



RULE MAKING ORDER
(RCW 34.05.360)

CR-103 (07/10/97)

Agency: Department of Corrections

- Permanent Rule
- Emergency Rule
- Expedited Adoption
- Expedited Repeal

(1) Date of Adoption:
May 2, 2000

(2) Purpose:

To comply with the Release and Settlement Agreement by and between the Humanists of Washington, et al. and Joseph Lehman, et al., Number C97-5499FDB, dated October 1, 1999; to reflect changes in department policies; and to make technical corrections. The revisions will help clarify the procedural guidelines relating to general and serious infractions, and the hearings and appeals process.

(3) Citation of Rules Affected by this order:

Repealed:
Amended: WAC 137-28-140; 160;170;185;220;230;260
Suspended:

(4) Statutory authority for adoption: RCW 72.01.090

Other Authority:

PERMANENT RULE ONLY (including EXPEDITED ADOPTION)

Adopted under notice filed as WSR 00-07-048 on March 7, 2000 (date).
Describe any changes other than editing from proposed to adopted version:
WAC 137-28-230(3) changed the word "general" to "serious" in third sentence, first occurrence

EMERGENCY RULE ONLY

Under RCW 34.05.350 the agency for good cause finds:

- (a) That immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that observing the time requirements of notice and opportunity to comment upon adoption of a permanent rule would be contrary to the public interest.
- (b) That state or federal law or federal rule or a federal deadline for state receipt of federal funds requires immediate adoption of a rule.

Reasons for this finding:

EXPEDITED REPEAL ONLY

Under Preproposal Statement of Inquiry filed as WSR _____ on _____ (date).

(5.3) Any other findings required by other provisions of law as precondition to adoption of effectiveness of rule?

Yes No If Yes, explain:

(6) Effective date of rule:

- | | |
|--|--|
| Permanent Rules | Emergency Rules |
| <input checked="" type="checkbox"/> 31 days after filing | <input type="checkbox"/> Immediately |
| <input type="checkbox"/> Other (specify) _____ | <input type="checkbox"/> Later (specify) _____ |

*(If less than 31 days after filing, specific finding in 5.3 under RCW 34.05.380(3) is required)

NAME (TYPE OR PRINT)

Joseph D. Lehman

SIGNATURE

TITLE
Secretary

DATE
May 2, 2000

CODE REVISER USE ONLY

CODE REVISER'S OFFICE
STATE OF WASHINGTON
FILED

MAY 2 2000

TIME 9:49 AM

WSR 00-10-079

(COMPLETE REVERSE SIDE)

**Note: if any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

Federal statute:	New	_____	Amended	_____	Repealed
Federal rules or standards:	New	_____	Amended	_____	Repealed
Recently enacted state statutes:	New	_____	Amended	_____	Repealed

*(current calendar year)

The number of sections adopted at the request of a nongovernmental entity:

New _____ Amended _____ Repealed

The number of sections adopted on the agency's own initiative:

New _____ Amended 3 Repealed

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

New _____ Amended 4 Repealed

The number of sections adopted using:

Negotiated rule making:	New	<u>7</u>	Amended	_____	Repealed
Pilot rule making:	New	_____	Amended	_____	Repealed
Other alternative rule making:	New	_____	Amended	_____	Repealed



AMENDATORY SECTION (Amending WSR 97-03-041, filed 1/10/97, effective 2/4/97)

WAC 137-28-140 Purpose. The rules in this chapter provide a standardized system to determine whether misconduct by an inmate of an adult correctional institution has occurred, and to provide a system that clearly links an offender's behavior and participation in available education and work programs as determined through classification with the receipt or denial of earned early release time and other privileges.

The rules in this chapter shall not apply to proceedings of the indeterminate sentence review board (~~or the division of community corrections~~).

The following rules set forth procedural guidelines. They do not create any procedural or substantive rights in any person, including any liberty interests in time credits, levels of custody, classification status, or other privileges. In accordance with Washington statutes, such matters are governed solely by the discretion of the department of corrections.

AMENDATORY SECTION (Amending WSR 97-03-041, filed 1/10/97, effective 2/4/97)

WAC 137-28-160 Definitions. For the purposes of this chapter, the following words have the following meanings:

Adult correctional institution and institution - a facility identified in RCW 72.01.050(2) and any similar facility hereinafter established.

Aggravated assault - an assault resulting in physical injury and requiring medical care (see definition of medical care).

