

# **Prison-Initiated Disciplinary Process Recommendations**

**October 30, 2023**

**Office of the Corrections Ombuds**  
P.O. Box 40009 | Olympia, Washington 98504  
Confidential Hotline: 360-664-4749 | <https://oco.wa.gov>

**INTEGRITY • RESPECT • COLLABORATION • EQUITY • COURAGE**

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## Summary

Prison-initiated disciplinary concerns consistently rank among the most common types of complaints received by the Office of the Corrections Ombuds. Of these complaints, a significant number relate to concerns regarding the fairness of the process of determining guilt in disciplinary proceedings.

The WA Department of Corrections' (WA DOC) current disciplinary process for prisons policy has not substantively changed for more than twenty years, but the department and community attitudes toward restorative justice and rehabilitation have evolved considerably in the meantime. While the Office of the Corrections Ombuds (OCO) recognizes that the prison hearing process is not a criminal legal proceeding, incarcerated individuals still have some due process rights when serious infractions are involved.<sup>1</sup> The WA DOC commitment to a system-wide cultural shift calls for a wholesale re-imagining of its disciplinary procedures. Additionally, research and understanding of individuals with past trauma and mental health issues within incarcerated populations call for a new way of thinking.

After more than four years of case investigations, individual resolutions, policy reviews, and discussions with WA DOC staff and leadership, on September 14, 2023, the OCO made two broad recommendations to improve the WA DOC's disciplinary process: (1) Change the "some evidence" standard to a "preponderance of the evidence" standard and (2) Enforce the infraction review policy as outlined in WAC 137-28-270 and DOC Policy 460.000(II)(2). Unfortunately, WA DOC appears unwilling to make these needed changes to its prison-initiated disciplinary process.

Currently, WA DOC is engaged in forward-thinking initiatives such as AMEND and Reentry 2030, and has announced its goal to reduce solitary confinement by 90 percent over the next five years. WA DOC claims to be a progressive corrections system and prides itself on being a leader in corrections nationwide. Yet, WA DOC misses the mark when it comes to its prison-initiated disciplinary process. By remaining committed to only relying on "some evidence" as its standard to uphold prison-initiated disciplinary infractions, WA DOC trails behind Oregon, California, Hawaii, and Alaska. Even Texas, which lacks the prison reform structure that the WA DOC is implementing, utilizes a preponderance of the evidence standard.

Without additional intervention, such as legislative or legal action, we believe that the current WA DOC disciplinary process will continue to negatively impact the health, safety, welfare, and rehabilitation of all incarcerated individuals. In alignment with our vision of a more humane and transparent Washington corrections system, we publish this report to demonstrate the wide gap between the OCO's recommendation and the current WA DOC policy.

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<sup>1</sup> *Wolff v. McDonnell*, 418 U.S. 593 (1974).

## OCO Recommendations

### Recommendation #1: Change the “some evidence” standard to a “preponderance of the evidence” standard.

- **The evidentiary standard used by DOC erodes trust in the system.**

The evidentiary standard used by the Department in disciplinary proceedings is the very low “some evidence” standard. To find an incarcerated person guilty of an infraction, DOC need only offer “some evidence” to support its assertion of guilt. In many complaints reviewed by the OCO, the “some evidence” that is offered by the Department consists only of the statement of one staff person. Even when an incarcerated person’s countervailing evidence is significant and convincing, the “some evidence” standard allows a hearings officer to disregard it entirely in favor of the staff statement.

Use of this low standard of evidence results in individuals being infraacted with minimal evidence to substantiate the infraction. This often arises in “they said, they said” situations where reports of multiple incarcerated people are not enough to outweigh a staff person’s statement (“some evidence”) to the contrary. Decisions perceived as unjust breed distrust among the incarcerated population, undermining the efforts of the Department to create a safer and more humane system.

- **The “some evidence” standard is not articulated in DOC policy.**

DOC policy does not identify the “some evidence” standard as the evidentiary standard used by the Department. No explanation of the applicable evidentiary standard exists in DOC 460.000 Disciplinary Process for Prisons, the extensive policy that would likely be the first resource to reference in seeking that information. Curiously, the standard does appear in the Statewide Orientation Handbook provided to incarcerated people at reception. This document states “[t]he standard of evidence for a guilty finding is ‘Some Evidence’ and you will be provided a summary of evidence.” The Handbook provides no definition of “some,” nor does it provide examples.

