

FORM OF ORDER AND TRANSMITTAL BY AGENCY HAVING SINGLE HEAD

State of Washington

DEPARTMENT OF CORRECTION

(agency name)

Administrative Order No. 88-02

(1) I, Chase Riveland, director of DEPARTMENT OF CORRECTIONS

do promulgate and adopt at Olympia, Washington (place)

the annexed rules relating to: WAC 137-28, Prisons--Discipline
WAC 137-28-006 Definitions. WAC 137-28-025 General Infractions.
WAC 137-28-030 Serious Infractions. WAC 137-28-035 Reporting to Law En-
WAC 137-28-080 Temporary Prehearing Confinement. forcement Authorities
WAC 137-28-090 Conduct of Hearing. WAC 137-28-097 Staff Advisors.

Adopting the following new sections:
WAC 137-28-094 Lesser Included and Related Infractions.
WAC 137-28-107 Sanctions and Mental Status.

(2) ALTERNATIVE A. Use only for Adoption of Permanent Rules.

This action is taken pursuant to Notice No. 89-01-104
filed with the code reviser on December 21, 1988 These rules shall take effect:
[ ] thirty days after they are filed with the code reviser pursuant to RCW 34.04.040(2).
[X] at a later date, such date being March 1, 1989.

(2) ALTERNATIVE B. Use only for Adoption of Emergency Rules.

I, find that an emergency exists and that this order is necessary for the preservation of the public health, safety, or general welfare and that observance of the requirements of notice and opportunity to present views on the proposed action would be contrary to public interest. A statement of the facts constituting the emergency is:

These rules are therefore adopted as emergency rules to take effect upon filing with the code reviser.

(3) Pursuant to the requirements of RCW 34.04.026 that "every agency shall incorporate the most specific, but in no case omit all, of the following language alternatives when adopting or amending rules" fill in statement (a), (b), or (c) as appropriate:

[X] (a) This rule is promulgated pursuant to RCW 72.09.010 and RCW 72.09.010 and is intended to administratively implement that statute.
[ ] (b) This rule is promulgated pursuant to RCW which directs that the

has authority to implement the provisions of (agency)
(name of act or RCW citation)

[ ] (c) This rule is promulgated under the general rule-making authority of the (agency)

as authorized in RCW

(4) The undersigned hereby declares that the agency has complied with the provisions of the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.04 RCW) and the State Register Act (chapter 34.08 RCW) in the adoption of these rules.

(5) This order, after being first recorded in the order register of this agency, is herewith transmitted to the Code Reviser for filing pursuant to chapter 34.04 RCW and chapter 1-12 WAC.

APPROVED AND ADOPTED January 27 19 89

By Chase Riveland
Secretary
Title

STATE OF WASHINGTON
FILED

JAN 27 1989

CODE REVISER'S OFFICE
WSR 89-04-032

**NOTE:**

<sup>1</sup>RCW 34.04.026 provides:

"(1) In addition to the provisions of RCW 34.04.025(1)(a)(i), every agency shall incorporate the most specific, but in no case omit all, of the following language alternatives when adopting or amending rules:

(a) The most specific reference shall be to a section of law which the rule is implementing, and shall be quoted as follows: "This rule is promulgated pursuant to RCW \_\_\_\_\_ and is intended to administratively implement that statute."

(b) The next specific reference, and one which shall be used only if paragraph (a) of this subsection is not applicable, shall be to that portion of an act which directs an agency to adopt rules and regulations as necessary to implement the act, and shall be quoted as follows: "This rule is promulgated pursuant to RCW \_\_\_\_\_ which directs that the (agency) has authority to implement the provisions of (name of act or RCW citation)."

(c) The least specific reference, and one which shall be used only if paragraphs (a) and (b) of this subsection are not applicable, is one which indicates that the rule is promulgated under the agency's broad rule-making authority—either in the agency enabling legislation or chapter 34.04 RCW, and shall be quoted as follows: "This rule is promulgated under the general rule-making authority of the (agency) as authorized in RCW \_\_\_\_\_."

(2) The code reviser is directed to develop a format for placing such specific language in each rule, and agencies shall then comply with the code reviser's direction, and shall include the same in the final rule.

(3) During the promulgation hearings process the public may question whether such rule should have a more specific reference, and the agency shall, pursuant to RCW 34.04.025(1)(b), give consideration to such requests."

AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-006 DEFINITIONS. For the purposes of this chapter the following words shall have the following meanings:

- (1) "Promptly" means to act as soon as reasonably possible, consistent with institutional goals of safety, security, and rehabilitation.
- (2) "Working days" means normal Monday through Friday work days, excluding weekends and holidays.
- (3) "Director" means the director of the division of prisons of the Washington state department of corrections or his/her designee.
- (4) "Superintendent" means a superintendent of an adult correctional institution or his/her designee.
- (5) ~~((Directors-review-committee--means-a-committee-appointed-by-the-director-~~
- ~~(6))~~ "Earned time" means that portion of the inmate's available sentence reduction which, by department of corrections' policy is earned specifically for program participation.
- ~~((7))~~ (6) "Good-conduct time credits" means that portion of an inmate's potential reduction to his/her minimum term which is authorized by RCW 9.95.070 and 72.09.130 and which is gained by not receiving serious infractions as listed in WAC 137-28-030.
- ~~((8))~~ (7) "Earned-early release" means that combined earned time and good-conduct time credits which, together, allow an inmate to earn up to one-third reduction off the minimum term established by the board of prison terms and paroles or sentencing court.
- ~~((9))~~ (8) "Adult correctional institution" and "institution" mean a facility identified in RCW 72.01.050(2) and any similar facility hereafter established.
- ~~((10))~~ (9) "Hearing officer" means a ~~((trained))~~ correctional staff member designated by a superintendent to conduct disciplinary hearings.

AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-025 GENERAL INFRACTIONS. Any of the following types of behavior shall constitute a general infraction:

- 051 - Unauthorized possession of money or other negotiable instruments totaling less than five dollars;
- 052 - Loaning of property for profit;
- 053 - Possession of anything not authorized for retention or receipt by an inmate and/or not issued to him/her by regular institutional channels;
- 055 - ~~((Intentionally))~~ Mutilating, altering, defacing or destroying items issued by the state the value of which is less than five dollars;
- 103 - Refusing to obey a lawful order of any staff member;
- 104 - Unexcused absence from work or any assignment;
- 110 - Theft of food;
- 202 - Abusive language directed to a staff member;
- 203 - Lying ~~((or-knowingly-providing-a--false--statement))~~ to a staff member;
- 205 - Participating in a meeting or gathering that has been disapproved in advance, in writing, by the institution administrative staff;
- 210 - Being in an area identified by an institution as an area where the presence of inmates is unauthorized;
- 211 - ~~((Intentional))~~ Failure to follow published safety or sanitary regulations;

- 212 - Using any equipment or machinery which is not specifically authorized;
- 213 - Using any equipment or machinery contrary to instructions or posted safety standards;
- 214 - ((Intentional)) Failure to stand count;
- 251 - Smoking where prohibited;
- 301 - Failure to keep one's person and one's quarters in accordance with published and posted standards, rules, or regulations;
- 302 - Tattooing or self-mutilation;
- 303 - Unauthorized use of mail or telephone;
- 305 - Correspondence or conduct with a visitor in violation of published and posted regulations;
- 351 - Giving, selling, or trading money or anything of value to, or accepting or purchasing money or anything of value from another inmate, a member of his/her family, or his/her friend, except when authorized; or
- 400 - Attempting to commit any of the above offenses, or aiding another person to commit any of the above offenses shall be considered the same as the commission of the offense itself.

AMENDATORY SECTION (Amending Order 85-06, filed 4/1/85)

WAC 137-28-030 SERIOUS INFRACTIONS. Any of the following types of behavior shall constitute a serious infraction:

- 501 - Committing homicide;
- 502 - Assaulting any person which results in the hospitalization of the person assaulted;
- 503 - Extortion, blackmail, demanding or receiving money or anything of value in return for protection against others, or under threat of informing;
- 504 - Engaging in sexual acts with others, with the exception of conjugal visits authorized by the superintendent;
- 505 - Fighting with any person except in self-defense;
- 506 - Threatening another with bodily harm or with any offense against his/her person;
- 507 - Committing an act not otherwise proscribed by these regulations which constitutes a felony or misdemeanor under state or federal law;
- 508 - Throwing objects or material at staff members, institution visitors, or other inmates;
- 521 - Holding a person hostage;
- 525 - Violation of conditions of furlough;
- 550 - Escape or attempted escape;
- 551 - Lying to the disciplinary hearing committee or hearing officer;
- 552 - ((Lying-to-a-staff-member-with-the-intention-of)) Attempting or causing an innocent person to be penalized or proceeded against by lying to a staff member;
- 553 - ((Intentionally-or-recklessly)) Setting a fire;
- 554 - ((Intentionally--or--recklessly)) Destroying or damaging state property, or the property of another person in excess of five dollars;
- 555 - Stealing (theft) ((or--knowing)) possession of stolen property;
- 556 - Refusing to submit to a body search when lawfully ordered to do so by a staff member;
- 557 - Refusing and/or failing to work or attend other regularly scheduled assignments;
- 558 - ((Intentionally)) Interfering with a staff member in the performance of his/her duties;



