

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*

500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>



March 25, 2014

**E-mail**

Timothy Norman Lang  
Aaron Michael Williams  
Office of the Attorney General  
PO Box 40116  
Olympia, WA 98504-0116

Dustin Gene Abrams  
#871623  
Washington State Penitentiary  
1313 N. 13th Avenue  
Walla Walla, WA 99362

CASE # 319547  
Personal Restraint Petition of Dustin Gene Abrams  
GRANT COUNTY SUPERIOR COURT No. 051004544

Dear Counsel and Mr. Abrams:

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), (b) and (c), 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:pb  
Enc.

**FILED**  
**MARCH 25, 2014**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>In the Matter of the Personal Restraint</b>	)	<b>No. 31954-7-III</b>
<b>of:</b>	)	
	)	
<b>DUSTIN GENE ABRAMS,</b>	)	<b>ORDER DISMISSING PERSONAL</b>
	)	<b>RESTRAINT PETITION</b>
	)	
<b>Petitioner.</b>	)	
	)	

Dustin Abrams seeks relief from personal restraint in the form of 75 days lost good time credit after a Department of Corrections (DOC) hearing officer found him guilty in separate disciplinary proceedings of serious prison infractions under WAC 137-25-030 (505) (fighting with any person), and (633) (assault on another offender).

The infractions stemmed from two incidents that occurred in and around a porter closet on the morning of July 25, 2013. The incident resulting in the 505 infraction is described in an Initial Serious Infraction Report submitted that day by corrections officer Eric Otto, and an accompanying incident report from corrections counselor Brian Gipson. At approximately 9:00 a.m., they investigated a loud thud coming from the porter closet

No. 31954-7-III  
*PRP of Abrams*

and observed offenders Mendez-Barragan and Abrams fighting and grappling with each other. Officer Otto ordered them to stop fighting and get on the ground. They complied and were placed in restraints. (DOC Response, Exhibit 2, Attachment A) Just prior to the fight, Mr. Gipson had observed offenders Abrams and Rodriguez inside the porter closet. Abrams was noticeably angry. Rodriguez was getting a mop and bucket and said, "It wasn't me. I wasn't me." Mendez-Barragan was at the closet doorway and was told to back away. (Exhibit 2, Attachment C) Later that morning, Officer Richard Robideau reviewed video footage that also showed Abrams hitting Rodriguez with his fist while Rodriguez was in the porter closet putting water in his mop bucket. Rodriguez did not fight back or attempt to strike Abrams. (Exhibit 2, Attachment F)

Officer Otto's Initial Serious Infraction Report charged Mr. Abrams with 505 and 633 infractions, but the document factually described only the fight between Abrams and Mendez-Barragan and not the incident involving Abrams and Rodriguez. On July 26, 2013, Mr. Abrams received a copy of the Disciplinary Hearing Notice/Appearance Waiver informing him of the charges and explaining his due process rights. (DOC response, Exhibit 2, Attachment B) He requested a witness statement from Mendez-Barragan. (*Id.*) At his disciplinary hearing held on July 31, Mr. Abrams pleaded not guilty to both infractions and gave no statement in his defense. Based upon staff written testimony that he was fighting with another offender and video footage showing the fight, the hearing officer found him guilty of the 505 infraction. The hearing officer dismissed

No. 31954-7-III  
*PRP of Abrams*

the 633 infraction without comment. The hearing officer imposed sanctions of 15 days segregation (with credit for 7 days served since July 25) and 45 days loss of good time. The hearing officer gave as a reason for the sanctions that they were within DOC guidelines. (Exhibit 2, Attachment D) Mr. Abrams received a written copy of the hearing officer's decision. (*Id.*)

On August 9, 2013, Officer Robideau submitted a second Initial Serious Infraction Report, recharging Mr. Abrams with a 633 infraction for striking Rodriguez. (Exhibit 2, Attachment F) On August 12, Mr. Abrams received a copy of the Disciplinary Hearing Notice/Appearance Waiver informing him of the charges and explaining his due process rights. He requested witness statements from both Rodriguez and Officer Robideau. (Exhibit 2, Attachment G) At his disciplinary hearing held on August 14, Mr. Abrams pleaded not guilty to the infraction and stated in his defense that Rodriguez did fight back. Based upon staff written testimony that Mr. Abrams assaulted another offender and video footage showing the assault, the hearing officer found him guilty of the 633 infraction. The hearing officer imposed a sanction of 30 days loss of good time, reasoning that the sanction was within DOC guidelines. Mr. Abrams received a written copy of the hearing officer's decision. (Exhibit 2, Attachment D) 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.*

No. 31954-7-III  
*PRP of Abrams*

*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). As discussed, Mr. Abrams received all of these indicia of due process for both of his disciplinary proceedings.