- **The standard is left up to the hearings officer’s discretion.**

Because the “some evidence” standard has not been incorporated into policy and has been left undefined, hearings officers have a tremendous amount of discretion when evaluating evidence. As a result, assessment of evidence and the resulting decisions vary considerably across the system. Some hearings officers take “some evidence” to mean one staff person’s statement is sufficient to meet the standard, while another may require physical evidence such as video to corroborate a staff statement. The inconsistencies of the prison-initiated disciplinary process throughout the state further erode trust in the system.

- **Many other US states use a more robust evidentiary standard than “some evidence.”** Washington DOC trails behind other states in its application of this low evidentiary standard. Many other states’ prison systems employ a “preponderance of the evidence” evidentiary standard. Oregon, for example, weighs the evidence to determine the outcome of the hearing.<sup>2</sup> Similarly, Hawaii applies a preponderance of the evidence standard, carefully differentiating this standard from a “beyond a reasonable doubt” standard.<sup>3</sup> Minnesota, Massachusetts, and Vermont also use a preponderance of the evidence standard.<sup>456</sup>

**Recommendation #2: Enforce the infraction review policy as outlined in WAC 137-28-270 and DOC Policy 460.000(II)(2).**

- **The current implementation of the infraction review procedure allows infractions that do not meet the WAC elements to be upheld until they are dismissed at the hearing.**

WAC 137-28-270 and DOC Policy 460.000(II)(2) require that serious infractions undergo review by an infraction review officer who will assess and evaluate the accuracy of the infraction packet. Infraction reviewers are tasked with verifying the incident, confirming appropriateness of the violation charged, ensuring the thoroughness of the packet information, and verifying the supporting documents are included and that all evidence was collected, photographed, and handled correctly. Additionally, the WAC allows the infraction review officer the opportunity to recommend referral to a mental health professional. Despite these requirements, the OCO routinely receives complaints where it appears that no review was conducted.

- **A meaningful review process could result in fewer hearings for DOC to manage and less time spent in administrative segregation (solitary confinement) for individuals awaiting their prison-initiated disciplinary hearings.**

If infraction reviewers more often identified unwarranted infractions at the review level, the need for some hearings would be eliminated. Fewer hearings could mean that DOC would be able to schedule hearings more swiftly, thereby avoiding extended wait times for incarcerated individuals housed in administrative segregation (solitary confinement).

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<sup>2</sup> [Oregon Secretary of State Administrative Rules](#)

<sup>3</sup> [COR.13.03 MISCONDUCT ADJUSTMENT PROCESS.PDF \(hawaii.gov\)](#)

<sup>4</sup> [410.01 FACILITY RULES AND INMATE DISCIPLINE \(vermont.gov\)](#)

<sup>5</sup> [103 CMR 430 \(mass.gov\)](#)

<sup>6</sup> [410.01 FACILITY RULES AND INMATE DISCIPLINE \(vermont.gov\)](#)

- **Implementation of an infraction checklist at the review stage could ensure that all reviewed infractions meet the requirements identified in the WAC.**  
Regular reviews and the use of a checklist would help to ensure consistency of review across the system. Consistent reviews would also serve as a source of feedback to staff writing infractions. Additionally, a checklist would help to ensure that the minimum requirements of each WAC violation are met before the infraction is approved by the reviewer and passes to the hearing stage.

## DOC Response

“The Department has a responsibility to ensure the safety and security of all staff and incarcerated individuals in our care and custody. The disciplinary process is a critical component of the agency’s ability to safeguard individuals through an internal due process. The “some evidence” standard has been determined an appropriate standard by the United States Supreme Court and is utilized by Corrections departments in over 40 states. ‘Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances.’<sup>7</sup> These standards being in place allow the Department the opportunity to act quickly, which supports the agency’s efforts to ensure the safety and wellbeing of the incarcerated population and the staff in our facilities. Under policy 460.000 Disciplinary Process for Prisons, incarcerated individuals may appeal a disciplinary action, providing an opportunity to have their infraction reviewed by the appropriate superintendent/designee. During this review, the superintendent/designee will evaluate the evidence presented as well as all relevant information necessary to reach a determination, including:

- a) Affirming the decision and/or sanction(s),
- b) Affirming the decision and reducing sanction(s),
- c) Dismissing/modifying downward the decision and sanction(s),
- d) Reversing/vacating the decision, or
- e) Remanding the matter for a new hearing.

1. The severity of the original sanction may not be increased.”

### DOC Response to OCO Recommendation #1

The “some evidence” standard has been ruled as an appropriate standard and supported as lawful by both the United States Supreme Court and the Washington Supreme Court.<sup>8</sup> Through an internal review, the Department has determined this standard is utilized by the majority of US correctional agencies.