Assault - a physical attack upon the body of another person. The attack may be made with any instrument including, but not limited to weapons, body parts, food products or bodily secretions.

Attempt - putting forth an effort to commit any infraction shall be considered the same as commission of the infraction. However, attempted aggravated assault shall be considered an attempted assault.

Bodily harm - physical pain or injury, illness, or impairment of physical condition.

Cell tag - if contraband or other violation is discovered in an area under control of the inmate (such as within the confines or contents of a cell), the contraband or other violation shall be constructively attributed to the inmate(s) assigned to that area,

unless the inmate(s) can establish a lack of involvement in the infraction at the disciplinary hearing.

Conspiracy - an agreement between two or more persons to commit an infraction. Conspiracy to commit an infraction shall be considered the same as commission of the infraction.

~~((Director - the director of the division of prisons of the Washington state department of corrections, or the director's designee.))~~ Deputy secretary - the deputy secretary of the office of correctional operations of the Washington state department of corrections, or the deputy secretary's designee.

Discovery - when a staff member discovers that an infraction has occurred or when an investigation into the incident is concluded.

Earned time - means that portion of time an offender is eligible to earn for program participation approved by the classification process and consistent with his/her case management plan.

Earned release time - means the combined earned time and good conduct time credit an offender is eligible to earn off the minimum term established by the indeterminate sentence review board or the sentencing court.

Good conduct time credits - that portion of an inmate's potential reduction to minimum term which is authorized by RCW 9.95.070 and 72.09.130 and which may be lost by receiving serious infractions.

Hearing officer - Staff member(s) designated by the superintendent to conduct disciplinary hearings.

Infraction - commission of, attempt to commit, or conspiracy with another to commit any violation of prison rules as enumerated in this code. Aiding or abetting another to commit an infraction will be considered the same as commission of the infraction.

Infraction review officer - staff member(s) designated by the superintendent to review a serious infraction.

Lesser included offense - any infraction that must necessarily have been committed in order to commit another infraction.

Medical care - any care conducted in a medical facility/treatment center by medical staff to treat a documented, physical injury, including, but not limited to bandaging, suturing, surgery, etc. An examination conducted by medical staff to determine whether an injury has been sustained shall not be considered medical care.

Mitigating factors - factors to be considered by the infracting officer in deciding whether to charge a #728(a) general infraction rather than a #728(b) serious infraction. Also, factors to be considered by the infraction review officer, hearings officer, and superintendent for the purpose of deciding whether a #728(b) serious infraction should be reduced to a #728(a) general infraction. Mitigating factors may include the seriousness of the sexually explicit material involved, whether the inmate has been convicted of a sexually motivated crime, the treatment needs of the inmate, the prior history of similar behavior, and the source of the material.

Possession - established when an item(s) is found on a person

or in an area which is under the control of the individual(s) charged.

Promptly - to act as soon as reasonably possible, consistent with institutional goals of safety, security, and rehabilitation.

Secretary - the secretary of the Washington state department of corrections, or the secretary's designee.

Sexual harassment - any word, action, gesture or other behavior that is sexual in nature and that would be offensive to a reasonable person.

Sexually explicit - means a depiction of one of the following:

● One of the participants in the sexual act is, or appears to be, nonconsenting;

● One of the participants in the sexual act appears to be forceful, threatening, or violent;

● One of the partners in the sexual act is dominating one of the other participants and one of the individuals is obviously in a submissive role or one of the participants is degraded, humiliated, or willingly engages in behavior that is degrading or humiliating;

● One of the participants in the sexual act is a minor, or appears to be a minor, or a minor alone is depicted in a sexually suggestive way;

● Actual penetration, be it penile/vaginal-oral, penile-anal, or penile-vaginal; digital-anal; digital-vaginal; or insertion of any inanimate object in the vaginal or anal cavity, and the depiction in the context presented is deemed to be a threat to legitimate penological objectives;

● Any bodily excretory function which is sexual in nature;

● Bestiality, sadomasochistic behavior, bondage; or

● Material reasonably deemed to be a threat to legitimate penological objectives.

Staff member - for purposes of this chapter includes employees of the department of corrections, contract employees, and volunteers.

Superintendent - superintendent of an adult correctional institution or the superintendent's designee.

