

I. ARGUMENT

A. DOC'S FAILURE TO PRESENT AND DISCLOSE A RECORDING OF THE OVERHEARD CONVERSATION, THE ONLY EVIDENCE LINKING JACKSON TO THE INFRACTION, VIOLATED JACKSON'S DUE PROCESS RIGHTS TO PRESENT DOCUMENTARY EVIDENCE AND RESULTED IN A FUNDAMENTALLY UNFAIR HEARING.

DOC argues that denying Jackson a recording of the overheard conversation did not violate due process, because Washington State law prohibits disclosure of audio recordings and, in any event, Jackson was able to present a lengthy defense, Response at 8

Since DOC admits that recordings of overheard phone conversations are never disclosable to the offender, and since the hearing officer (H/O) did not listen to, or review, the telephone recording, DOC did not allow Jackson to present potentially exculpatory documentary evidence in his defense and, therefore, violated minimum due process safeguards of Wolff v. McConnell, 418 U.S. 539, 94 S.Ct. 2963 (1974).

Although RCW 9.93.095(3)(b) prohibits DOC from giving an inmate a copy of the telephone recording (Response at 8), the H/O may listen to the recording prior to the hearing. DOC Policy 450.200 (attached as Exhibit 1) This policy is consistent with the DOC rules requiring the H/O to review confidential information and the sources of that information. (see WAC 137-28-300(2) and PRP at 14-15, 19)

In Jackson's case, the H/O based the finding of guilt on the infraction report, writing that, "SIU investigator stated he heard, and could identify, the offender's voice conspiring to introduce contraband. (Response, Exhibit 2, Attachment F)

Nothing on the record indicates that the H/O listened to a recording of the telephone conversation prior to the hearing or at any other time. The Response correctly states that the H/O based his decision solely on the summary of confidential information contained in the Initial Serious Infraction Report. (Response at 4)

Any evidence that could conceivably connect Jackson with the 606 infraction, introduction of tobacco, was contained on the phone recordings, as indicated by the H/O's findings that guilt was established by the overheard phone conversation. The recording was the only evidence of Jackson's infraction, but it was withheld from Jackson, not reviewed by the H/O and omitted from the record of the hearing.

Since the recorded conversation was the only evidence and since it was not disclosed to Jackson or reviewed by the H/O, Jackson's due process rights to call witnesses and present exculpatory documentary evidence in his defense was violated.

B. JACKSON'S LENGTHY WRITTEN AND ORAL DEFENCE IS NOT INDICATIVE OF ADEQUATE NOTICE.

DOC argues that adequate notice of the charges was provided as evidenced by the “lengthy statement in his own defense” presented at the hearing. Response at 7

The lengthy defense presented by Jackson, both orally and in writing, consisted of repeated requests for the recording to be made part of the record and disclosed to him. He stated at the hearing, “I’d like [recording of his conversation] at this hearing.” PRP at 6, citing Exhibit 6, transcript of hearing. He also stated, “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.” Id.

In his written defense, Jackson asked to be able to “review and hear the [recording] in person at this hearing.” Response, Exh. 2, Att. G, written defense. A review of the “Statement of Facts” in both the Response and the PRP and exhibits shows numerous requests by Jackson for the recordings to be made part of the record, because they would exonerate him.¹ The recordings would support his “lengthy” defense in which he described his innocent business plans and deals in great detail.

In his “lengthy” defense, both on the hearing transcript and in the written document attached to the Hearing Findings, Jackson, repeatedly argued that the recordings would exonerate him. The fact of Jackson’s writing a lengthy defense document and presenting his argument orally

¹ For example, “Prior to the hearing [Jackson requested] a copy of the phone recording” Response at 3 See also, PRP at 3.

at the hearing is of no relevance to whether he had adequate notice or the opportunity to present a defense.

C. CONFIDENTIAL INFORMATION WAS USED AT THE HEARING AND WAS NOT REVIEWED OR DETERMINED CREDIBLE OR RELIABLE BY THE HEARING OFFICER, AND THEREFORE DOC VIOLATED JACKSON'S RIGHT TO MINIMUM DUE PROCESS.