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<sup>7</sup> *Superintendent v. Hill*, 472 U.S. 445 (1985)

<sup>8</sup> *Petition of Johnston*, 109 Wn.2d 493 (1987)

To ensure the appropriate use of the “some evidence” standard, the Department requires all hearings staff to participate in a disciplinary hearings officer training, which includes an explanation of the “some evidence” standard and has incorporated this language within the Offender handbook. While the Department does not include definitions in agency policy, we do recognize how a readily available definition may be beneficial to staff and the disciplinary process. The Department will work to create a job aid to be made available to staff, reinforcing that the “some evidence” standard requires an impartial review of all evidence, and that a guilty finding must be supported by credible evidence.

### **DOC Response to OCO Recommendation #2**

Regarding the agency’s enforcement of the infraction review policy, the Department requires staff to complete a disciplinary hearings officer training in order to review serious infractions. The Department also requires every infraction review to include the use of an infraction checklist to ensure thoroughness.

Every infraction requires the use of an Infraction Checklist. This checklist is not required to be included in the packets that are presented to the incarcerated population. This may cause the perception that a checklist was not utilized. The Department will consider creating a consistent practice of including the checklist in the materials presented to the incarcerated population following a completed disciplinary process.

Staff are required to complete a disciplinary hearings officer training in order to review serious infractions. This training includes training of the proper use of the infraction checklist. This training is only required to be completed once. The agency will be working with the Training and Development Unit to work to create a refresher training that can be assigned to staff, reinforcing best practices.

Pursuant to policy 460.000 Disciplinary Process for Prisons, the infraction appeals process should be utilized by the incarcerated individual if they believe an infraction was not appropriately reviewed.

### **OCO Response to the DOC’s October 17, 2023 Letter**

The OCO appreciates the DOC’s response to the OCO’s recommendations and recognizes that the prison-initiated disciplinary process is a critical component of the DOC’s ability to safeguard individuals who live and work inside its facilities. However, the OCO disagrees with the DOC’s rationale for maintaining the “some evidence” standard and its unwillingness to change to a preponderance of evidence standard.

The DOC quotes *Petition of Johnson*, 109 Wn.2d 493 (1987) as the Washington Supreme Court decision that supports the lawful usage of the “some evidence” standard as the appropriate standard to be used in prison-initiated disciplinary proceedings. The OCO questions whether the holding of this case aligns with the values that the DOC aspires to today. *Johnson* states that “ascertaining whether this standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence.” This highlights the concerns the OCO has regarding the “some evidence” standard not requiring a full examination of the situation, or the evidence presented before determining finding of guilt. The case goes on to say “the relevant question is whether there is any evidence in the record that could support the conclusion” which equates the “some evidence” standard to the “any evidence” test.

The DOC also quotes *Superintendent v. Hill*, 472 U.S. 445 (1985) as the US Supreme Court decision that supports the “some evidence” standard at the federal level. This case set the floor for the standard of evidence required to meet the due process requirements identified in *Wolff v. McDonnell*, 418 U.S. 539 (1974). The OCO questions the DOC’s decision to continue to accept this minimum standard.

Washington DOC purports to be a progressive corrections system and prides itself on being a leader in corrections nationwide. Currently, the WA DOC is engaged in forward-thinking initiatives such as AMEND and Reentry 2030, and has announced its goal to reduce solitary confinement by 90 percent over the next five years. Yet the WA DOC misses the mark when it comes to its prison-initiated disciplinary system.

Washington DOC remains a hold-out when it comes to the standard of evidence used to uphold disciplinary infractions in comparison to other states. Oregon, for example, weighs the evidence to determine the outcome of the hearing.<sup>9</sup> Similarly, Hawaii applies a preponderance of the evidence standard, carefully differentiating this standard from a “beyond a reasonable doubt” standard.<sup>10</sup> Even states such as Texas which lack the prison reform structure that the Washington DOC is implementing, utilize a preponderance of the evidence standard.<sup>11</sup> Similarly, Alaska states that a “prisoner cannot be found guilty of an alleged infraction unless the hearing officer or a majority of the disciplinary committee, as applicable, is convinced from the evidence presented at the hearing that the prisoner's guilt is established by a preponderance of the evidence.”<sup>12</sup>

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<sup>9</sup> [Oregon Secretary of State Administrative Rules](#)

<sup>10</sup> [COR.13.03 MISCONDUCT ADJUSTMENT PROCESS.PDF \(hawaii.gov\)](#)

<sup>11</sup> [Disciplinary Rules and Procedures for Offenders \(texas.gov\)](#)

<sup>12</sup> [Section 22 AAC 05.455 - Rules of evidence in disciplinary hearings; lesser included infractions, 22 Alaska Admin. Code § 05.455 | Casetext Search + Citor](#)



The WA DOC is incorrect in its statement issued in the October 17, 2023 response letter. The DOC states that the “some evidence” standard is “utilized by Corrections departments in over 40 states.” This is an inaccurate number.