Mr. Abrams nevertheless claims that due his process rights were violated and both infractions must be expunged because neither of his disciplinary hearings was held within three days of when he was placed in pre-hearing confinement—contrary to the requirements of DOC Policy 460.000, section VI. A. and E.

Subsection VI. A. refers to a flowchart attached to the policy that outlines the serious infraction process and timeframes. (DOC Policy 460.000, section VI. A., Attachment 3) The flowchart and subsection VI. E. state that when an offender is in pre-hearing confinement, the hearing will be scheduled within 3 working days of placement

No. 31954-7-III  
*PRP of Abrams*

unless extended by the superintendent. Mr. Abrams contends the policy's directive use of the term "will" created a liberty interest that was denied him because he was placed in pre-hearing confinement on July 25, and without superintendent approval his two disciplinary hearings were not held until July 31 and August 14. His claim fails.

Comment 1 to the flowchart states: "Per WAC 137-28, the time limitations contained in the flowchart are not jurisdictional and failure to adhere to any particular regulation will not be grounds for automatic reversal of a disciplinary hearing." (DOC Policy 460.000, Attachment 3) The regulation pertinent to the reference in the flowchart is WAC 137-28-140. It states that the rules in that chapter "provide a standardized system to determine whether misconduct by an inmate of an adult correctional institution has occurred . . . ." *Id.* It also states that the rules set forth procedural guidelines and "[d]o not create any procedural or substantive rights in any person, including any liberty interests in time credits, levels of custody, classification status or other privileges." WAC 137-28-140. It further states: "In accordance with Washington statutes, such matters are governed solely by the discretion of the department of corrections." *Id.*

Thus, based upon the language of the policy and its governing regulation, the time parameters are not outcome determinative and do not give prisoners who are placed in prehearing confinement a liberty interest in receiving a disciplinary hearing within three days. *See In re Pers. Restraint of Cashaw*, 123 Wn.2d 138, 145, 866 P.2d 8 (1994) (State regulations that establish procedures for official decision making do not create liberty

No. 31954-7-III  
*PRP of Abrams*

interests; only substantive laws can create these interests) (citing *Olim v. Wakinekona*, 461 U.S. 238, 250-51, 103 S. Ct. 1741, 75 L. Ed. 2d 813 (1983)). At most, Mr. Abrams shows only procedural violations that were not “so arbitrary and capricious as to deny [him] a fundamentally fair proceeding so as to work to [his] prejudice.” *In re Pers. Restraint of Grantham*, 168 Wn.2d at 215. His due process claim is without merit.

Mr. Abrams next claims his Fifth Amendment right against double jeopardy was violated after he was first found not guilty of the 633 infraction for the July 25 incident, but was again written up and found guilty for the identical 633 infraction. This claim also fails.

Contrary to Mr. Abrams’s contention, the hearing officer at the July 31 hearing only dismissed the 633 infraction without comment and did not make a “not guilty” finding.<sup>1</sup> Moreover, in finding Mr. Abrams guilty of the 505 fighting infraction, the hearing officer did not consider the evidence pertaining to the Rodriguez assault. In any event, the double jeopardy clause is limited to criminal prosecutions, and prison disciplinary proceedings are not criminal prosecutions or judicial proceedings but are civil and remedial in nature. *In re Pers. Restraint of Higgins*, 152 Wn.2d 155, 163, 95 P.3d 330 (2004). Thus, “the DOC’s rehearing of [a] petitioner’s disciplinary infraction hearing does not violate double jeopardy.” *Id.* at 163. *Higgins* forecloses Mr. Abrams’s

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<sup>1</sup> While not disclosed in the record, the dismissal was perhaps due to lack of notice in the July 25 infraction report of facts to support a 633 infraction involving Rodriguez.

No. 31954-7-III  
*PRP of Abrams*

double jeopardy claim.

Mr. Abrams makes no claim entitling him to relief in a personal restraint petition.

He fails his burden under *Grantham*.

Accordingly, the petition is dismissed as frivolous. RAP 16.11(b).<sup>2</sup>

DATED: March 25, 2014



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**KEVIN M. KORSMO**  
**CHIEF JUDGE**

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<sup>2</sup> The court waives the filing fee for this petition based upon Mr. Abrams's indigence. RAP 16.8(a).