DOC argues that no confidential information was used at the hearing and therefore the H/O did not need to make a determination regarding confidential information. Response at 9

As argued in the PRP, the 9th Circuit has held that due process requires that the H/O find that a report containing confidential information be reliable. Reliability may be established by the oath of the investigating officer and in other ways. See PRP at 20, citing Zimmerlee v. Keeney, 831 F.2d 183, 186-87 (9th Cir. 1987). The 6th Circuit has also held that a credibility determination must be made by the H/O by conducting an independent review that is more than a recording of the findings of the investigating officer. PRP at 20 – 21, citing Hensley v. Wilson 850 F.2d. 269 (6th Cir. 1988). In addition, Washington law requires an independent review. See PRP at 22, citing WAC 137-28-300(7)(a)

At Jackson's hearing, the H/O made his findings of guilt based solely on the Initial Serious Infraction Report. In the narrative portion of the Initial Serious Infraction Report, it clearly states that, "This infraction serves as both notice and summary of confidential information."

(Response, Exhibit 2, Att. B) In the narrative, the reporting staff writes of a "HQ Special Investigation Unit" (SIU) investigation of staff misconduct" and of "information received and evidence recovered about that staff member." *Id.* Notes from that investigation (See PRP, Exhibit 10, case no. HQ-69-07-101) state that "Information was received from a *confidential source* stated Jackson might also be involved in the receiving of contraband from C/O Hopkins." Emphasis added.

At the hearing Jackson asked the H/O about the confidential information: "[infraction report] states that this information serves as both notice and summary of confidential information...On what phone recording....are the allegations to the facts stating by the reporting staff...And I would like to be able to review and hear this evidence against me at this hearing..." The H/O does not respond by telling Jackson that he is mistaken about confidential information. Instead, he states "OK. I'm gonna stop you right there. You won't get that tape...you have to request that through public disclosure." PRP, Exhibit 6, at 12-13.

On Jackson's appeal, the Superintendent designee affirmatively indicates that he has confirmed that the H/O made an independent determination regarding [reliability and credibility] of confidential sources and information." Response Exhibit 2, Att. K The Superintendent Designee indicates that the confidential information was

documented on DOC form 21-962. Id. However, that form does not appear on the record, nor was it provided by DOC in its Response.

Reviewing the Initial Serious Infraction Report, hearing transcript, investigative notes and appeal decision, it is expressly stated that confidential information or sources were involved in the investigation and subsequent infraction.

The record is devoid of any evidence that the H/O reviewed any confidential information, including recordings and investigative notes. Since no attempt was made to determine the credibility and reliability of confidential information and/or the source, DOC violated Jackson's due process rights.

The failure of the H/O to determine the credibility and reliability of confidential information and informants is especially important in this case, where evidence of guilt depends entirely on the overheard phone conversation.

D. THE HEARING OFFICER PROVIDED AN INADEQUATE SUMMARY OF EVIDENCE, AND THEREFORE VIOLATED JACKSON'S RIGHT TO DUE PROCESS

DOC argues that the H/O provided an adequate summary of evidence because he based the findings solely on the written report of the investigator contained in the initial serious infraction report. As evidence of the sufficient summary, DOC points to Jackson's "multiple

letters and kites after the hearing setting forth his basis for appeal.”

Response at 10.

The H/O did not provide a written statement of the evidence relied upon. In the Disciplinary Hearing Minutes and Findings, under “summary of testimony...evidence used/findings...”, there is no reference to evidence other than Jackson’s own plea of not guilty and that he “wanted to read a statement into the record.” (Response, Exh. 2, Att. F) Jackson was found guilty of a 606 infraction, introduction of tobacco (see Response Exh. 2, Att. C) In the “Reason” section, for the finding of guilt, the H/O based his guilty determination on the infraction report, in which, “the [investigator] could identify the offender’s voice conspiring to introduce *contraband*.” Response Exhibit 2, Att.F Emphasis added. That report by C/O Baxter supported the infraction solely by summarizing a conversation he overheard. The conversation is contained in a recording. The H/O admitted the recording existed when he told Jackson to request a copy through public disclosure. But the hearing minutes and findings do not state that the H/O, himself, considered, or reviewed, the actual recording. He based his findings on the conclusion reached by the investigator without indicating the basis for his agreement with the investigator. It was central to Jackson’s defense that the recording would exonerate him and that the investigator’s report of the contents of the phone conversation is inaccurate or taken out of context. Even DOC policy recognizes that