The following **17** states utilize a preponderance of the evidence standard: Alaska<sup>13</sup>, California<sup>14</sup>, Colorado<sup>15</sup>, Hawaii<sup>16</sup>, Indiana<sup>17</sup>, Kansas<sup>18</sup>, Massachusetts<sup>19</sup>, Michigan<sup>20</sup>, Minnesota<sup>21</sup>, New Mexico<sup>22</sup>, Oregon<sup>23</sup>, Pennsylvania<sup>24</sup>, South Carolina<sup>25</sup>, Tennessee<sup>26</sup>, Texas<sup>27</sup>, Vermont<sup>28</sup>, and Virginia<sup>29</sup>. **Three** states (as indicated with a \* in the table below) use a “more probable than not” or substantial evidence standard which is akin to a preponderance of the evidence standard. This list includes Arizona<sup>30</sup>, Nebraska<sup>31</sup>, and New Jersey<sup>32</sup>. Only **14** states, including Washington, specifically state in their correctional policy that they rely on a “some evidence” standard including: Alabama<sup>33</sup>, Arkansas<sup>34</sup>, Idaho<sup>35</sup>, Illinois<sup>36</sup>, Maryland<sup>37</sup>, Montana<sup>38</sup>,

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<sup>13</sup> [Section 22 AAC 05.455 - Rules of evidence in disciplinary hearings; lesser included infractions, 22 Alaska Admin. Code § 05.455 | Casetext Search + Citator](#)

<sup>14</sup> [Handbook-Chapter-5.pdf \(prisonlaw.com\)](#)

<sup>15</sup> [0150\\_01\\_02012023.pdf - Google Drive](#)

<sup>16</sup> [COR.13.03 MISCONDUCT ADJUSTMENT PROCESS.PDF \(hawaii.gov\)](#)

<sup>17</sup> [02-04-101-ADP-3-1-2020.pdf \(in.gov\)](#)

<sup>18</sup> [Microsoft Word - 11119 \(ks.gov\)](#)

<sup>19</sup> [103 CMR 430 \(mass.gov\)](#)

<sup>20</sup> [PrisonerDiscipline.pdf \(mi.gov\)](#)

<sup>21</sup> <https://policy.doc.mn.gov/DocPolicy/PolicyDoc?name=303.010.pdf>

<sup>22</sup> [CD-090100\\_English.pdf \(nm.gov\)](#)

<sup>23</sup> [Oregon Secretary of State Administrative Rules](#)

<sup>24</sup> [801 Policy \(pa.gov\)](#)

<sup>25</sup> [southcarolina-op2214.pdf \(prisonpolicy.org\)](#)

<sup>26</sup> [502-01.pdf \(tn.gov\)](#)

<sup>27</sup> [Disciplinary Rules and Procedures for Offenders \(texas.gov\)](#)

<sup>28</sup> [410.01 FACILITY RULES AND INMATE DISCIPLINE \(vermont.gov\)](#)

<sup>29</sup> [Microsoft Word - vadoc-op-861-1-rh.docx \(virginia.gov\)](#)

<sup>30</sup> [DO 803 - Inmate Disciplinary Procedure \(az.gov\)](#)

<sup>31</sup> [title\\_68\\_chapters\\_1-10.pdf \(nebraska.gov\)](#)

<sup>32</sup> [Section 10A:4-9.15 - Evidence required, N.J. Admin. Code § 10A:4-9.15 | Casetext Search + Citator](#)

<sup>33</sup> [Microsoft Word - disproc19 \(alabama.gov\)](#)

<sup>34</sup> [Rule 004.00.90-006 - Disciplinary Rules and Regulations, 004-00-90 Ark. Code R. § 6 | Casetext Search + Citator](#)

<sup>35</sup> [01 \(idaho.gov\)](#)

<sup>36</sup> [Ill. Admin. Code tit. 20, § 504.80 - Adjustment Committee Hearing Procedures | State Regulations | US Law | LII / Legal Information Institute \(cornell.edu\)](#)

