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Supreme Court No. 97232-0

WASHINGTON STATE SUPREME COURT

CARRI D. WILLIAMS,

Petitioner,

v.

JO WOFFORD, Superintendent, Washington Corrections Center for
Women, and the WASHINGTON DEPARTMENT OF CORRECTIONS

Respondent.

**BRIEF OF AMICUS CURIAE COLUMBIA LEGAL SERVICES
MEMORANDUM OF IN SUPPORT OF RETAINING AND
DECIDING THE RAP 16.2 PETITION**

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I. INTERESTS OF AMICUS CURIAE

The interests of the proposed Amicus Columbia Legal Services are described in the motion for leave to participate as amicus that accompanies this brief.

II. STATEMENT OF THE CASE

Amicus relies on the facts set forth in Petitioner's Original Action in the Nature For a Petition for a Writ of Prohibition and/or Mandamus.

III. ARGUMENT

A. This Court Should Accept Review of the Petitioner's Writ of Prohibition Because DOC Policies Related to Issuance of a 549 Infraction Violate Prisoners' Due Process Rights.

"It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands." Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593 (1972). (emphasis added).

Petitioner Carri Williams, a prisoner in DOC custody, recently filed a Prison Rape Elimination Act (PREA) complaint alleging ongoing sexual misconduct by a prison guard. Her allegations were investigated, and the Superintendent made a finding that it was more likely than not that Ms. Williams provided false or misleading information. Ms. Williams had no opportunity to challenge this finding and was infracted. A hearing was set for late-May, where, to find her guilty, a DOC hearing officer would merely need to find that there was "some evidence" that Ms. Williams

provided false or misleading information. Now, Ms. Williams, rather than her alleged abuser, faces punishment, in large part because DOC policies provide inadequate due process protections to prisoners who are found by the Superintendent to have provided false or misleading information.

The lack of due process protections in this context has serious implications. The fear of retaliation and punishment DOC's policies engender discourages prisoners to report incidents of sexual misconduct and renders PREA meaningless. This is especially important in light of DOC's history of widespread staff sexual abuse of female prisoners.¹

Given these implications, the Court should review whether punishment of any kind can and should be imposed upon prisoners who report allegations of sexual abuse. But, at a minimum, the Court should seriously examine the procedures through which DOC determines whether punishment will be imposed once a prisoner reports sexual misconduct.

¹ In 2007, Columbia Legal Services filed a class action lawsuit against the Department of Corrections on behalf of women prisoners who had been sexually abused by staff at the Washington Corrections Center for Women (WCCW). *Doe v. Clarke*, No. 07-2-01513-0 (Thurston Co. Superior Court). In 2010, a settlement agreement was reached that included a three-year monitoring period. This monitoring period has ended, so there has been no formal outside monitoring of DOC to determine whether reports of staff-on-prisoner sexual abuse have increased since that time. The lack of outside monitoring heightens the need for robust adherence to, and enforcement of, PREA.

1. This Court should accept review of the Petition for a Writ to determine whether the “some evidence” standard of proof used at 549 hearings² meets minimum due process requirements.

Minimum due process requires that the DOC review allegations of serious violations under a “some evidence” burden of proof. *In re Pers. Restraint of Schley*, 197 Wn. App. 862, 869, 392 P.3d 1099 (2017). This is an extremely low burden to satisfy. In *In re Pers. Restraint of McKay*, the hearing officer described the standard as “fairly low, probably like 30, 35 percent certainty.” 127 Wn. App. 165, 167, 110 P.3d 856 (2005). “This low burden means, short of total arbitrariness, DOC can always meet its burden, find a serious infraction took place, and strip a prisoner of whatever liberty interest is at stake.” *In re Pers. Restraint of Schley*, 191 Wn.2d 278, 293, 421 P.3d 951 (2018) (Gonzalez, J., concurring).