- 559 - Gambling;
- 600 - Tampering with or blocking any locking device or seal;
- 601 - Possession or introduction of an explosive(~~(or poison)~~) or any ammunition or components thereof;
- 602 - Possession or introduction of any gun, firearm, weapon, sharpened instrument, knife, or (~~unauthorized tool~~) poison or components thereof;
- 603 - Possession, introduction, transfer, or use of any narcotics, controlled substance(~~(or related paraphernalia)~~); possession of more than 15 grams of marijuana; possession, transfer, or use of any intoxicant or drug not prescribed or authorized for the inmate or for the inmate to whom transferred, if applicable, by the medical staff; (~~or being intoxicated, or under the influence of an unauthorized drug, narcotic, controlled substance, or other intoxicant;~~)
- 605 - Unauthorized possession of any officer's or staff's clothing;
- 607 - Refusing to submit to a urinalysis when ordered to do so by an authorized staff member;
- 608 - Refusing to submit to a breathalyzer or other standard sobriety test;
- 650 - Rioting;
- 651 - Inciting others to riot;
- 652 - Engaging in or inciting a prohibited group demonstration or developing an unauthorized club or organization;
- 653 - (~~Intentionally~~) Interfering with the taking of count;
- 654 - Counterfeiting, forging or unauthorized reproduction of any document, article of identification, money, security, or official paper;
- 655 - Making intoxicants, controlled substances, narcotics;
- 656 - Giving or offering any official or staff member or a volunteer a bribe or anything of value for a favor or unauthorized service;
- 657 - Four or more general infractions arising out of separate incidents, all of which occur within the previous six-month period, and which have been reported in writing;
- 658 - (~~Intentional~~) Failure to perform according to an administrative action taken pursuant to WAC 137-28-050(2), or resisting posthearing sanctions as provided for in WAC 137-28-105;
- 660 - Unauthorized possession of money or other negotiable instruments of five dollars or more;
- 661 - Performing or taking part in performing a marriage in the institution buildings or on the institutional grounds, except when such marriage was approved by the superintendent of the institution, which may, in appropriate cases, also be deemed a violation of a visiting rule that can subject an inmate to the sanction contained in WAC 137-28-105 (1) (d), as well as other sanctions available for serious infractions;
- 662 - Solicitation of goods and/or services for which the provider would expect payment when the inmate knows or should have known he/she has no funds available to pay for such goods or services;
- 663 - Strongarming; use of physical force or coercion for personal gain against any inmate or staff member;
- 700 - Attempting to commit or aiding another person to commit a serious infraction as enumerated in this rule, and such action shall be considered the same as commission of the offense itself; (~~or~~)
- 701 - Commission of any general infraction as enumerated in WAC 137-28-025 or any local rule denominated as a general infraction in such a manner as likely to result in danger to life or limb or to create a risk to the orderly operation of the institution or the health and safety of its inmates, staff, or visitors shall be considered a serious

infraction, provided there is substantial evidence which establishes there was such a danger;

702 - Possession of an unauthorized tool;

703 - Being under the influence of intoxicants, or possession of less than 15 grams of marijuana, or under the influence of an unauthorized drug, narcotic, controlled substance, or other intoxicant; or

704 - Assaulting any person which does not result in the hospitalization of the person assaulted.

AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-035 REPORTING TO LAW ENFORCEMENT AUTHORITIES. (1) It shall be the duty of the superintendent to report any violation of a federal, state, or local law to law enforcement authorities.

(2) If a violation has been reported to law enforcement authorities, ((the)) an inmate who has been charged with an infraction shall not be questioned about the incident, outside of a formal disciplinary hearing or an administrative segregation hearing, held pursuant to this chapter, until after it has been determined that no prosecution will occur or until a finding of guilt is made.

(3) The provisions in this rule shall not preclude the reasonable segregation of the inmate in accordance with administrative segregation rules appearing in this chapter.

AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-080 ((PREHEARING-PROCEDURES--RESTRICTION-OF-INMATE)) TEMPORARY PREHEARING CONFINEMENT. (({†})-Prior to and during a hearing on a serious infraction:

(a) ~~An inmate in minimum security status may be restricted to a security area without loss of his/her classification status when there is a reasonable belief that he/she is a substantial security risk; or~~

(b) ~~An inmate who is reasonably believed to be of danger to himself/herself or to others, in serious danger from others, or a danger to the order and security of the institution may, upon written verification by the shift commander that such danger is reasonable believed to exist, be restricted to his/her own room or cell or placed in segregation. Such restriction must be approved by the superintendent within twenty-four hours after the confinement;~~

(c) ~~An inmate shall not be confined or segregated for more than three working days unless there is an intervening hearing on the incident involved or the inmate or the institution, for good cause, require additional time not to exceed seventy-two hours to prepare its or his/her case for the hearing, or there is an administrative segregation hearing in accordance with the provisions of this chapter.~~

(2) ~~Confinement or restriction as authorized in this rule shall not limit the right of an inmate to prepare an adequate defense to the charge(s) against him/her.~~

(3) ~~An inmate confined or restricted as authorized in this section shall be entitled to the same rights as those committed to segregation by the hearing officer following the hearing, as set forth in WAC 137-28-110.~~

(4) ~~An inmate confined or restricted as authorized in this section shall receive credit for time served in such manner if he/she is subsequently found guilty of the offense by the hearing officer.)~~ (1) Prior to and during a hearing, an inmate may be temporarily confined

to his/her cell or room or moved to a higher custody level, including segregation, when it is reasonably believed that the inmate presents a risk to the security of the institution, an escape, a danger to himself/herself or to others, or is in danger from others.

(2) Restricts made under this rule shall be made by the shift commander who shall in writing verify the grounds for temporary pre-hearing confinement exist and the nature of such grounds. All restricts to a segregation unit must also be approved by the superintendent/acting superintendent within one working day of the confinement.

(3) Confinement imposed under this rule shall not be for more than three working days unless either the inmate or the institution, for good cause, requires additional time not to exceed three working days to prepare for the disciplinary hearing, or there is an administrative segregation hearing in accordance with the requirements of chapter 137-32 WAC.

(4) While confinement under this rule is temporary and only suspends an inmate's previous custody status, inmates confined shall be subject to the same rules and restrictions as other persons in the unit or status under which the inmate is temporarily confined.

(5) An inmate confined under this rule shall be afforded reasonable opportunities to adequately prepare defenses to the charge(s) against him/her.

(6) An inmate confined or restricted as authorized under this rule shall receive credit for time served in such manner if subsequently found guilty.

AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-090 CONDUCT OF HEARING. (1) The hearing officer shall assure that the inmate is (~~competent-to-understand~~) capable of understanding the charge against him/her (~~and~~), the nature of the proceedings, and (~~to-participate-therein~~) is able to adequately take part in the hearing. (~~He/she~~) If there is reason to doubt the inmate's understanding or ability, the hearing officer may order a postponement of the hearing (~~to-secure-a-report-on-the-competence-of-the-inmate,-or-take-such-other-action-as-will-assure-the-fairness--and-orderliness-of-the-hearing~~) in order to obtain additional information on the inmate's mental status. If the report indicates the inmate is not able to understand and/or take part in the proceedings, the hearing officer may proceed with the hearing with the inmate being fully assisted by a staff advisor appointed under WAC 137-28-097.

(2) The inmate shall be present at all stages of the hearing except during the decisional deliberations and any inquiry the hearing officer may wish to make concerning the identity of unidentified witnesses. An inmate may waive his/her presence at a hearing.

(3) The inmate shall be informed that if he/she chooses not to testify in the hearing, his/her silence may be used against him/her.

(4) The clerk shall be responsible for presenting all appropriate paperwork to the hearing officer, but shall not be responsible for orally presenting facts and circumstances surrounding the incident.

(5) The hearing officer shall divide the hearing into two stages consisting of:

(a) Determination of the guilt or innocence of the inmate; and

(b) Determination of further action to be taken.

(6) Evidence, testimony, questions, and examinations shall be limited to facts relevant to the alleged infraction, or disposition if an infraction has been found.

(7) Where institution staff members are witnesses against the inmate, (~~every-effort-shall-be-made-to-have-such-witnesses-present-to-testify--at-the-hearing--PROVIDED,-HOWEVER,-The-written-statements-of-such-staff-members-may-be-considered-in-their-absence-upon--a--showing~~)



of--good-cause)) a written statement from the staff member may be considered by the hearings officer instead of in-person testimony, except where the hearing officer determines that the staff member's presence is necessary to an adequate understanding of the issues in the case.