Working days - Monday through Friday, excluding weekends and holidays.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-170 Supplementary rules. (1) The superintendent may promulgate local supplementary rules, policies, and procedures including (:-

~~(a) The creation of new infractions, either general or serious;~~

~~(b) The reclassification of any infractions set out in these~~

rules,

~~(c))~~ the creation of new sanctions.

(2) All new or (~~reclassified~~) supplemental (~~infractions~~ and) sanctions shall be approved in writing by the (~~director~~) deputy secretary before being put into effect.

~~((3) The secretary, department of corrections, or designee, has the authority to amend or supplement the rules set forth in this chapter by written policy or directive.)~~

NEW SECTION

WAC 137-28-185 Creation or amendment of serious infractions.

(1) The secretary or designee may create and/or amend serious infractions.

(2) Prior to the creation or amendment of a serious infraction, the secretary or designee shall follow the rule-making procedures of chapter 34.05 RCW, the Administrative Procedure Act.

(3) Nothing herein shall be construed as limiting the department of corrections' exclusion from the Administrative Procedure Act under RCW 34.05.030 (1) (c).

AMENDATORY SECTION (Amending WSR 97-03-041, filed 1/10/97, effective 2/4/97)

WAC 137-28-220 General infractions. (1) Any of the following

types of behavior may constitute(~~s~~) a general infraction:

Unauthorized possession/theft

- 051 - Unauthorized possession of money, stamps or negotiable instruments the total value of which is less than five dollars.
- 053 - Possession of anything not authorized for retention or receipt by an inmate and/or not issued to an inmate by regular institutional channels.
- 255 - Misuse or waste of issued supplies, goods, services or property, the replacement value of which is less than ten dollars.
- 310 - Pretending or failing to take prescribed medication that the inmate has accepted by concealing or retaining a single or daily dose.
- 354 - Theft of food, the value of which is five dollars or less.

- 356 - Possession of unauthorized amount of otherwise authorized clothing, bedding, or issued supplies.

Loaning/trading

- 052 - Loaning of property for profit.
351 - Giving, selling, borrowing, lending, or trading money or anything of value to, or accepting or purchasing money or anything of value from, another inmate or that inmate's friend(s) or family the value of which is less than ten dollars.

Altering/destroying property

- 055 - Mutilating, altering, defacing or destroying any item valued at less than ten dollars and that is not the personal property of the inmate.

Disruptive behavior/lying

- 202 - Abusive language, harassment or other offensive behavior directed to or in the presence of staff, visitors, inmates, or other persons or groups.
203 - Lying to a staff member.
244 - Unauthorized displays of sexual affection with another inmate.
353 - Disruptive behavior.
355 - Horseplay, roughhousing or any other unauthorized physical contact between inmates.

Failure to follow rules and orders

- 102 - Failure to follow any written rules or policies adopted by the institution and not specified within this chapter or in local disciplinary rules.
103 - Refusing or failing to obey an order, oral or written, of any staff member.
210 - Out of bounds; being in an area where the presence of the inmate is unauthorized.
214 - Interfering or failing to comply with count procedures.
251 - Smoking and possession of tobacco products where prohibited.
301 - Failure to keep your person or your quarters in accordance with institution rules or policies.

Unauthorized communication/visitor contact

- 303 - Unauthorized use of mail or telephone.
304 - Unwanted written and telephonic communications to any person.
305 - Correspondence or conduct with a visitor in violation of published or posted rules and policies.

- 309 - Unauthorized display of affection with a visitor.

Inappropriate use of equipment

- 212 - Using any equipment or machinery when not specifically authorized.
- 213 - Using any equipment or machinery contrary to instructions or safety standards.

Unexcused absence/feigning illness

- 104 - Unexcused absence from work or any assignment, scheduled meeting, appointment, or call out.
- 352 - Pretending to be ill or injured contrary to medical/mental health screening results.

Inappropriate sexual behavior

- 728(a) - Possession of any written, photographic or hand-drawn material that depicts a sexually explicit act as defined in WAC 137-28-160.

(2) In determining whether a #728(a) infraction or a #728(b) infraction pursuant to WAC 137-28-260 should be charged, the infracting officer shall consider mitigating factors as defined in WAC 137-28-160.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-230 General infraction procedure. Infraction report.

(1) In the event of a general infraction, a staff member may make an on-site adjustment. An on-site adjustment may consist of counselling, warning, or reprimanding the inmate and/or causing the inmate to remove him/herself from the situation immediately. An on-site adjustment under this rule cannot be considered a general infraction for the purposes of determining whether a #657 serious infraction has occurred.

