DH PILOT APPEALS 10/23/17 to 02/09/18	
ISO DECISIONS	**Decision Count**
Decision & penalty confirmed - CAR 29(4)(a)	20
Decision & penalty rescinded, inmate record to be updated - CAR 29(4)(c)(i)	6
Grand Total	**26**

BRITISH COLUMBIA

November 30, 2017

59320-20/17-097
2867

s.22

c/o North Fraser Pretrial Centre
1451 Kingsway Avenue
Port Coquitlam BC V3C 1S2

Dear s.22

I am writing in response to a letter dated November 27, 2017, received from your lawyer, Mr. J. Ladha, addressed to and received at the Investigation & Standards Office on November 28. A review of your disciplinary hearing held at North Fraser Pretrial Centre (NFPC) was requested.

Pursuant to s. 29(2) of the CAR, I have obtained and reviewed the audio record of your disciplinary hearing held on November 21, two pictures taken of the contraband found, the Violation of Correction Act Regulation Inmate Offence Report, and the letter submitted by your lawyer on your behalf.

You were charged with breaching s. 21(1)(y) of the CAR, which states "an inmate must not possess contraband". You were accused of being in possession of a syringe which tested positive for Fentanyl.

You pled not guilty to the charge. After reviewing the evidence, the hearing chairperson found you guilty. A disposition of 20 days segregation was imposed, to be served consecutively to the period of segregation you were serving at the time. The hearing chairperson indicated you would serve this disposition from November 24 to December 13.

Following my review, I note the following was established at your hearing:

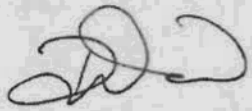
- There was contraband found in your cell and you denied ownership and knowing it existed.
- You were assigned to cell s.22 the evening of s.22 and the contraband was found shortly after unlocking your cell the next morning.
- You were not the sole occupant of cell s.22 and although the person also assigned to this cell was removed, his belongings remained in the cell.
- The hearing chairperson found you guilty based on your response to your understanding of the charges against you.

An administratively fair hearing involves the assessment of evidence by the hearing chairperson. It is my finding the hearing chairperson applied insufficient weight to the testimony and evidence you provided.

Ministry of Attorney General
Investigation & Standards Office
Mailing Address:
PO Box 9279 Stn Prov Govt
Victoria BC V8W 9J7
Phone: 250 387-5948
Fax: 250 356-9875

I have determined the disciplinary hearing was not conducted in an administratively and procedurally fair manner. I am therefore rescinding the decision made and the penalty imposed by the hearing chairperson pursuant to s. 29(4)(a), CAR.

Sincerely,



D. Ward
Inspector
Investigation and Standards Office

/sl

c. Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. E. Smith, Warden, North Fraser Pretrial Centre
Mr. J. McCarthy, Hearing Chairperson, Okanagan Correctional Centre
Mr. J. Ladha, Barrister & Solicitor, JL Law

BRITISH COLUMBIA

December 15, 2017 mailed Dec 15

59320-20/11-081
2874

s.22
c/o Okanagan Correctional Centre
2000 Enterprise Way
Oliver BC V0H 1T2

Dear s.22

I am writing in response to a letter received on December 8, 2017 from your legal counsel, Ms. B. Froese, requesting a review of a disciplinary hearing held at Okanagan Correctional Centre (OCC). The hearing commenced November 5 and concluded on December 4.

Pursuant to Correction Act Regulation (CAR), Section 29(2), I reviewed the documents and audio recordings of the disciplinary hearing.

You were charged and found guilty of violating Correction Act Regulation (CAR) Section 21(1) (y) which states; "An inmate must not possess contraband." The hearing chairperson found you guilty and imposed a disposition of 10 days segregation. He noted you were currently in segregation pursuant to CAR, section 17.1 and indicated the segregation time would run concurrently; therefore your disposition expired on the date of the hearing which was December 4.

In reviewing the proceedings, I have determined the disciplinary hearing was not conducted in an administratively and procedurally fair manner.

An accused has the right to know the case against him in order to prepare a defense to the charge.

The accused indicated he understood the charge when initially asked. However, he did not have a clear understanding of the charge as he and his counsel shortly afterward asked for the definition of contraband under the *Correction Act* that he was being charged under. His legal counsel indicated they were assuming it was under *Correction Act*, section 1(a) an intoxicant. It was reasonable for the accused to think this as the circumstances indicated a "white powdery substance" taken from the accused's cell which later tested positive for fentanyl.