<sup>37</sup> [Section 12.03.01.22 - Disciplinary Proceeding Procedures - Fact Finding and Decision Phase - Rendering the Decision, Md. Code Regs. 12.03.01.22 | Casetext Search + Citator](#)

<sup>38</sup> [MONTANA STATE PRISON \(mt.gov\)](#)

Nevada<sup>39</sup>, New York<sup>40</sup>, Ohio<sup>41</sup>, Oklahoma<sup>42</sup>, South Dakota<sup>43</sup>, Utah<sup>44</sup>, and West Virginia<sup>45</sup>. Furthermore, **16** states do not identify what standard is used for disciplinary proceedings in their correctional policies, including: Connecticut<sup>46</sup>, Delaware<sup>47</sup>, Florida<sup>48</sup>, Georgia<sup>49</sup>, Iowa<sup>50</sup>, Kentucky<sup>51</sup>, Louisiana<sup>52</sup>, Maine<sup>53</sup>, Mississippi<sup>54</sup>, Missouri<sup>55</sup>, New Hampshire<sup>56</sup>, North Carolina<sup>57</sup>, North Dakota<sup>58</sup>, Rhode Island<sup>59</sup>, Wisconsin<sup>60</sup>, and Wyoming<sup>61</sup>.

Thus, as it appears written in the accessible policies, **20** states utilize a preponderance of the evidence standard while **14** states, including Washington, utilize a “some evidence” standard. These numbers are reflected in the table below. As a result, Washington DOC remains in the minority of states that still rely on the minimum “some evidence” standard.

With this data in mind, the OCO encourages DOC to remain a leader in the field of corrections by adopting a preponderance of the evidence standard for its prison-initiated disciplinary hearings. As DOC’s September 2023 “Solitary Confinement Transformation Project” publication states, Washington DOC “is among the most creative, ambitious, and progressive Departments of Correction in the nation, capable of trailblazing efforts.” Indeed, the DOC’s goal to reduce the use of solitary confinement by 90 percent over the next five years aligns with that description. The Office of the Corrections Ombuds urges the Department of Corrections to embrace the opportunity to align its prison-initiated disciplinary program with this description as well.

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<sup>39</sup> [AR 707 - Offender Disciplinary Process.pdf \(nv.gov\)](#)

<sup>40</sup> [Directive 6500R-G - Disciplinary Due Process for Individuals in Custody.pdf \(nyc.gov\)](#)

<sup>41</sup> [Rule 5120-9-06 - Ohio Administrative Code | Ohio Laws](#)

<sup>42</sup> [Disciplinary Procedures \(oklahoma.gov\)](#)

<sup>43</sup> [Microsoft Word - Inmate Discipline System.doc \(sd.gov\)](#)

<sup>44</sup> [FD01 - Inmate Discipline - Procedure - Utah Department of Corrections \(UT\) - PowerDMS](#)

<sup>45</sup> [WV -32500 OCR.pdf \(umich.edu\)](#)

<sup>46</sup> [Microsoft Word - AD 9.5 Code of Penal Discipline \(2019.10.01\).docx \(prisonpolicy.org\)](#)

<sup>47</sup> [delaware-42.pdf \(prisonpolicy.org\)](#)

<sup>48</sup> [33-601.307 : Disciplinary Hearings - Florida Administrative Rules, Law, Code, Register - FAC, FAR, eRulemaking \(flrules.org\)](#)

<sup>49</sup> [105928 \(powerdms.com\)](#)

<sup>50</sup> [08-29-2018.201.50.21.pdf \(iowa.gov\)](#)

<sup>51</sup> [CPP 15.6.pdf \(ky.gov\)](#)

<sup>52</sup> [22v01-15.doc \(live.com\)](#)

<sup>53</sup> [Title 34-A, §3032: Disciplinary action \(maine.gov\)](#)

<sup>54</sup> [MISSISSIPPI DEPARTMENT OF CORRECTIONS \(ms.gov\)](#)

<sup>55</sup> [offender-rulebook-9-12-14.pdf \(mo.gov\)](#)

<sup>56</sup> [MANUAL \(prisonpolicy.org\)](#)

<sup>57</sup> [B-0200 01 19 22.pdf \(nc.gov\)](#)

<sup>58</sup> [NORTH DAKOTA CORRECTIONAL FACILITY RUES \(nd.gov\)](#)

<sup>59</sup> [11.01-8 Inmate Discipline - Final Version.pdf](#)