(2) In the event of a general infraction where a staff member does not make an on-site adjustment, the staff member may prepare and submit an infraction report. The infraction report shall include:

- (a) Name, number and housing location of the offender;
- (b) A description of the incident;
- (c) The time and place of the incident;
- (d) The names of witnesses, victims, and other persons involved;
- (e) The specific rule(s) alleged to have been violated;
- (f) A description of any action taken and copies of any relevant documentation or supplemental reports;
- (g) Name and signature of reporting staff.

(3) The general infraction report shall be submitted promptly to the supervisor or unit team designated by the superintendent to receive such reports. The supervisor or unit team may upgrade the general infraction to a serious infraction. If the infraction is upgraded, the supervisor or unit team shall forward the serious infraction report to the hearing clerk for preparation for a hearing on the serious infraction.

(4) The supervisor or unit team receiving a general infraction report shall decide whether the inmate is guilty or not guilty within five working days of receipt of the report. An extension to the five days may be granted by the hearing officer. This decision of the supervisor or unit team can be reached by:

(a) Taking no further action, in which case the report shall not be retained in the inmate's files, but may be retained in other institutional files designated for statistical, recordkeeping, or litigation purposes;

(b) Deciding the infraction without a hearing upon a determination that the inmate is guilty, the supervising employee or unit team may impose any appropriate sanction; or

(c) Scheduling an informal hearing with the inmate present at which the supervising employee or unit team may allow witnesses and documentary evidence. Upon finding that an inmate is guilty, the supervising employee or unit team may impose any appropriate sanction.

AMENDATORY SECTION (Amending WSR 97-03-041, filed 1/10/97, effective 2/4/97)

WAC 137-28-260 Serious infractions.

(1) Assault/threatening actions/causing injury to another person

- 501 - Committing homicide.
- 502 - Aggravated assault on another offender.
- 503 - Extortion, blackmail, or demanding or receiving money or anything of value in return for protection against others, or under threat of informing.
- 505 - Fighting with any person.
- 506 - Threatening another with bodily harm or with any offense against another person, property or family.
- 508 - Throwing objects, materials, substances or spitting at staff, visitors, or other inmates.
- 511 - Aggravated assault on a visitor.
- 520 - Unauthorized demonstration, practice or use of martial arts.
- 521 - Taking or holding any person hostage.

- 588 - Causing a valid and documented threat of transmission of a contagious disease to any person due to intentional, negligent or reckless action.
- 599 - Careless behavior that causes injury to another offender.
- 604 - Aggravated assault on a staff member.
- 633 - Assault on another offender.
- 663 - Using physical force, intimidation or coercion against any person.
- 699 - Careless behavior that causes injury to a staff member.
- 704 - Assault on a staff member.
- 711 - Assault on a visitor.
- 717 - Causing a threat of injury to another person by disregard of orders, careless behavior, resisting assisted movement or physical efforts to restrain.
- 777 - Causing injury to a staff member by resisting orders, resisting assisted movement or physical efforts to restrain.
- 799 - Careless behavior that causes injury to a visitor.

Unauthorized possession

- 559 - Gambling; possession of gambling paraphernalia.
- 601 - Possession, manufacture or introduction of an explosive device or any ammunition, or any components of an explosive device or ammunition.
- 602 - Possession, manufacture or introduction of any gun, firearm, weapon, sharpened instrument, knife, or poison or any components thereof.
- 620 - Receipt or possession of contraband during participation in off-grounds or outer perimeter activity or work detail.
- 660 - Unauthorized possession of money, stamps, or negotiable instruments, the value of which is five dollars or more.
- 702 - Possession, manufacture or introduction of an unauthorized tool.
- 736 - Possession, manufacture or introduction of unauthorized keys.
- 738 - Possession of the clothing of a staff member.

Tattooing

- 710 - Being tattooed while incarcerated, tattooing another, or possessing tattoo paraphernalia.

Theft/possession of stolen property

- 555 - Theft of property or possession of stolen property.

- 741 - Theft of food, the value of which is more than five dollars.
- 755 - Misuse or waste of issued supplies, goods, services or property, the replacement value of which is ten dollars or more.

Forgery

- 654 - Counterfeiting, forging, altering or unauthorized reproduction of any document, article of identification, money, security, or official paper.