The hearing chairperson responded to the query stating the accused is being charged with possession of contraband within the definition of *Correction Act*, section 1(f) which states: "if possessed without prior authorization, any other object or substance that, in the opinion of an authorized person, may threaten the management, operation, discipline or security of, or safety of persons in, the correctional centre." He indicated the substance in question was a "white powdery substance". He further specified the inmate was not being charged under any other section such as *Correction Act*, section 1(a) an intoxicant.

It is unclear how the hearing chairperson arrived at this conclusion as this was not written on the inmate offence report nor did he ask the charging officer to advise him of the definition of the contraband he was charging the inmate under. In addition, the circumstances of the charge on the inmate offence report did not address whether

or not the inmate was authorized to have the "white powdery substance" nor was there information stating why it would be deemed threatening to the management, operation, discipline or security of, or safety of persons in, the correctional centre.

The inmate based on statements by the hearing chairperson, that he was only being charged with possession of a "white powdery substance" in fact changed his plea from not guilty to guilty stipulating he was pleading guilty only to possessing a "white powdery substance" he identified as salt. He denied possession of a "white powdery substance" identified as fentanyl.

Under the circumstances, the accused was not given sufficient notice or information to understand the charge against him. This impeded the accused's ability to prepare his defense to the charge.

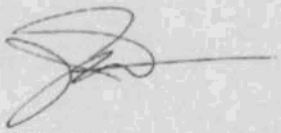
An accused has a right to have his case heard by a neutral decision maker.

As noted above, the hearing chairperson defined the inmate's charge and then proceeded to hear the evidence presented in support of the charge. Although the charging officer did not present any evidence in the hearing concerning whether or not the accused was authorized to have the "white powdery substance"; the hearing chairperson stated the accused did not have authorization to have the "white powdery substance". It appears the hearing chairperson made an assumption that was not based on any of the evidence presented, thereby creating an apprehension of bias.

The hearing chairperson also did not respond in a procedurally fair manner to evidence introduced by the accused's legal counsel that addressed the reliability of ion scans. The hearing chairperson gave evidence regarding the reliability of ion scans and device calibration in general which he stated was based on his experience as a trainer in use of the scanning device. However, he is not qualified to present evidence concerning a specific scan of a substance; nor is his giving evidence in a hearing procedurally fair as it creates an apprehension of bias. The hearing chairperson does not work at the correctional centre where the ION scan was conducted, so has no direct knowledge of the specific ion scan of the "white powdery substance" or the maintenance or condition of the ion scanning device. The hearing chairperson should have called the officer that conducted the scan as a witness; however he did not do so.

I am rescinding the decision made and the penalty imposed by the hearing chairperson pursuant to CAR, Section 29(4)(c). I am directing your record be amended to reflect the rescission.

Sincerely,



J. Parkin
Inspector
Investigation and Standards Office

c. Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. S. DiCastri, Warden, Okanagan Correctional Centre
Mr. T. Peterson, Hearing Chairperson, Vancouver Island Regional Correctional Centre
Ms. B. Froese, Barrister and Solicitor

BRITISH COLUMBIA

January 15, 2018

59320-20/17-123
2887

s.22

c/o Surrey Pretrial Services Centre
14323 – 57th Avenue
Surrey BC V3X 1B1

Dear s.22

I am writing in response to your letter received on January 15, 2018, requesting a review of the disposition imposed at a disciplinary hearing held at Surrey Pretrial Services Centre (SPSC). The hearing commenced and concluded on January 8.

Pursuant to Correction Act Regulation (CAR), Section 29(2), I reviewed the documents and audio recordings of the disciplinary hearing.

You were charged and found guilty of violating Correction Act Regulation (CAR) Section 21(1)(c) which states; "An inmate must not enter a cell or living unit that is not assigned to the inmate without the permission of a staff member." The hearing chairperson found you guilty based on your admission and video evidence. He reviewed your disciplinary record and imposed a disposition of 15 days segregation. You received time served from January 6.

In reviewing the proceedings, I have determined the disciplinary hearing was not conducted in an administratively and procedurally fair manner.

Denied the right to consult with legal counsel.