<sup>60</sup> [POLICY \(wi.gov\)](#)

<sup>61</sup> [Authority: \(prisonpolicy.org\)](#)

## Standards of Evidence Applied in Prison Disciplinary Hearings Across the United States

Preponderance of the Evidence	Standard Not Identified in Policy	Some Evidence
1. Alaska	1. Connecticut	1. Alabama
2. Arizona*	2. Delaware	2. Arkansas
3. California	3. Florida	3. Idaho
4. Colorado	4. Georgia	4. Illinois
5. Hawaii	5. Iowa	5. Maryland
6. Indiana	6. Kentucky	6. Montana
7. Kansas	7. Louisiana	7. Nevada
8. Massachusetts	8. Maine	8. New York
9. Michigan	9. Mississippi	9. Ohio
10. Minnesota	10. Missouri	10. Oklahoma
11. Nebraska*	11. New Hampshire	11. South Dakota
12. New Jersey*	12. North Carolina	12. Utah
13. New Mexico	13. North Dakota	13. Washington
14. Oregon	14. Rhode Island	14. West Virginia
15. Pennsylvania	15. Wisconsin	
16. South Carolina	16. Wyoming	
17. Tennessee		
18. Texas		
19. Vermont		
20. Virginia		

\* Use a “more probable than not” or substantial evidence standard which is akin to a preponderance of the evidence standard.

## Attachment 1: September 14, 2023 OCO Letter to the DOC



STATE OF WASHINGTON  
**OFFICE OF THE CORRECTIONS OMBUDS**  
P.O. Box 40009 • Olympia, Washington 98504 • (360) 664-4749

September 14, 2023

Cheryl Strange, Secretary  
Department of Corrections  
PO Box 41100  
Olympia, Washington 98504-1100

Secretary Strange:

The purpose of this letter is to inform the Department of Corrections of two recommendations that, in the ombuds' opinion, the Department should consider. Our September Monthly Outcome Report will include the summaries of investigations into disciplinary proceedings in which our office substantiated policy violations, Department of Corrections' staff mistakes, and unnecessary long administrative segregation placements. I request that the Department inform me of any action taken on the recommendations or the reason for not complying with the recommendations by October 14, 2023, so that we can publish the Department response with our September Monthly Outcome Report.

### **BACKGROUND**

Disciplinary concerns consistently rank among the most common types of complaints received by the Office of the Corrections Ombuds (OCO). Of these complaints, a significant number relate to concerns regarding the fairness of the process of determining guilt in disciplinary proceedings.

Department of Corrections' (DOC) current disciplinary process has not substantively changed since its inception in 1995, but DOC and community attitudes toward restorative justice and rehabilitation have evolved considerably in the meantime. While the OCO recognizes that the prison hearing process is not a criminal legal proceeding, incarcerated individuals still have some due process rights when serious infractions are involved.<sup>1</sup> DOC's commitment to a system-wide cultural shift calls for a wholesale re-imagining of its disciplinary procedures. Additionally, research and understanding of individuals with past trauma and mental health issues within incarcerated populations call for a new way of thinking.

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<sup>1</sup> Wolff v. McDonnell, 418 U.S. 593 (1974).

**INTEGRITY • RESPECT • COLLABORATION • EQUITY • COURAGE**

### **RECOMMENDATIONS**

After more than four years of case investigations, individual resolutions, policy reviews, and discussions with DOC staff and leadership, the OCO suggests the following two broad recommendations.

#### **RECOMMENDATION 1: Change the “some evidence” standard to a “preponderance of the evidence” standard.**

- **The evidentiary standard used by DOC erodes trust in the system.**

The evidentiary standard used by the Department in disciplinary proceedings is the very low “some evidence” standard. To find an incarcerated person guilty of an infraction, DOC need only offer “some evidence” to support its assertion of guilt. In many complaints reviewed by the OCO, the “some evidence” that is offered by the Department consists only of the statement of one staff person. Even when an incarcerated person’s countervailing evidence is significant and convincing, the “some evidence” standard allows a hearings officer to disregard it entirely in favor of the staff statement.

Use of this low standard of evidence results in individuals being infraacted with minimal evidence to substantiate the infraction. This often arises in “he said, she said” situations where reports of multiple incarcerated people are not enough to outweigh a staff person’s statement (“some evidence”) to the contrary. Decisions perceived as unjust breed distrust among the incarcerated population, undermining the efforts of the Department to create a safer and more humane system.