Setting fire, damaging or destroying property

- 553 - Setting a fire.
- 554 - Mutilating, altering, defacing or destroying any item, the value of which is ten dollars or more and that is not the personal property of the inmate.
- 563 - Making a false fire alarm or tampering with, damaging, blocking or interfering with fire alarms, fire extinguishers, fire hoses, fire exits, or other fire fighting equipment or devices.
- 600 - Tampering with, damaging, blocking, or interfering with any locking or security device.
- 720 - Flooding a cell or other area of the institution.

Inciting others/participation in unacceptable group behavior

- 650 - Rioting.
- 651 - Inciting others to riot.
- 652 - Engaging in or inciting a group demonstration.
- 661 - Performing or taking part in an unauthorized marriage.
- 682 - Engaging in an organized work stoppage.
- 708 - Organizing or participating in an unauthorized group activity or meeting.
- 734 - Participating or engaging in the activities of any unauthorized club, organization, gang or security threat group; or wearing or possessing the symbols of an unauthorized club, organization, gang or security threat group.
- 746 - Participating in or inciting others to go on a hunger strike.

Inappropriate sexual behavior

- 504 - Engaging in sexual acts with others with the exception of spouses during approved extended family visits.

659 - Sexual harassment; any word, action, gesture or other behavior that is sexual in nature and that would be offensive to a reasonable person.

728(b) - Possession of any written, photographic or hand-drawn material that depicts a sexually explicit act(s) as defined in ((~~DOE~~ 450-100)) WAC 137-28-160.

750 - Indecent exposure.

Providing false statements

551 - Lying to the disciplinary hearing officer or lying on a disciplinary appeal.

552 - Causing an innocent person to be penalized or proceeded against by lying.

706 - Lying or giving false information about proposed community residence when proposing a release plan, community placement, etc.

Interfering with staff/impersonating

558 - Interfering with staff members, medical personnel, fire fighters, or law enforcement personnel in the performance of their duties.

605 - Impersonating any staff member, other inmate or visitor.

Failure to follow orders and rules

509 - Refusing a direct order by any staff member to proceed to or disperse from a particular area.

556 - Refusing to submit to or cooperate in a search when ordered to do so by a staff member.

557 - Refusing to participate in an available education or work program or other mandatory programming assignment.

609 - Refusing or failing to submit to testing required by policy, statute, or court order, such as DNA blood tests, when ordered to do so by a staff member.

658 - Failing to comply with any administrative or posthearing sanction imposed for committing any general or serious infraction.

724 - Refusing a cell or housing assignment.

745 - Refusing a transfer to another facility.

Counts/unauthorized absence

653 - Causing an inaccurate count by means of unauthorized absence, hiding, concealing ones self or other form of deception or distraction.

Escape/attempted escape

525 - Violating conditions of furlough.

550 - Escape or attempted escape.

- 560 - Unauthorized possession of items or materials likely to be used in an escape attempt.

Committing crimes/excess infractions

- 507 - Committing any act that is a felony under state or federal law that is not otherwise included in these rules.
- 517 - Committing any act that is a misdemeanor under local, state, or federal law that is not otherwise included in these rules.
- 657 - Being found guilty of four or more general infractions which have been reported in writing arising out of separate incidents, all of which occur within a six-month period.

Unacceptable communication

- 718 - Use of mail or telephone in violation of court order or local, state or federal law.
- 726 - Telephoning or sending written communication or otherwise initiating communication with a minor without the approval of that minor's parent or guardian.
- 727 - Telephoning or sending written communications to any person contrary to previous written warnings and/or documented disciplinary actions.

Misuse of controlled substances, drugs, alcohol and related programs

- 603 - Possession, introduction, or transfer of any narcotic, controlled substance, illegal drug, unauthorized drug or drug paraphernalia.
- 606 - Possession of tobacco products and/or matches in close/maximum housing units where strictly prohibited.
- 607 - Refusing to submit to a urinalysis and/or failure to provide a urine sample when ordered to do so by a staff member.
- 608 - Refusing or failing to submit to a breathalyzer or other standard sobriety test when ordered to do so by a staff member.
- 610 - Unauthorized accumulation of prescribed medication greater than a single or daily dose.
- 655 - Making intoxicants, alcohol, controlled substances, narcotics, or the possession of ingredients, equipment, items, formulas or instructions that are used in making intoxicants, alcohol, controlled substances, or narcotics.
- 707 - Possession, introduction, or transfer of any alcoholic or intoxicating beverage.
- 716 - Unauthorized use of drugs, alcohol or other intoxicants.