In the disposition phase of the hearing you repeatedly requested an adjournment for the purpose of having legal counsel attend at the hearing to assist you with the sentencing in this matter. The hearing chairperson denied your request for an adjournment as he had already found you guilty.

You have the right to consult with legal counsel at any time during a disciplinary hearing. The hearing chairperson denied your request on the mistaken belief that once a finding of guilt has been made, you do not have the right to consult with counsel. In this circumstance he should have adjourned the matter and given you the opportunity to contact and consult with legal counsel prior to imposing a disposition.

I am rescinding the decision made and the penalty imposed by the hearing chairperson pursuant to CAR, Section 29(4)(c). I am directing your record be amended to reflect the rescission.

Ministry
of
Attorney General

Investigation
&
Standards Office

Mailing Address:
PO Box 9279 Stn Prov Govt
Victoria BC V8W 9J7

Phone: 250 387-5948
Fax: 250 356-9875

Sincerely,

J. Parkin
Inspector
Investigation and Standards Office

/sl

c: Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. M. Lang, Warden, Surrey Pretrial Services Centre
Mr. C. Demerais, Hearing Chairperson, Okanagan Correctional Centre

BRITISH COLUMBIA

January 24, 2018

59320-20/17-126
2891

s.22
c/o Surrey Pretrial Services Centre
14323 – 57th Avenue
Surrey BC V3X 1B1

Dear s.22

I am writing in response to a letter dated and received on January 22, 2018 from your legal advocate, Mr. V. Jack. Mr. Jack requested a review of a disciplinary hearing held at Surrey Pretrial Services Centre (SPSC) on your behalf. The hearing commenced December 24, 2017 and concluded on January 15, 2018. The grounds submitted for the review are:

- Unreasonable for hearing chairperson to find the "brew" was an intoxicant in absence of scientific evidence.
- Duress defence: The hearing chairperson did not apply a contextual analysis to the accused's situation and erroneously found there is always a safe avenue of escape available to an accused regardless of the circumstances.
- Decision maker was not neutral.

Pursuant to *Correction Act Regulation* (CAR), Section 29(2), I reviewed the documents and audio recordings of the disciplinary hearing.

You were charged and found guilty of violating *Correction Act Regulation* (CAR) Section 21(1) (y) which states; "An inmate must not possess contraband." The hearing chairperson found you guilty and imposed a disposition of intermittent cell confinement after reviewing your disciplinary history and behavior on the living unit since your admission.

In reviewing the proceedings, I have determined the disciplinary hearing was not conducted in an administratively and procedurally fair manner.

Reasons:
An accused is entitled to a hearing conducted by a neutral decision maker.
The evidence presented in the hearing is insufficient to prove on the balance of probabilities that the accused was in possession of contraband deemed an "intoxicant".

The accused was charged with possessing contraband identified only as a "brew". The inmate offence report did not specifically define the contraband under *Correction Act*, section 1. After hearing evidence concerning the substance found in the accused's cell, the hearing chairperson defined the contraband as an "intoxicant" pursuant to Correction Act, section 1(a). However, Correction Act

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Regulation (CAR), section 1 provides a definition for an “intoxicant” that must be proven on the balance of probabilities in order to find a person guilty of the charge under CAR, section 21(1)(y). CAR, section 1 states an "intoxicant means a substance that, if taken into the body, has the potential to impair or alter judgment, behaviour or the capacity to recognize reality or to meet the ordinary demands of life, but does not include caffeine, nicotine or any authorized medication used in accordance with the directions given by a staff member or health care professional”. There was no evidence presented in the hearing that specifically identified the substance as an “intoxicant”.

The charging officer described a substance found in the inmate’s cell. The inmate stated his belief the substance was a “brew” made by another inmate that he had been forced to take into his cell. The charging officer also testified he does not have any specific scientific knowledge of testing substances so is unable to say the substance found was an “intoxicant” within the definition stated under CAR, section 1. There was no evidence presented of any testing equipment being used to determine if alcohol is present and the charging officer is not an expert witness.

The hearing chairperson relied on the charging officer’s description of the substance, and his own personal knowledge of alcohol production, in order to define the substance as an “intoxicant” under *Correction Act,* section 1(a). He did not refer to the definition of an “intoxicant” provided in the CAR. By presenting this information the hearing chairperson has essentially deemed himself an “expert” witness and thereby abrogated his role as a neutral decision maker. A hearing chairperson acting as a witness in a disciplinary proceeding creates an apprehension of bias. Additionally the hearing chairperson neither saw, nor tested, the “brew” so his expertise is limited as a witness. The evidence presented is insufficient to prove the substance found in the inmate’s cell is an “intoxicant”.

