COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

In the Matter of the Personal Restraint of: **JAMES BENJAMIN BARSTAD,** **Petitioner.**	)	**No. 34778-8-III** **ORDER DISMISSING PERSONAL RESTRAINT PETITION**

James Barstad seeks relief from personal restraint in the form of 30 days lost good time credit and other sanctions imposed by a Department of Corrections (DOC) hearing officer who found him guilty of a serious prison infraction under WAC 137-25-030 (637) (Committing sexual abuse against another offender, as defined in department policy). DOC Policy 490.800, Attachment 1, defines "sexual abuse" to include "sexual contact between 2 or more offenders without an offender's consent . . . including intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttock of the victim."

The facts giving rise to the 637 infraction are set forth in an Initial Serious Infraction Report submitted by Monroe Correctional Complex staff member Michelle Henderling on March 11, 2016. (DOC Response, Exhibit 1, Attachment A) According to

the report, Officer Henderling was given pre-approval by Superintendent Jackson to infract Barstad as a result of a Prison Rape Elimination Act (PREA) investigation conducted pursuant to DOC Policy 490.860. The report stated that "in this instance of alleged offender to offender sexual abuse of another offender the Appointing Authority, by a preponderance of the evidence presented and after review of the investigation conducted by Jon Farnsworth, Lt., determined the allegations are substantiated and Offender Barstad . . . did violate WAC 637 against another offender between January 1, 2016 and January 25, 2016. During the interview process offender Barstad admitted to this allegation." (*Id*.) In particular, another offender alleged that Barstad "came up behind me, grabbed my upper torso by wrapping his arms around me, and started dry humping me." (*Id.*)

On March 14, 2016, Barstad received a copy of the infraction report and a Disciplinary Hearing Notice/Appearance Waiver informing him of the infraction and explaining his due process rights. (DOC Response, Exhibit 1 Attachment B) He requested witness statements from Lt. Farnsworth and from the alleged victim. (*Id.*) Lt. Farnsworth returned a witness statement in which he indicated that during the interview, offender Barstad did admit to the allegation but stated it was just horseplay. (Exhibit 1, Attachment D)

Barstad pleaded not guilty to the infraction at his March 17, 2016 disciplinary hearing. He stated: "There was no physical contact except with my arms around his

torso. While I did give two pelvic thrusts, it did not connect." (Exhibit 1, Attachment F at 1) Barstad said he believed it was a third party who reported the incident, not the victim. He further stated:

> The victim didn't want me to get in trouble over this. We are friends. He wouldn't want me to get in trouble. When it happened he told me he didn't like it, and to stop. I told him I would never do it again. I think what bothered him most was that I had done it in public in front of others. It might have made him look weak. It was not sexual. We were playing. I made two pelvic thrusts but I didn't grind on him. I took it too far this time. I've had a paradigm shift over this.

(*Id.* at 2) The investigative file also contained a summary of Lt. Farnsworth's interview with the victim. The summary indicates the victim likewise minimized the incident by stating it was horseplay and that he asked him (Barstad) to stop and he has not done it since. The victim said the matter was a misunderstanding that was blown out of proportion and was not a PREA. (PRP Reply Exhibit F) In further colloquy during the hearing, the hearing officer asked Barstad whether there were any specific questions he wanted the hearing officer to ask the victim. Barstad's questions were whether the victim is afraid of him and whether "he thinks I'm trying to screw him." The hearing officer denied the victim witness statement on the basis Barstad's questions were opinion inquiries unnecessary to his defense. (*Id.*)

The hearing officer found Barstad guilty of the 637 infraction based upon the written infraction report, review of confidential PREA materials, and Barstad's testimony. The hearing officer further reasoned

[I]t is unknown whether offender Barstad made contact with the victim's buttock,

> however it is undisputed that offender Barstad took a substantial step toward committing the violation when he wrapped his arms around the other offender's torso and delivered at least two pelvic thrusts. Attempt shall be considered the same as having committed the violation. The WAC 637 is supported.

(Exhibit 1, Attachment F) The hearing officer imposed sanctions that included 30 days lost good time credit. (*Id*.) Barstad received a written copy of the hearing officer's decision with reasons for the sanctions. (*Id.*) The superintendent's designee denied his administrative appeal. (Exhibit 1, Attachment G at 3) This petition followed.