- 752 - Receiving a positive test for use of unauthorized drugs, alcohol, or other intoxicants.

Soliciting/fraud

- 656 - Giving, offering or receiving from any person a bribe or anything of value for an unauthorized favor or service.
- 662 - Soliciting goods or services for which the provider would expect payment when the inmate knows or should know that no funds are available to pay for those goods or services.
- 714 - Giving, selling, borrowing, lending, or trading money or anything of value to, or accepting or purchasing money or anything of value from, another inmate or that inmate's friend(s) or family, the value of which is ten dollars or more.
- 740 - Fraud, embezzlement, or obtaining goods, services, money, or anything of value under false pretense.

Creating an emergency situation

- 712 - Attempted suicide or self-mutilation.
- 742 - Creating a false emergency by feigning illness when contrary to medical/mental health screening results.
- 744 - Making a bomb threat.

(2) In determining whether a # 728(b) infraction or a # 728(a) infraction pursuant to WAC 137-28-220 should be charged, the infracting officer shall consider mitigating factors as defined in WAC 137-28-160.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-270 Serious infraction procedure. Infraction report.

(1) In the event of a serious infraction, the staff member who discovers such violation shall prepare and submit an infraction report. The infraction report shall be submitted promptly upon discovery of the incident or upon completion of an investigation. The infraction report must include:

- (a) Name, number and housing assignment of offender;
- (b) A description of the incident;
- (c) The time and place of the incident;
- (d) The names of witnesses, victims, and other persons

involved;

(e) The specific rule alleged to have been violated;

(f) A description of any action taken;

(g) Copies of any relevant documentation or supplemental reports. Confidential information and the identities of confidential informants shall not be included;

(h) Name and signature of reporting staff.

(2) The infracting staff member may recommend action to be taken on the infraction to the hearing officer. This may include a recommendation that the inmate be referred for a mental health consultation.

(3) Serious infraction reports may be reviewed by the ~~((infracting staff member's supervisor))~~ infraction review officer who may:

(a) Approve the report and forward it to the hearing clerk;

(b) Require the report be revised, rewritten or reinvestigated by the reporting staff member to ensure that the alleged facts support the charges;

(c) Add, dismiss, delete or reduce the indicated WAC violations as appropriate, based upon the information and/or evidence provided by the reporting staff member and any mitigating factors;

(d) Recommend referral to a mental health professional for consultation if there is a question whether:

(i) Mental illness contributed to the behavior that led to the infraction; or

(ii) The inmate's mental health status may need to be monitored.

(4) If a negotiated hearing process is in place in the facility, the report may be forwarded to the designated hearings officer.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-290 Preparations for hearing. In preparation for the hearing, the hearing clerk or designee shall, at least twenty-four hours in advance of the hearing:

(1) Provide copies of the infraction report to the inmate;

(2) Advise the inmate in writing:

(a) Of his/her right to have a hearing;

(b) That if he/she chooses not to testify at or attend the hearing, his/her silence may be used against him/her;

(c) To present written statements from other inmates, staff, or other persons only if those statements would be relevant to the infraction and have a tendency to demonstrate his/her innocence;

(d) To request that staff members, other inmates, and other persons be present as witnesses in his/her defense for the hearing

if it is determined by the hearing officer that to do so would not be unduly hazardous to institutional safety or correctional goals. Limitations may be made by the hearing officer if the information to be presented by the witnesses is deemed to be irrelevant, duplicative, or unnecessary to the adequate presentation of the inmate's case;

(e) To have a staff advisor assist in preparation of the inmate's case when it is determined by appropriate staff that the inmate is unable to adequately represent him/herself on the basis of literacy, competence, or other disability;

(f) To have access to nonconfidential reports and records used by the hearing officer during the fact-finding stage. However, where reports and records contain information that might reasonably compromise the security or safety of the institution or its inmates, these reports and records shall be identified as confidential and withheld. A summary of the confidential information shall be provided to the inmate. This summary may be included in the infraction report.