The “some evidence” standard of proof has been called into question on at least two occasions by this Court. In *In re Pers. Restraint of Johnston*, several prisoners were found guilty under the “some evidence” standard of using marijuana based solely on a single positive urinalysis test. 109 Wn.2d 493, 745 P.2d 864 (1987). The petitioners argued that a single positive test using the method DOC employed was insufficient evidence of marijuana use due to the questionable accuracy of the test, and

² A 549 is a serious prison violation that occurs when a prisoner provides false or misleading information during any stage of an investigation of sexual misconduct. WAC 137-25-030.

therefore violated the prisoners' due process rights. *Id.* at 496. The Court affirmed the findings of guilt and application of the standard. *Id.* at 867.

In his dissent, Justice Utter acknowledged that prisoners have lesser due process rights than other classes of individuals, but that this does not equate to a complete denial of rights:

But though rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and prisoners in this country.

Id. at 869 (Utter, J., dissenting) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 555-56, 94 S. Ct. 2963 (1974)).

The “some evidence” standard of proof was most recently called into question in *Schley*, where the Court held that DOC must prove an infraction by a preponderance of the evidence, rather than “some evidence,” if the infraction necessarily results in the revocation of a Drug Offender Sentencing Alternative (DOSA) sentence. 191 Wn.2d at 285.

While the majority opinion focused only on the evidentiary standard required in the DOSA context, the concurring opinion questioned whether the “some evidence” standard generally meets minimum due process requirements for all prisoners accused of serious disciplinary violations.

Id. at 293 (Gonzalez, J. concurring) (due process requires more than “some evidence.”). The criticism is warranted because under the “some

evidence” standard, “1 inmate’s lie would be sufficient to undermine the sworn testimony of 10 inmates because there would be *a piece* of evidence to support the infraction.” *Id.* Similarly, the U.S. Supreme Court has, in a different context, questioned the effectiveness of “some evidence” as a standard of proof. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537, 124 S. Ct. 2633 (2004) (holding that the “some evidence” standard is inadequate; Government has utilized the standard in the past as standard of review, not as a standard of proof).

Petitioner’s case highlights the deficiencies that exist when “some evidence” is used at 549 hearings. The standard is rendered entirely meaningless because before the hearing, the Superintendent has already made findings under a heightened standard of proof. DOC Policy 490.860(V)(B)(2). Because there has been a finding of the same legally significant fact under this higher standard, the hearing officer can wholly rely on the Superintendent’s findings to support his own finding of guilt.

549 hearings are also unique in two distinct ways. In addition to the pre-adjudication by the Superintendent, 549 infractions originate in distinct subject matter: “providing false or misleading information during any stage of an investigation involving sexual misconduct.” WAC 137-25-030. One of the primary ways these investigations arise is when prisoners allege staff misconduct through the filing of a PREA complaint. Reporting

incidents of staff sexual misconduct is fraught with risks for the prisoner; as a result, many prisoners refuse to report at all. See “*The Very Basics about Sexual Abuse in Detention*,” (Just Detention International) (October 2018) (noting that vast majority of sexual abuse goes unreported because of fear of not being believed and danger associated with retaliation). 549 hearings further discourage reporting of abuse, and conflict with DOC’s own messaging to prisoners and the public regarding these complaints:

[T]he DOC recognizes the right of staff and inmates to be free from retaliation for reporting sexual misconduct. The DOC has zero tolerance for all forms of retaliation against any person because of his/her involvement in the reporting of investigation of a complaint.

DOC, PREA FAQ, available at: doc.wa.gov/corrections/prea/faq.htm (last accessed June 15, 2019).

Accordingly, 549 hearings in any form are of questionable utility. However, if they remain in place, the Court should consider whether a 30-35% finding that a prisoner provided false information when reporting allegations of sexual abuse meets minimum due process requirements.

2. The Court should accept review of Petitioner’s Writ because DOC’s procedures for adjudicating 549 infractions lacks an impartial decisionmaker.

DOC presents the illusion of impartiality at 549 hearings. In reality, the decisionmaker and decision-making process are substantially biased against the prisoner, with a predetermined outcome.

The law requires that prisoners at disciplinary proceedings be afforded minimum due process. *In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 398, 978 P.2d 1083 (1999). The prisoner must (1) receive notice of the alleged violation; (2) be provided an opportunity to present documentary evidence and call witnesses; and (3) receive a written statement of the evidence relied upon and the reasons for the disciplinary action. *Id.* (citing *Wolff*, 418 U.S. at 563-66). Additionally, “[a]ll disciplinary hearings will be conducted by an impartial Disciplinary Hearing Officer[.]” DOC Policy 460.000(II)(D).