Prisoners seeking relief from personal restraint arising from a prison disciplinary hearing must show that the hearing "was so arbitrary and capricious as to deny them a fundamentally fair proceeding so as to work to the petitioner's prejudice." *In re Pers. Restraint of Grantham*, 168 Wn.2d 204, 215, 227 P.3d 285 (2010); *In re Pers. Restraint of Reismiller*, 101 Wn.2d 291, 293-94, 678 P.2d 323 (1984). The proceeding is not arbitrary and capricious if the petitioner was afforded the minimum due process applicable to prison disciplinary proceedings. *Reismiller*, 101 Wn.2d at 294.

Minimum due process in such proceedings means the prisoner must (1) receive notice of the alleged violation; (2) be provided an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals; and (3) receive a written statement of the evidence relied upon and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-66, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *see also In re Pers. Restraint of Gronquist*, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999). Barstad received all of these indicia of due process.

Barstad nevertheless claims he was subject to an arbitrary and capricious determination of guilt on grounds that the hearing officer failed to follow WAC 137-28-310(2) (hearing officer must rely solely on evidence considered at the hearing when deciding guilt or innocence); WAC 137-28-300(7)(b)(i) (hearing officer shall make independent determination regarding reliability of confidential source, credibility of the information, the necessity of not revealing source of confidential information, and whether there was a motive to fabricate); and WAC 137-28-285(1)(a) (offender has right to fair and impartial hearing). Barstad believes that a prisoner with a retaliatory motive initiated an anonymous false PREA report against him, whereas both Barstad and the alleged victim understood that the incident was only horseplay. Barstad appears to contend there was already no evidence that he committed the infraction and that the hearing officer's failure to also consider the ill-motivated anonymous report violated the above-cited regulations, thus denying him due process because he was unable to demonstrate his innocence.

The hearing officer did review the confidential materials in the file, including interviews of the prisoners involved. (DOC Response, Exhibit 1, Attachment F at 3) In PREA matters, "[i]nformation related to allegations/incidents of sexual misconduct is confidential and will only be disclosed when necessary for related treatment, security and management decisions." DOC Policies 490.860(III); 490.800(IV). The record in this petition does not indicate that an anonymous prisoner actually initiated the complaint

against Barstad. But even if so, and even if that individual had a retaliatory motive, Barstad still admitted to the incident. He confirmed the details in his own testimony at the hearing. In this situation, irregularity, if any, in the hearing officer's assessment of the confidential information by not addressing the WAC 137-28-300(7)(b) factors with respect to the anonymous individual did not deny Barstad a fundamentally fair proceeding or result in any prejudice.

The question then turns to whether the evidence supports the finding of guilty for the 637 infraction. The evidentiary requirements of due process are met if there is "some evidence" in the record to support the finding of guilt. *Superintendent v. Hill*, 472 U.S. 445, 455-56, 105 S.Ct. 2768, 86 L. Ed. 2d 356 (1985); *In re Pers. Restraint of Reismiller*, 101 Wn.2d at 295-96. An attempt to commit a serious violation (infraction) is considered the same as committing the violation. WAC 137-25-030(1).

Barstad contends there is no evidence that he committed the 637 infraction because the incident was just horseplay or a joke and he had no intent to sexually abuse the victim. He argues that he cannot be found guilty of attempt to commit the infraction when he did not physically touch the victim's buttock and had no intent to do so. He maintains there can be no attempt to commit sexual abuse without intent.

The hearing officer considered the initial serious infraction report, which states that an offender reported that Barstad "came up behind me, grabbed my upper torso by wrapping his arms around me, and started dry humping me." (DOC Response, Exhibit 1,

Attachment A) Barstad testified: "I made two pelvic thrusts but I didn't grind on him. I took it too far this time." *Id.* Barstad also stated that the other offender told him he didn't like it and to stop. He conceded that his pelvic thrusts mimic a sexual act. This constitutes some evidence of a substantial step, and therefore an attempt, to commit sexual abuse without the other offender's consent. In finding Barstad guilty, the hearing officer rejected his (and the victim's) innocent explanation that the incident was only horseplay. This court does not reweigh the evidence or review the hearing officer's credibility determinations. *Superintendent v. Hill*, 472 U.S. at 455. The 637 infraction is supported by "some evidence" under *Hill*.