I am rescinding the decision made and the penalty imposed by the hearing chairperson pursuant to CAR, Section 29(4)(c). I am directing your record be amended to reflect the rescission.

Sincerely,

J. Parkin
Inspector
Investigation and Standards Office

/sl

c: Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. M. Lang, Warden, Surrey Pretrial Services Centre
Mr. B. Crowe, Hearing Chairperson, North Fraser Pretrial Centre
Mr. V. Jack, Legal Advocate, Prisoners’ Legal Services

BRITISH COLUMBIA

January 25, 2018

59320-20/16-145
2896

s.22

c/o North Fraser Pretrial Centre
1451 Kingsway Avenue
Port Coquitlam BC V3C 1S2

Dear s.22

I am writing in response to a letter from your advocate, Vibert Jack, dated January 25, 2018 requesting a review of your disciplinary hearing concluded at North Fraser Pretrial Centre (NFPC) on January 22. In his request for review, your advocate raises the following grounds for appeal: the onus to identify witnesses was on you and you were limited to two witnesses that were never called, the hearing officer did not weigh the evidence in an appropriate manner and as a result came to an unreasonable decision in finding you guilty.

Pursuant to Section 29(2), Correction Act Regulation (CAR), I reviewed all the documents, the audio recording of the disciplinary hearing and DVR of the January 21 incident.

On January 21 you were charged with violating s. 21(1)(w), CAR which states: "An inmate must not threaten another person." The circumstances allege at approximately 1520 hours you became aggressive and threatening toward CO s.22 after you asked him about church. CO s.22 told to wait and you responded "watch your fucking mouth and do you want some of this." You came toward him in an aggressive stand and started to square off with him. You backed off and went into the canteen line again.

The hearing commenced on January 22 and the hearing chairperson heard evidence from the charging officer and yourself. You plead not guilty, and after reviewing all the evidence, the hearing chairperson found you guilty of CAR 21(1)(w) which states, an inmate must not threaten another person. He reviewed your institutional history and imposed a disposition of 8 days segregation to be served January 21-28.

Following my review, I note the following was established at your hearing:

- The charging officer, CO s.22 read the offence report and reiterated you threatened him.
- The video of the alleged incident and the circumstances as described in the offence report were inconsistent. The video showed you walking slowly towards the officer and walking past the officer. You did not take an aggressive stance, square up or stand in front of the officer as described in the offence report.

- You denied threatening the officer but admit to saying, “why are talking to me like a fucking idiot, you fucking clown.”
- You requested two inmate witnesses who are seen in the video as being within three feet of your interaction with the officer. The hearing chairperson asked you to identify these inmates and when you did not know their names he stated he would not be able to call them if you could not identify them. You offered a few ideas in how to identify them but the hearing chairperson was unwilling to pursue your suggestions. The charging officer was not asked if he could identify these inmates. You stated you had only been on the unit a short time and had been in segregation since this incident. You had no chance to find out the names of these potential witnesses.
- You were found guilty based on the charging officer’s testimony which was inconsistent with the video evidence.
- The hearing chairperson reviewed your previous CAR 21 history in determining his disposition. You were given an 8 day segregation sentence to be served January 21-28.

In his letter to Investigation and Standards Office, Vibert Jack raises the following concerns:

- It was unfair to place the burden on you to determine the names of witnesses, as it was all but impossible for you to accomplish this task. Considering there was video of the incident it would have been trivially easy for the institution to find witnesses of the event. The institution made no effort in this regard.
- The video supports your version of events and as such your denial of having threatened the officer should have been given more weight. Had you been allowed to call witnesses, this may have provided further evidence to support your denial. This potential evidence was ignored completely. The hearing chairperson did not weigh the evidence available to him in an appropriate manner and as a result came to an unreasonable decision in finding you guilty.

In reviewing the proceedings, I have determined the disciplinary hearing was not conducted in an administratively and procedurally fair manner.

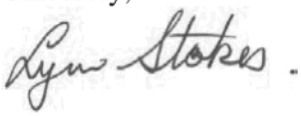
The evidence presented in the hearing is insufficient to find the accused person guilty of threatening another person pursuant to CAR, section 21(1)(w).