when a recording is used as evidence for an infraction, the report must indicate that the offender was "overheard", and the H/O may listen to the telephone call prior to the hearing. DOC Policy 450.200, supra

Where the overheard call is the only evidence that might link Jackson to the contraband, the H/O should listen to the call.

In Jackson's case, the H/O did not listen to the recording. He blindly accepted the report and told Jackson, "if staff said you did this...that's all I have to have." PRP Exh 6, Transcript at 18-19. The H/O's findings were conclusory, because he based them on the infraction report, stating, , "that's all I have to have." Id. He cited no facts and therefore, as he said at the hearing, "if staff says it happened, it's true." Id.

Here, the investigator did not testify under oath and did not sign a sworn infraction report. (See Zimmerlee v. Keeney, supra at 5) Since the recording contains all the evidence against Jackson and the H/O is given permission by DOC Policy to review the recording, the H/O's conclusory findings are inadequate, because the actual evidence was not reviewed and the H/O merely accepted the conclusion as stated in the infraction report.

E. NO EVIDENCE LINKED JACKSON TO THE INTRODUCTION OF CONTRABAND; THEREFORE THE FINDING OF GUILT WAS ARBITRARY AND CAPRICIOUS

DOC argues that the infraction was supported by some evidence, because the facts contained in the infraction report and Jackson's own

statement at the hearing “was certainly some evidence.” Response at 12

The facts contained in the infraction report do not constitute any evidence , because there is nothing connecting Jackson to the tobacco that was introduced into MICC by C/O Hopkins, DOC staff.

As the DOC Response indicates, disciplinary decisions must be supported by “some” or “any” evidence. Response at 10, citing In Re Reismiller., 101 Wn.2d 291, 678 P.2d 323 (1984)

The court in Reismiller addressed an infraction report that stated that a “suspected marijuana cigarette” had been found in the inmate’s cell. The cigarette was presented at the inmate’s hearing, although no witnesses testified that the cigarette was the same one that appeared in the inmate’s cell. The Court found that no connection had been established between the inmate and the cigarette. Id at 296-97

DOC argues that the evidence in Jackson’s hearing “ certainly satisfies the “some” evidence test , citing Rudd v. Sargent, 866 F. 2d 260, 262 (8th Cir. 1989). Response at 11. However, “some evidence” can be rebutted where there is an infraction report, but the inmate is not allowed to present requested evidence that could defeat the potential finding of guilt. In re Leland, 115 Wn.App. 517, 537, 61 P.3d 357 (2003) In that case, the infraction inmate challenged a toxicology report where the H/O did not review the actual report. Since the inmate was not allowed to challenge the validity of the report, the court found that his

due process rights were violated. Leland at 537² (See also PRP at 26, citing Leland at 537)

Although an infraction report typically satisfies the some evidence standard, that is only assuming the inmate was allowed to present requested evidence and that such evidence did not defeat guilt. Leland at 537. The H/O based the decision solely on the infraction report. A close scrutiny of the infraction report shows no evidence linking Jackson to the introduction of tobacco.

The Initial Serious Infraction Report begins by referring to a HQ special investigation of Staff misconduct at MICC. The investigative note pursuant to that SIU investigation is attached to the PRP as Exhibit 10. The investigative note indicates that Jackson was involved in business with other offenders. The note then indicates that money sent via Western Union was picked up by the Staff (C/O Hopkins) and that Jackson and his sister were upset "about the deal because they never received the merchandise." There is no indication of exactly what kind of deal was being discussed or with whom the "deal" was being conducted. There is no indication of what the merchandise consisted of. There is no mention of tobacco.