(8) The hearing officer shall have the authority to cross-examine the staff member reporting the infraction.

(9) The inmate shall be allowed to call witnesses and present documentary evidence in his/her defense when permitting him/her to do so will not be unduly hazardous to institutional safety or correctional goals unless the witness and/or information desired to be presented is deemed to be irrelevant, immaterial, unnecessarily duplicative of other information before the hearing officer, or otherwise found to be unnecessary to the adequate presentation of the inmate's case. The testimony of all witnesses from outside the institution shall be considered in writing. In the event the hearing officer determines that the presence of a witness is appropriate, the hearing officer will call the witnesses or continue the hearing until such time as the witness is available. If the witness is unavailable, the hearing officer may, in his/her discretion, consider the written testimony previously submitted.

(10) The inmate may question witnesses against him/her in the discretion of the hearing officer. If the hearing officer determines that an inmate witness would be subject to risk of harm if his/her identity were disclosed, testimony of the inmate witness may be introduced by the testimony of a staff member to whom the information was provided by the inmate witness and/or the affidavit of the inmate witness. If the staff member to whom the inmate witness provided information is, for good cause, unavailable, the written statement of such uninvolved staff member may be used.

(11) The hearing officer shall, out of the presence of all inmates, inquire as to the identity of any anonymous inmate witness, and as to how the testifying staff member received such information. The refusal of the staff member presenting the testimony of the unidentified inmate witness to identify such inmate shall make the testimony inadmissible unless the refusal to identify the witness is approved by ((a-staff-member-with-the-rank-of-captain-or--above--based-on-that-staff-member's-determination-of)) the superintendent or acting superintendent who personally determines that there is good cause for nondisclosure and that the informant is reliable. This decision may not be delegated beyond the superintendent or acting superintendent. The hearing officer must make an independent determination as to the reliability of informant and credibility of information offered, except that the hearing officer may accept an assurance of credibility from ((a-staff-member)) the superintendent or acting superintendent who approves the nondisclosure of identity of the inmate witness.

#### NEW SECTION

WAC 137-28-094 LESSER INCLUDED AND RELATED INFRACTIONS. The hearing officer is authorized to find an inmate guilty of a lesser included offense. Where the evidence suggests an inmate is guilty of an offense not charged and which is not a lesser included offense to a charged offense, the hearing officer may recommend that new charges be filed to address such offenses. The inmate may waive the right to a new proceeding and allow the hearing officer to enter a finding of guilty or not guilty and sanction on the offense.



AMENDATORY SECTION (Amending Order 84-13, filed 8/14/84, effective 10/10/84)

WAC 137-28-097 STAFF ADVISORS. (1) An inmate may have a staff advisor appointed by the hearing officer to prepare for a hearing. The hearing officer shall consider such factors as the literacy, the complexity of the issue and the inmate's overall ability to speak for himself/herself and adequately present his/her case, prior to assigning a staff advisor. The assignment of a staff advisor will only be necessary when considering such factors, and should not be construed to mean that a staff advisor must be assigned. The staff advisor will be a staff member and not involved in the observation of the infraction. The staff advisor may attend the hearing, but shall not be responsible for presentation of the inmate's case, questioning witnesses, or making other oral presentation unless requested to do so by the hearing officer.

(2) Where a hearing is postponed because of the mental status of an inmate pursuant to this chapter, an advisor shall be appointed immediately and instructed to fully investigate and prepare the inmate's case, should the inmate later be unable to prepare or present his/her own case.

(3) A list of approved staff advisors will be maintained by the superintendent.

~~((3))~~ (4) Staff advisors shall be provided with:

(a) Copies of the written decisions of the hearing officer and the superintendent in cases in which the staff advisors are involved;

(b) An opportunity to have private conversation with inmates they are representing;

(c) Access to written information to be used by the hearing officer in the fact-finding stage as far in advance of the hearing as is reasonably possible; and

(d) Reasonable access to all witnesses.

NEW SECTION

WAC 137-28-107 SANCTIONS AND MENTAL STATUS. In determining an appropriate sanction, the hearing officer should give consideration to the inmate's mental health and his/her intellectual, emotional, and maturity levels and what effect a particular sanction might have on the inmate in light of such factors. The hearing officer may request the assistance of other department staff in determining appropriate sanctions.