- **The “some evidence” standard is not articulated in DOC policy.**

DOC policy does not identify the “some evidence” standard as the evidentiary standard used by the Department. No explanation of the applicable evidentiary standard exists in DOC 460.000 Disciplinary Process for Prisons, the extensive policy that would likely be the first resource to reference in seeking that information. Curiously, the standard does appear in the Statewide Orientation Handbook provided to incarcerated people at reception. This document states “[t]he standard of evidence for a guilty finding is “Some Evidence”, and you will be provided a summary of evidence.” The Handbook provides no definition of “some,” nor does it provide examples.

- **The standard is left up to the hearings officer’s discretion.**

Because the “some evidence” standard has not been incorporated into policy and has been left undefined, hearings officers have a tremendous amount of discretion when evaluating evidence. As a result, assessment of evidence and the resulting decisions vary considerably across the system. Some hearings officers take “some evidence” to

mean one staff person's statement is sufficient to meet the standard, while another may require physical evidence such as video to corroborate a staff statement. The inconsistencies of the disciplinary process throughout the state further erode trust in the system.

- **Many other US states use a more robust evidentiary standard that “some evidence.”** Washington DOC trails behind other states in its application of this low evidentiary standard. Many other states' prison systems employ a “preponderance of the evidence” evidentiary standard. Oregon, for example, weighs the evidence to determine the outcome of the hearing.<sup>2</sup> Similarly, Hawaii applies a preponderance of the evidence standard, carefully differentiating this standard from a “beyond a reasonable doubt” standard.<sup>3</sup> Vermont and Massachusetts also use a preponderance of the evidence standard, noting the proponent of the disciplinary report has the burden of proving the offense by a preponderance standard.<sup>4 5</sup>

**RECOMMENDATION 2: Enforce the infraction review policy as outlined in WAC 137-28-270 and DOC Policy 460.000(II)(2).**

- **The current implementation of the infraction review procedure is allowing infractions that do not meet the WAC elements to be upheld until they are dismissed at the hearing.**  
WAC 137-28-270 and DOC Policy 460.000(II)(2) require that serious infractions undergo review by an infraction review officer who will assess and evaluate the accuracy of the infraction packet. Infraction reviewers are tasked with verifying the incident, confirming appropriateness of the violation charged, ensuring the thoroughness of the packet information, and verifying the supporting documents are included and that all evidence was collected, photographed, and handled correctly. Additionally, the WAC allows the infraction review officer the opportunity to recommend referral to a mental health professional. Despite these requirements, the OCO routinely receives complaints where it appears that no review was conducted.
- **A meaningful review process could result in fewer hearings for DOC to manage and less time spent in administrative segregation for individuals awaiting their disciplinary hearings.**  
If infraction reviewers more often identified unwarranted infractions at the review level, the need for some hearings would be eliminated. Fewer hearings could mean

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<sup>2</sup> [Oregon Secretary of State Administrative Rules](#)

<sup>3</sup> [COR.13.03 MISCONDUCT ADJUSTMENT PROCESS.PDF \(hawaii.gov\)](#)

<sup>4</sup> [410.01 FACILITY RULES AND INMATE DISCIPLINE \(vermont.gov\)](#)

<sup>5</sup> [103 CMR 430 \(mass.gov\)](#)

If infraction reviewers more often identified unwarranted infractions at the review level, the need for some hearings would be eliminated. Fewer hearings could mean that DOC would be able to schedule hearings more swiftly, thereby avoiding extended wait times for incarcerated individuals housed in administrative segregation.

- **Implementation of an infraction checklist at the review stage could ensure that all reviewed infractions meet the requirements identified in the WAC.**

Regular reviews and the use of a checklist would help to ensure consistency of review across the system. Consistent reviews would also serve as a source of feedback to staff writing infractions. Additionally, a checklist would help to ensure that the minimum requirements of each WAC violation are met before the infraction is approved by the reviewer and passes to the hearing stage.

The OCO is committed to providing a credible process for receiving, reviewing, and assisting in the resolution of issues as they arise within the DOC, and we hope you will accept and take positive action on our recommendations.