The remainder of the investigative note refers to another inmate who does have a direct connection to the introduction of tobacco --

² Leland was abrogated on the issue of jurisdiction by In re Higgins, 115 Wn.2d 155, 93 P.3d 330 (2004); however, it appears to still be good law on the due process issue.

inmate Grantham. According to the investigative note, Grantham and his brother discussed dropping off wrapped material and coffee to the "girl." The delivery of contraband was made by a man related to inmate Grantham. That is the only reference to the actual contraband. There is no connection indicated in the investigative note between Jackson and Grantham, Jackson and tobacco and Jackson and C/O Hopkins (other than the fact that she picked up money). See PRP, Exhibit 10. The investigative notes are not inconsistent with Jackson's defense -- that he was involved in business activities with another inmate.

A confidential email, also part of the investigation, from Chief investigator Gilbert to investigator Baxter indicates that Jackson's sister reported that Hopkins had illegally cashed a money order, *not wired money*, and that charges should be filed with the police. (PRP Exh 19) This shows that whatever business deal Jackson and his sister were discussing did not have anything to do with the wired money that Hopkins picked up. Hopkins, in her own words, as told to the investigators, was wired money. There is a concrete difference between picking up wired money and cashing a money order.

Returning to the infraction report, it states that the staff (Hopkins) turned in the tobacco contraband, and that Hopkins stated she had been wired money. However, those are two separate events, with no link to each other. Hopkins at no time indicated where or who the tobacco came from or who paid for it. There is no evidence on the record that

Hopkins brought up Jackson's name with investigators. In fact, as the investigative note points out, she was involved with another inmate (Swirczynski). Id.

Finally, the infraction report refers to an overheard telephone conversation between Jackson and his sister talking about how Hopkins had picked up money and they were angry that the deal had not been completed by staff. Jackson's defense was that this report is not an accurate representation of the contents of the conversation; however, assuming the statement is true, at face value, the conversation only indicates that there was some deal with Hopkins. There is no indication of what the deal consisted of. There is absolutely no reference to tobacco specifically or contraband generally. There is also reference to money sent to Jackson's sister (Hanley) by other inmates. That also shows absolutely no connection between Jackson and tobacco nor can one draw an inference as to Jackson's role, if any, with Hopkins and the other inmates.

There was no other evidence cited by the H/O (see hearing Minutes and Findings, Response, Exh 2, Att. F). Although DOC's Response includes photographs of "displayed contraband" from C/O Hopkins (Response, Exh. 2, Att. I), there is no indication that the tobacco seen in the photographs came from or is related to Jackson. There is no reference anywhere to tobacco in connection with Jackson. In fact, according to the investigation, it appears that inmate Grantham

provided the tobacco to Hopkins through his brother. PRP, Exh 10.

There is nothing in the record of the hearing or in the investigative notes linking Jackson to Grantham and/or the tobacco.

Taken together, no evidence links Jackson to tobacco. The investigation alluded to in the infraction report shows that the Staff (C/O Hopkins) and inmate Grantham were involved in the delivery of tobacco and that Hopkins was directly involved with another inmate, Swirczynsky, and not with Jackson. There is evidence, both in the infraction report and investigative notes, that whether intentional or unintentional, Jackson did have some financial connection to other inmate(s) and possibly Hopkins, but there is absolutely no evidence on the face of the infraction report or on the record or even in the SIU investigation, that Jackson was involved in paying C/O Hopkins or any staff or inmate for the introduction of tobacco,

F. THIS WAS A FUNDAMENTALLY UNFAIR HEARING AND A VIOLATION OF DUE PROCESS BECAUSE THE ONLY POSSIBLE EVIDENCE THAT WOULD PROVE JACKSON'S INNOCENCE WAS AN EXISTING AUDIO RECORDING THAT WAS NEITHER REVIEWED NOR ADMITTED INTO EVIDENCE.

