RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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JOSHUA O'HARA CARGILL
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Spokane, WA 99201

CASE #: 75018-6-I
Personal Restraint Petition of Joshua O'Hara Cargill

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5A."

This court's file in the above matter has been closed.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

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enclosure

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 75018-6-I
JOSHUA O'HARA CARGILL,	)	ORDER OF DISMISSAL
Petitioner.	)	

Joshua Cargill filed this personal restraint petition challenging the sanctions imposed by the Department of Corrections (DOC) following a prison disciplinary action. In order to obtain relief in this setting, Cargill must demonstrate that he is being "restrained under RAP 16.4(b) and that the restraint is unlawful under RAP 16.4(c)." In re Pers. Restraint of Grantham, 168 Wn.2d 204, 227 P.3d 285, 290 (2010) (quoting In re Pers. Restraint of Isadore, 151 Wn.2d 294, 298, 88 P.3d 390 (2004)). Because Cargill fails to meet this burden, his petition is dismissed.

On September 8, 2014, a corrections officer observed Cargill sitting on his lower bunk facing the wall and a flashing light coming from the area. When questioned, Cargill admitted to creating sparks by rubbing two batteries together in order to light incense. The officer directed Cargill to stay at the front of his cell and not touch anything. However, Cargill grabbed something from a box on his cell table and flushed it down the toilet. While being questioned, Cargill did not verbally respond or would only provide a one or two word response. Upon suspicion that Cargill had something in his mouth, officers searched and located a balloon under his tongue. Cargill was placed in administrative segregation and released on September 25, 2014 pending investigation.

The contents of the balloon were sent to the Washington State Patrol crime lab. On October 29, 2014, DOC received the toxicology report stating the contents

tested positive for methamphetamine. On November 3, 2014, Cargill was placed in pre-hearing confinement and infracted for violating WAC 137-25-030 (603) (possession, introduction, use, or transfer of any narcotic, controlled substance, illegal drug, unauthorized drug, mind altering substance, or drug paraphernalia). The infraction report reads:

> This infraction serves as the conclusion to an investigation into narcotics possession and comes now as a result of the toxicology test that was performed by the Washington State Patrol and the results of that test that the IIU was waiting on. On 9/08/14 at 0430 hours Offender Cargill, Joshua #788283 was caught arcing in his cell by staff. When Cargill was directed by staff not to leave the cell front he ignored the directive by walking away, grabbing items off his table and flushing them down the toilet. The suspected reason to take these actions are due to the fact that Cargill was disposing of contraband that he didn't want staff to find. When staff brought Cargill out of his cell to pat search him he was discovered to have a clear balloon containing a brownish-yellow liquid concealed under his tongue. The balloon was confiscated and logged into CRCC / MSC evidence locker #106 to be tested by the IIU. On 9/08/14 at 0800 hours I retrieved the substance from evidence locker #106 and transported it to the IIU office evidence lockers. On 9/17/14 I mailed the substance out to the Washington State Patrol Crime Lab to have a toxicology test conducted. On 10/29/14 I received a toxicology report back from the WSP Crime Lab. Following a gas chromatography/mass spectrometry test, the toxicology report confirms that the substance Cargill had concealed under his tongue tested positive for methamphetamine. By being in possession of methamphetamine, Cargill is guilty of a 603 WAC violation for possession of narcotics.

A disciplinary hearing was held on November 10, 2014. Cargill requested a witness statement from one corrections officer, Shawn Nissen. However, Nissen returned his witness statement form responding that he had no personal knowledge of the incident because happened at a time that he was not working. At the hearing, Cargill requested a witness statement from his chemical

dependency counselor, Keith Schmaljohn. The hearing officer denied the statement on the grounds that Schmaljohn had no exculpatory evidence to provide. Cargill testified on his own behalf at the hearing and admitted that the balloon contained urine that he planned to use in order to pass a drug test. Based on the infraction report, toxicology test and photos, the hearing officer found Cargill guilty of the infraction and sanctioned him with 15 days of lost good conduct time, 15 days of administrative segregation, 30 days lost visitation and 20 days lost recreation time.