Barstad next makes several claims to the effect that he was denied an impartial hearing because he was not allowed to present a defense by confronting witnesses or accessing the confidential information, and that the prison superintendent made an unconstitutional delegation of his authority by declining to reopen the investigation and instead forcing the hearing officer to find him guilty of the infraction without any evidence.

In the prison disciplinary setting, inmates have no constitutional right to confront or cross-examine witnesses. *Wolff v. McDonnell*, 418 U.S. at 567-69; *In re Pers. Restraint of Burton*, 80 Wn. App. 573, 586, 910 P.2d 1295 (1996). Inmates are not granted an unrestricted right to call witnesses because of the "obvious potential for disruption and for interference with . . . the correctional program of the institution."

Wolff, 418 U.S. at 566. Allowing inmates to do so would only present greater hazards to the institutional interests of safety and security. *Id.* at 567. Hearing officers are given broad discretion to exclude witnesses from a disciplinary hearing. *Id.* A prison official may deny a witness whose testimony would be irrelevant or unnecessary. *Id.*; *see* WAC 137-28-300(7).

Barstad testified at the hearing and gave his version of the incident. His requested witness Lt. Farnsworth provided a statement. In light of Barstad's testimony and the investigative file materials that included Lt. Farnsworth's victim interview summary, Barstad's proposed questions of the victim about his opinion as to Barstad's intent and whether he was scared of Barstad were not necessary to his defense. *See* WAC 137-28-300(7) (offender may submit proposed questions to be asked of witnesses, but the hearing officer may exclude questions that are irrelevant or unnecessary to the adequate presentation of the offender's case). And Barstad had no right to see the confidential information or to confront any confidential witness. *See Zimmerlee v. Keeney*, 831 F.2d 183, 186 (9th Cir. 1987) (due process does not require that an informant's identity be revealed to an inmate). Moreover, as discussed above, the alleged retaliatory motives of the purported anonymous witness are of no moment to Barstad's defense that the incident did occur but was mere horseplay.

In these circumstances, Barstad was not denied the opportunity to present his defense. His claim that he was denied a fair and impartial hearing is an unsupported

conclusory allegation that does not command further review. *In re Pers. Restraint of Cook*, 114 Wn.2d 813-14, 792 P.2d 505 (1990).

Finally, upon conclusion of the disciplinary hearing, the hearing officer initially recommended the investigation be reopened because it was inconclusive whether Barstad made actual physical contact with the victim's buttock. (DOC Response, Exhibit 1, Attachment F at 3) The superintendent deemed additional investigation unnecessary. The superintendent's designee upheld the hearing officer's findings that the evidence established an attempt to commit the 637 infraction, which is the same as having committed the infraction. The hearing officer made independent findings of guilt based upon the evidence considered at the hearing. There was no unconstitutional delegation of authority by the superintendent.

Barstad does not present an arguable basis for collateral relief either in fact or law, given the constraints of the personal restraint petition vehicle. *In re Pers. Restraint of Khan*, 184 Wn.2d 679, 686-87, 363 P.3d 577 (2015). He fails his burden under *Grantham* and *Reismiller*.

Accordingly, the petition is dismissed as frivolous pursuant to RAP 16.11(b).

ROBERT LAWRENCE-BERREY
ACTING CHIEF JUDGE

Renee S. Townsley
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July 3, 2017

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CASE # 347788
Personal Restraint Petition of James Barstad
SPOKANE COUNTY SUPERIOR COURT No. 961013103

Counsel and Mr. Barstad:

Enclosed is a copy of the Order Dismissing Personal Restraint Petition filed by this Court today in the above-referenced case.

In accordance with RAP 16.14(c) and RAP 13.5 A, review of this Order may be obtained only by filing a Motion for Discretionary Review in the Washington State Supreme Court within 30 days after the filing of this Order. A copy must be filed with the Court of Appeals.

The address for the Washington State Supreme Court is Temple of Justice, P. O. Box 40929, Olympia, WA 98504-0929.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:bls
Enclosure