

⁸ Although DOC provides no discussion or authority to demonstrate that the hearing notice is determinative on this issue, WAC 137-28-290(g) provides: "The inmate must establish that any requested witness has relevant and exculpatory evidence to present at the hearing. The inmate must list all intended witnesses on the notice of hearing. The hearing officer may, in his/her discretion, allow additional witnesses for good cause shown." While the notice provides a place for an inmate to list witnesses, the notice does not advise an inmate that he must do so.

⁹ The record does not include a transcript of the hearing. However, Malik and his attorney have provided declarations describing the hearing. DOC does not dispute their descriptions and does not provide any additional details of the hearing.

institutional safety or correctional goals.

Minimum due process includes the right to present witnesses and documentary evidence when not hazardous to institutional safety or correctional goals. While a hearing officer has discretion to limit evidence presented at an infraction hearing, he or she must generally state proper reasons for doing so, either at the time of the hearing or thereafter.¹⁰ Here, no explanation has ever been offered for the apparent absence of Barth's statement from the record before the hearing officer or for the hearing officer's failure to address Malik's request for the recording of the alleged telephone conversation. Under these circumstances, we conclude that Malik's due process rights were violated.¹¹

Malik also contends that he was denied due process by the hearing officer's use of confidential information. DOC must provide the inmate with a summary of any confidential information used in a disciplinary proceeding, and the hearing officer must make an independent determination of the reliability of the informant, the credibility of the information, and the necessity of confidentiality.¹² Reliability may be established by some factual information in

¹⁰ See, e.g., Krier, 108 Wn. App. at 43-44; Ponte v. Real, 471 U.S. 491, 497, 105 S. Ct. 2192, 85 L. Ed. 2d 553 (1985) (to satisfy due process, prison officials may choose to explain, in a limited manner, why witnesses were not allowed to testify, either at the hearing, or at some later time, as long as the reasons are logically related to preventing undue hazards to institutional safety or correctional goals); WAC 137-28-300(6)(a) (hearing officer may deny admission of evidence or testimony he or she determines is irrelevant or unnecessary to the adequate presentation of the inmate's case).

¹¹ Krier, 108 Wn. App. at 45.

¹² WAC 137-28-290, -300(7).

the record from which the hearing officer may reasonably conclude that the confidential information is reliable, such as (1) the oath of the investigating officer as to the truth of the report containing confidential information; (2) corroborating testimony; (3) the hearing officer's statement on the record that he or she has firsthand knowledge of the past record of reliability of the source; or (4) in camera review of the material documenting the investigator's assessment of the informant's credibility.¹³

Malik contends that he was not informed that confidential information would be considered in the proceedings until the hearing officer told him so at the hearing. The record supports his claim. The initial infraction does not refer to confidential information. In fact, the Infraction Review Checklist completed by C. Whaley on December 18 includes the notation "N/A" over the five check boxes referring to confidential information. No summary of any confidential information appears in the record. There is no indication in the record that the hearing officer completed a DOC form 21-962, Confidential Information Review Checklist, and no such form appears in the record.¹⁴ And Superintendent Pacholke's appeal decision form does not indicate that he reviewed the hearing officer's analysis of any confidential information.

¹³ Zimmerlee v. Keeney, 831 F.2d 183, 186-87 (9th Cir. 1987); Wells v. Israel, 854 F.2d 995, 999 (7th Cir. 1988). WAC 137-28-300(7)(b) also provides guidance for a hearing officer's consideration of reliability of sources and credibility of confidential information.

¹⁴ DOC offers no explanation for the absence in this case of form 21-962, which is typically provided to this court in personal restraint petitions challenging the use of confidential information.

DOC contends that the "entire investigation" was included in the initial infraction report and that the confidential information was the description of the marijuana contained in the newspaper and obtained "through confidential informants." But again, the initial infraction report does not include the word "confidential" and the witnesses, all apparently DOC employees who provided the details about the package, are listed by name on the initial infraction report. Under these circumstances, DOC cannot reasonably claim that Malik was properly notified that the hearing officer would be considering confidential information.

And DOC fails to offer any summary or description of what the hearing officer referred to as "confidential information" during the hearing or what, if anything, the hearing officer reviewed when she left the room. Moreover, the hearing officer's statement that the "confidential information is credible and reliable" is wholly conclusory. The hearing officer failed to identify any factual information to support a finding of reliability. Similarly, the hearing officer's statement that "releasing this information could jeopardize the safety and security of the institution" is conclusory and clearly inadequate here, where the record contains not even the most general summary of the confidential information or any suggestion that any person other than DOC employees named in the infraction report could have supplied any of the details in that report.

NO. 62840-2-I / 10

Given the circumstances here, including DOC's failure to provide satisfactory explanations in response to his contentions, we are satisfied that Malik has established a basis for relief by showing that he was not afforded his minimal due process rights during the disciplinary proceedings.¹⁵ Accordingly,

¹⁵ See Anderson, 112 Wn.2d at 548-49; Krier, 108 Wn. App. at 45.

NO. 62840-2-1 / 11

we grant the petition and remand to DOC to conduct a hearing at which the minimum due process requirements are met.¹⁶

Petition granted.

Leach, J.

WE CONCUR:

Cox, J.

Becker, J.

¹⁶ In re Pers. Restraint of Goulsby, 120 Wn. App. 223, 231, 84 P.3d 922 (2004); In re Pers. Restraint of Higgins, 152 Wn.2d 155, 160, 95 P.3d 330 (2004). In view of our holding, we find it unnecessary to address Malik's claim that the hearing officer's decision was not supported by some evidence.



STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS

APPLICABILITY
**PRISON/WORK RELEASE
OFFENDER/SPANISH MANUALS**

REVISION DATE
3/5/09

PAGE NUMBER
8 of 9

NUMBER
DOC 450.200

POLICY

TITLE

TELEPHONE USE BY OFFENDERS

- c. Staff not attending formal training by the vendor may receive on-site training consisting of 16 hours of supervised monitoring. The Chief Investigator providing the training will notify the Performance Unit upon successful completion of the training.
- d. The Performance Unit will document and maintain records of completed training.

4. Disclosure

- a. All recordings will be maintained per RCW 9.73.095.
- b. The contents of an intercepted and recorded telephone conversation will be disclosed only as necessary to safeguard the orderly operation of the facility, in response to a court order, or in the prosecution or investigation of a crime.
 - 1) The Office of the Attorney General will review all court orders prior to disclosure of recordings to ensure that it is a court order and has been served lawfully.
- c. When the recording is used as evidence for an infraction, the infraction will start by indicating the offender was overheard, and include the information that was discussed and what was said that warrants the infraction. The Hearing Officer may listen to the telephone call prior to the hearing. An offender will never have access to or listen to a recorded call.
- d. An outside agency conducting a criminal investigation or prosecution of any crime may request a recording by submitting a written request on agency letterhead.
- e. The nature and capabilities of the offender telephone monitoring systems are considered confidential and will not be discussed with general staff or in front of offenders.
- f. Recording equipment will be installed per approved telecommunication guidelines.

II. [5A-19] Offender Telephone Use in Work Release

- A. Offenders with hearing and/or speech disabilities, and offenders who wish to communicate with parties who have such disabilities, will have access to a Telecommunications Device for the Deaf (TDD), or comparable equipment.