However, the existence of an impartial decisionmaker is impossible at 549 hearings because of the Superintendent’s ever-present role in the process, and no process to check any bias or error by the Superintendent. When a prisoner makes a PREA complaint against DOC staff, the complaint may be reviewed by the Superintendent to make a finding by a preponderance of the evidence as to whether the prisoner provided false or misleading information. DOC Policy 490.860(V)(B). Once this finding is made, a 549 violation notice is served upon the prisoner and must be authorized by the Superintendent. *Id.*

Upon issuance of the infraction, a hearing is set by DOC. Remarkably, the Superintendent determines who will serve as the hearing officer for the proceeding and review the Superintendent’s initial findings.

DOC Policy 460.000(II)(B). And, should the prisoner be found guilty of the infraction and appeal, the appeal will be forwarded to the Superintendent, who has 10 days to affirm her own findings. DOC Policy 460.000(V)(I)(3).

There are several procedural problems with this arrangement. The prisoner's right to present meaningful evidence at her 549 hearing is seriously compromised by the Superintendent's earlier finding. Moreover, the prisoner has no opportunity to challenge the Superintendent's initial finding. Equally troubling is that the Superintendent chooses the 549 hearing officer. And, to reverse the Superintendent, the hearing officer must find that the Superintendent's findings provided no evidence of the violation. But as stated above, the Superintendent has already found that it is more likely than not that the violation occurred.

This situation is analogous to *Schley*, where the petitioner's DOSA was revoked based on a fighting infraction (proved by "some evidence"), which resulted in termination from chemical dependency treatment. 191 Wn.2d at 280. Termination from chemical dependency treatment automatically resulted in receiving a 762 infraction (termination from chemical dependency treatment, where a finding of guilt results in a DOSA revocation). At the 762 hearing, the petitioner did not have the right to challenge the underlying infraction that led to termination from

chemical dependency treatment. Thus, the only issue before the hearing officer was whether the petitioner had been terminated from treatment. *Id.* at 282. Under these circumstances, the Court held that the DOSA hearing was a mere formality; the petitioner’s DOSA was “functionally revoked once he was found guilty at the infraction hearing.” *Id.* at 288.

The same problem exists here. Persons accused of 549 violations are functionally guilty once the Superintendent makes her decision, making the 549 hearing a “mere formality.”

B. This Court Should Accept Petitioner’s Writ to Decide Whether Petitioner Is Entitled to Immunity Under RCW 4.24.510.

Under RCW 4.24.510, “any person who communicates a complaint...to any agency...of...state...government...is immune from civil liability for claims based upon the communication to the agency...regarding any matter reasonably of concern to that agency.” RCW 4.24.510. The purpose of the statute is to “help protect people who make complaints to [the] government from civil suits regarding those complaints. *Saldivar v. Momah*, 145 Wn. App. 365, 387, 186 P.3d 1117 (2008). The immunity applies to “communications to a public officer who is authorized to act on the communication.” *Id.*

This statute is intended to protect Ms. Williams and similarly situated prisoners who report claims of staff sexual abuse. Ms. Williams

communicated her complaint to a state agency – DOC – on a matter reasonably of concern to DOC – reports of sexual misconduct. *See* DOC website, PREA link, available at: <https://www.doc.wa.gov/corrections/prea/default.htm>, last accessed June 15, 2019 (“DOC is committed to providing a safe, healthy environment for inmates and every report of misconduct is taken seriously.”). However, due to DOC’s policy, Ms. Williams and other prisoners are put at greater risk of facing punishment for reporting allegations of sexual misconduct. It is important for the Court to address the scope of this statute because of its potential impact on all prisoners, and particularly women prisoners.

IV. CONCLUSION

For the reasons set forth above, this Court should find that the Petitioner’s writ meets the criteria for review under RAP 16.2.

Respectfully submitted and dated this 17th day of June, 2019.

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