Review of prison disciplinary proceedings is limited to a determination of whether the action taken was so arbitrary and capricious as to deny the inmate a fundamentally fair proceeding. In re Pers. Restraint of Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984). A disciplinary proceeding is not arbitrary and capricious if the inmate was afforded the applicable minimum due process protections and the decision was supported by at least some evidence. In re Pers. Restraint of Krier, 108 Wn. App. 31, 38, 29 P.3d 720 (2001). Due process requires that an inmate facing a disciplinary hearing receive adequate notice of the alleged violation, an opportunity to present documentary evidence and call witnesses when not unduly hazardous to institutional safety and correctional goals, and a written statement of the evidence relied upon and the reasons for the disciplinary action. In re Pers. Restraint of Gronquist, 138 Wn.2d 388, 396-97, 978 P.2d 1083 (1999). The evidentiary requirements of due process are satisfied if there is "some evidence" in the record to support a prison disciplinary decision. In re Pers. Restraint of Johnston, 109 Wn.2d 493, 497, 745 P.2d 864 (1987)

(quoting Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445, 455-56, 86 L. Ed. 2d 356, 105 S. Ct. 2768 (1985)). There must be "some reasonable connection between the evidence and the inmate in order to support actions taken by the prison disciplinary board." In re Pers. Restraint of Anderson, 112 Wn.2d 546, 549, 772 P.2d 510 (1989). This court will not re-weigh the evidence considered by the hearing officer. Johnston, 109 Wn.2d at 497.

Cargill first asserts that DOC violated its own policies and administrative regulations when it failed to timely provide him with an interview review of his placement in administrative segregation. WAC 137-32-015 provides that when an offender is placed in administrative segregation, an intermediate review must be conducted within 14 days of an initial review. Cargill had an initial review on September 10, 2014. It does not appear that Cargill had an intermediate review on September 24 as required, but Cargill was released from administrative segregation on September 25. Because Cargill is no longer under any cognizable "restraint" or "disability" as a result of the alleged error, the claim is moot. In re Pers. Restraint of Cross, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983) (a claim is moot if the court can provide no effective relief).

Cargill next claims that the disciplinary hearing was continued and that he did not receive notice of the continuance. He contends that because he was placed in pre-hearing confinement on November 3, 2014, the hearing was required to be held on November 6, but was not held until November 10. But WAC 127-28-290(3) provides that, for an offender placed in pre-hearing confinement, "the hearing will be had within three business days of service of the

infraction report...unless...the hearing is continued in writing by the hearing officer." Cargill fails to establish that the brief continuance violated the statute or due process.

Cargill next argues that DOC staff mishandled evidence. He contends that the chain of custody log shows that there were periods of time that the urine sample was "unaccounted for." Cargill also asserts that the length of time between when the sample was taken and when it was tested could have affected the results. But a petitioner in a personal restraint petition must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief, and may not rest on mere speculation. In re Pers. Restraint of Rice, 118 Wn. 2d 876, 886, 828 P.2d 1086 (1992). Cargill does not provide sufficient evidence to support these assertions.

Cargill contends that he was denied due process because staff refused to provide him with a copy of the chain of custody form. But while an offender facing a disciplinary hearing is entitled to a summary of supporting evidence, he or she does not have a constitutional or statutory right to examine physical evidence. See WAC 137-28-285(2)(d).

Cargill argues that he was denied the opportunity to present witness statements from Nissen or Schmaljohn in his defense. But Niessen had no knowledge of the actual events that occurred since they did not occur during his shift. Cargill did not request a witness statement from Schmaljohn until the hearing, and the hearing officer determined that Schmaljohn's testimony would not be relevant. See WAC 137-28-285(1)(f) (an offender has the right to "call

witnesses and present documentary evidence" but "the hearing officer may exclude witnesses/evidence deemed irrelevant, duplicative or unnecessary.")

Cargill argues that he was denied a fair and impartial hearing because the hearing officer communicated about the case via email to other DOC staff members. But the emails that Cargill attaches to his petition do not appear to have been sent by the hearing officer, and they are dated after the disciplinary hearing took place.

Finally, Cargill argues that an investigator disparaged him and insinuated that Cargill was stupid. Cargill appears to take issue with a statement in the investigator's report that "[w]hen interviewed by the IIU, Cargill exhibited very erratic behavior and had trouble comprehending the simplest of questions." But this appears to be a factual statement based on the investigator's observations, not an intent to ridicule Cargill.

Cargill makes no showing that he was denied a fundamentally fair proceeding or that the finding of guilt was based on less than constitutionally sufficient evidence. Moreover, Cargill fails to demonstrate that DOC failed to follow its own policies. Consequently, the petition is dismissed. Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 7th day of March, 2017.

Trickey, ACJ
Acting Chief Judge