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), supra, 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)

DOC investigative reports, on which the infraction report was based, show unequivocally that Staff misconduct was transpiring at MICC. The Staff involved in this infraction, according to DOC's own investigation (and alluded to in the infraction report), was emotionally involved with and introducing contraband with another inmate, not Jackson. Given this set of circumstances, which was known to the investigator, Baxter, of this infraction, any inmate who got involved with inmate Swirczynsky,³ the acknowledged partner of the Staff (C/O Hopkins), ran the risk of mistakenly being implicated in the misconduct ring.

In this case, overheard and recorded phone conversations between Jackson and his sister had no connection with the contraband ring. DOC, also admittedly, has access to the recorded conversation(s).

³ Swirczynsky is the inmate known to Jackson as "Domino" and with whom Jackson conducted an unrelated business transaction. See PRP at 5, fn 5

DOC policy permits the H/O to listen to and review the recordings in their entirety rather than look at a very short summary contained in the infraction report. In his defense, Jackson, both at the hearing and in his declaration attached to the Personal Restraint Petition, gives a very detailed account of his business activities with another inmate who by chance was the inmate involved with DOC's corrupt corrections officer. PRP Exh. 9⁴

In this case, a review by the H/O of the recorded conversations (and investigative notes) would have allowed him to make a determination as to the reliability and credibility of the infraction report. The narrative on the infraction report indicated 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 H/O.

Although by statute and DOC policy, the inmate cannot gain access to the recording, where it is undisputed that DOC employs a corrupt corrections officer and DOC policy allows the H/O to listen to proof of the inmate's innocence, it is clear that evidence that could have defeated the allegations in the infraction report was not reviewed or presented. This denial, by the H/O, of evidence that could defeat the alleged evidence appearing in the Initial Serious Infraction Report, is

⁴ Jackson's Declaration includes exhibits which show in great detail his business plans, and the included letters show that Jackson had been pursuing his business ideas for several years. PRP, Exh. 9

similar to the fact pattern in In re Leland, supra, where the inmate was not allowed to challenge the toxicology report and the court held that the "some evidence" standard had not been met. See PRP at 26.

In this case, the H/O expressly stated to Jackson at the hearing that he would blindly rely on the written infraction report, and that statement is confirmed in the Hearing Minutes and Findings. (PRP, Exh. 3) The H/O also did not listen to the recording of the conversation that constituted the basis for his finding of guilt, not did he review the investigative notes.

This disciplinary hearing was fundamentally unfair because the infraction consisted of no evidence connecting Jackson to the introduction of tobacco. Documentary exculpatory evidence was not allowed nor did the H/O review the recording.

In its response, the DOC made the following statement: "While Mr. Jackson explains his version of the events, apparently the hearing officer and the Superintendent's designee both found Investigator Baxter's version of the events more credible." Response at 11

The H/O said in the middle of the hearing, "if staff says it happened, it happened." PRP, Exh. 6 at 18 The hearing officer exercised no judgment or discretion. By policy, he could have listened to the existing recording which constituted all the evidence. Clearly, the H/O did not allow Jackson the opportunity to present evidence and Jackson's due process rights were violated.

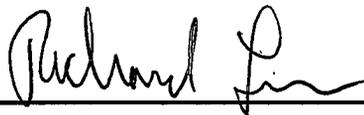
This infraction hearing finding should be reversed and the infraction expunged from Jackson's DOC record.

F. Conclusion

For the reasons stated above, and in Jackson's petition, this disciplinary hearing decision was arbitrary and capricious and the due process violations resulted in a fundamentally unfair hearing.

Jackson requests that this Court find that the disciplinary hearing violated his due process rights and order that the finding of guilt be vacated.

RESPECTFULLY SUBMITTED this 5th day of
June, 2009.



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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.

Exhibit 1

FILED
COURT OF APPEALS
DIVISION II

NO. 38796-4-II

09 MAY -6 AM 10:57

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

In re Personal Restraint Petition of:

VERNON JACKSON,

Petitioner.

CERTIFICATE OF
SERVICE

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all parties or their counsel of record as follows:

- US Mail Postage Prepaid
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TO:

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

EXECUTED this 5th day of May, 2009 at Olympia, WA.

Cherrie Kollmer
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