The rules of evidence in administrative hearings are not bound by the strict rules of evidence that are applicable to a court of law. However, the hearing chairperson in coming to a decision of guilt or innocence must rely upon the evidence presented at the hearing and give reasons for why certain evidence is given more credibility than other evidence. In this instance, the evidence presented consisted of the charging officers narrative and this was inconsistent with the video evidence.

One of the principles of administrative fairness requires an inmate be able to understand the charges against them and also reply to those charges. In your hearing you requested two inmate witnesses, but you were unable to identify them. As a result your witnesses were not called. The onus was not on you to identify these witnesses. The hearing should have been adjourned to accommodate this request. As a result you were unable to present your full defense.

In light of these findings, pursuant to s. 29(4)(c)(i), CAR I am rescinding the decision and the penalty imposed and directing the person in charge to change the inmates records to reflect this decision.

Sincerely,



Lynn Stokes
Inspector
Investigation & Standards Office

/sl

c: Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. E. Smith, Warden, North Fraser Pretrial Centre
Mr. T. Fass, Hearing Chairperson, Surrey Pretrial Services Centre
Mr. V. Jack, Legal Advocate

BRITISH COLUMBIA

February 08, 2018 mailed Feb 9

59320-20/12-064
2903

s.22

c/o Surrey Pre-Trial Services Centre
14323 – 57th Avenue
Surrey, BC V3X 1B1

Dear s.22

I am writing in response to your legal advocate's letter dated February 07, 2018 and received by fax that same date, requesting a review of a disciplinary hearing concluded at Surrey Pretrial Services Centre (SPSC) on February 06, 2018.

Pursuant to Section 29(2) of the Correction Act Regulation (CAR), I have obtained and reviewed the record of the proceedings.

You were charged with breaching s. 21(1)(z.2)(i) of the CAR, which states that "an inmate must not engage in an activity that jeopardizes or is likely to jeopardize the safety of a person." Specifically, you were accused of attempting to s.15 on January 27, 2017.

At your hearing, you stated you understood the charge against you, and you were aware of your right to consult with counsel. You confirmed you were ready to proceed and you pled not guilty. After reviewing the evidence, the hearing chairperson found you guilty and imposed a disposition of ten evenings of intermittent cellular confinement, from 17:20 to 21:45 hours, commencing February 06 until February 15, 2018.

Following my review, I noted the following was established in your hearing:

- The hearing opened on January 29, 2018 and was adjourned for you to consult with counsel
- The hearing resumed and was concluded on February 06, 2018 and was conducted by telephone by a hearing chairperson from another correctional centre
- The charging officer was present during the incident and confirmed you were in line at the medication window
- He testified the nurse was suspicious of you possibly s.15 and confiscated a s.15
- You admitted to s.15 but argued that you had inadvertently choked or coughed and did not intentionally s.15

- The charging officer testified you returned to your unit immediately after being accused of s.15
- He did not confirm or deny that you had accidentally s.15 as he couldn't say if you had coughed or not
- The nurse involved did not appear as a witness
- There was no s.15 presented as evidence
- Your request for an inmate witness was subtly discouraged by the hearing chairperson and you subsequently withdrew your request

s.22 , I am determining that in this hearing, the only evidence that you had deliberately tried to s.15 was hearsay evidence presented by the charging officer. The charging officer could not confirm or deny your claims of accidentally s.15 and the nurse involved did not testify nor was her written statement presented. You argued that your s.15 was an accident and you were discouraged from calling an inmate witness who you say may have corroborated your story. Based on these reasons, and pursuant to s. 29(4)(c)(i) CAR, I am rescinding the decision made and the penalty imposed and ordering that the person in charge change your record accordingly. This matter is concluded and the file is now closed.

Sincerely,

Chris Zatylny
Inspector
Investigation & Standards Office

/sl

c: Ms. E. Arend, Assistant Deputy Minister, Corrections Branch
Ms. S. Macpherson, Provincial Director, Adult Custody Division
Mr. M. Lang, Warden, Surrey Pretrial Services Centre
Mr. B. Crowe, Hearing Chairperson, North Fraser Pretrial Centre
Mr. V. Jack, Legal Advocate, Prisoners' Legal Services