Sincerely,



Caitlin Robertson, PhD  
Director

cc: Sean Murphy, Deputy Secretary  
Don Holbrook, Assistant Secretary Men's Prisons Division  
Jeannie Darneille, Assistant Secretary Women's Prisons Division  
Scott Edwards, Assistant Secretary Budget, Strategy, and Technology  
Tomas Fithian, Senior Director – Correctional Operations

## Attachment 2: October 17, 2023 DOC Letter to the OCO



STATE OF WASHINGTON  
**DEPARTMENT OF CORRECTIONS**  
P.O. Box 41100 • Olympia, Washington 98504-1110

October 17, 2023

Dr. Caitlin Robertson  
Office of the Corrections ombuds  
PO Box 40009  
Olympia, WA 98504-1100

RE: Disciplinary Process

Dr. Robertson,

The Department of Corrections is in receipt of your letter pertaining to the agency's disciplinary process to include the "some evidence" standard utilized by the Department and the enforcement of the infraction review policy.

The Department has a responsibility to ensure the safety and security of all staff and incarcerated individuals in our care and custody. The disciplinary process is a critical component of the agency's ability to safeguard individuals through an internal due process. The "some evidence" standard has been determined an appropriate standard by the United States Supreme Court and is utilized by Corrections departments in over 40 states.

"Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances".<sup>1</sup>

These standards being in place allow the Department the opportunity to act quickly, which supports the agency's efforts to ensure the safety and wellbeing of the incarcerated population and the staff in our facilities.

Under policy 460.000 Disciplinary Process for Prisons, incarcerated individuals may appeal a disciplinary action, providing an opportunity to have their infraction reviewed by the appropriate superintendent/designee. During this review, the superintendent/designee will evaluate the evidence presented as well as all relevant information necessary to reach a determination, including:

- a) Affirming the decision and/or sanction(s),
- b) Affirming the decision and reducing sanction(s),
- c) Dismissing/modifying downward the decision and sanction(s),
- d) Reversing/vacating the decision, or
- e) Remanding the matter for a new hearing.

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<sup>1</sup> *Superintendent v. Hill*, 472 U.S. 445 (1985).



1. The severity of the original sanction may not be increased.

With this background, we provide the following response to OCO Recommendation 1:

**Recommendation 1:** Change the “some evidence” standard to a “preponderance of evidence” standard.

**Response:** The “some evidence” standard has been ruled as an appropriate standard and supported as lawful by both the United States Supreme Court and the Washington Supreme Court.<sup>2</sup> Through an internal review, the Department has determined this standard is utilized by the majority of US correctional agencies.

To ensure the appropriate use of the “some evidence” standard, the Department requires all hearings staff to participate in a disciplinary hearings officer training, which includes an explanation of the “some evidence” standard and has incorporated this language within the Offender handbook. While the Department does not include definitions in agency policy, we do recognize how a readily available definition may be beneficial to staff and the disciplinary process. The Department will work to create a job aid to be made available to staff, reinforcing that the “some evidence” standard requires an impartial review of all evidence, and that a guilty finding must be supported by credible evidence.

Regarding the agency’s enforcement of the infraction review policy, the Department requires staff to complete a disciplinary hearings officer training in order to review serious infractions. The Department also requires every infraction review to include the use of an infraction checklist to ensure thoroughness. Based upon this information, the Department provides the following response to OCO Recommendation 2:

**Recommendation 2:** Enforce the infraction review policy as outlined in WAC 137-28-270 and DOC Policy 460.000 (II)(2).

**Response:** Every infraction requires the use of an Infraction Checklist. This checklist is not required to be included in the packets that are presented to the incarcerated population. This may cause the perception that a checklist was not utilized. The Department will consider creating a consistent practice of including the checklist in the materials presented to the incarcerated population following a completed disciplinary process.

Staff are required to complete a disciplinary hearings officer training in order to review serious infractions. This training includes training of the proper use of the infraction checklist. This training is only required to be completed once. The agency will be working with the Training and Development Unit to work to create a refresher training that can be assigned to staff, reinforcing best practices.

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<sup>2</sup> *Petition of Johnston*, 109 Wn.2d 493 (1987)

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Pursuant to policy 460.000 Disciplinary Process for Prisons, the infraction appeals process should be utilized by the incarcerated individual if they believe an infraction was not appropriately reviewed.

Thank you for your letter, and for the opportunity to respond. The Department of Corrections is committed to providing a lawful and fair process that supports the staff and the incarcerated population's safety and wellbeing and appreciates the recommendations put forth by the Office of Corrections Ombuds.

Sincerely,



Sean Murphy  
Deputy Secretary

cc: Cheryl Strange, Secretary  
Don Holbrook, Assistant Secretary Men's Prisons Division  
Jeannie Darneille, Assistant Secretary Women's Prisons Division  
Scott Edwards, Assistant Secretary Budget, Strategy, and Technology  
Tomas Fithian, Senior Director – Correctional Operations

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