(g) The inmate must establish that any requested witness has relevant and exculpatory evidence to present at the hearing. The inmate must list all intended witnesses on the notice of hearing. The hearing officer may, in his/her discretion, allow additional witnesses for good cause shown;

(3) Advise the inmate that he/she does not have a right:

(a) To cross-examine witnesses;

(b) To have the infracting staff member present at the hearing;

(c) To a polygraph or other supplemental tests;

(4) Obtain written acknowledgement of the inmate's receipt of the information;

(5) Determine from the inmate whether the inmate wishes to contest the allegation;

(6) Schedule the hearing within (~~ten~~) seven working days after discovery of the incident. If an inmate is placed in prehearing confinement, a hearing shall be held within three working days after the day of placement, unless the time is extended by the superintendent. If the hearing is continued, a determination shall be made whether the inmate should remain on prehearing confinement and the reasons for that confinement.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-300 Conduct of hearing. (1) The hearing officer shall ensure that the inmate is capable of understanding the charge against him/her, the nature of the proceedings, and is able to adequately take part in the hearing. If there is reason to doubt the inmate's understanding or ability, the hearing officer may

order a continuance of the hearing in order to obtain additional information(~~(. If the hearing officer determines that the inmate is not able to understand or take part in the proceedings, the hearing officer shall assign a staff advisor to the inmate. If the inmate's mental status impairs the inmate's ability to participate in the hearing, the staff advisor appointed should be a mental health professional or a staff member with mental health training or experience)~~), refer the inmate to a mental health staff member for assessment, appoint a mental health staff member to represent the inmate at the hearing, or request a staff advisor.

(2) The inmate shall be present at all stages of the hearing except during deliberations and any inquiry the hearing officer may make concerning the source of confidential information.

(3) The hearing officer may consider relevant evidence presented outside the hearing when not feasible to present that evidence within the hearing. The inmate shall be apprised of the content of that evidence and shall be allowed to rebut that evidence during the hearing. An inmate may waive his/her presence at a hearing. Failure without good cause to attend a scheduled hearing may be deemed a waiver of personal attendance. An inmate may be removed from his/her disciplinary hearing and the hearing may be continued in the inmate's absence if the inmate's behavior disrupts the disciplinary hearing.

(4) Where institution staff members are witnesses against the inmate, a written statement from the staff member may be considered by the hearing 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.

(5) The hearing officer has the authority to question all witnesses. The inmate may submit proposed questions to be asked of witnesses, but the hearing officer has discretion over the questions asked.

(6) The inmate shall be allowed to present witnesses in his/her defense and to 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. Testimony of witnesses from outside the facility will be submitted in writing.

(a) The hearing officer may deny the admission of evidence or testimony if the hearing officer determines that the testimony or evidence is 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.

(b) The testimony of witnesses that is adverse to the inmate may be given in person, in writing, or by telephone.

(c) The hearing officer shall document on the written record the reasons for denial of in-person testimony that is requested in writing by the inmate.

(7) If the hearing officer determines that a source of information would be subject to risk of harm if his/her identity were disclosed, testimony of the confidential source may be introduced by the testimony of a staff member. The confidential testimony may be provided by the source or by the written and

signed statement of the source. If the staff member to whom the source provided information is unavailable, the written statement of this staff member may be used.

(a) The hearing officer shall, out of the presence of all inmates and off the record, identify the confidential source, and how the testifying staff member received the confidential information.

(b) The staff member presenting the information from a confidential source shall identify the source and the circumstances surrounding the receipt of the confidential information to the hearing officer, off the record. The hearing officer shall make an independent determination regarding the reliability of the confidential source, the credibility of the information, and the necessity of not revealing the source of the confidential information. In determining whether the confidential source is reliable and the confidential information is credible, the hearing officer should consider all relevant circumstances including, but not limited to:

(i) Evidence from other staff members that the confidential source has previously given reliable information;

(ii) Evidence that the confidential source had no apparent motive to fabricate information;

(iii) Evidence that the confidential source received no benefit from providing the information;

(iv) Whether the confidential source is giving first-hand information;

(v) Whether the confidential information is internally consistent and is consistent with other known facts; and

(vi) The existence of corroborating evidence.

The hearing officer shall also determine whether safety concerns justify nondisclosure of the source of confidential information. The reliability and credibility determination and the need for confidentiality must be made on the record.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-310 Decision of hearing officer. (1) A report of the hearing shall be made.

(a) The report shall include:

(i) The charge;

(ii) Names of witnesses;

(iii) Inmate plea(s);

(iv) Summary of the testimony and cross-examination;

(v) A description of the physical evidence used;

(vi) Reasons for denying witnesses or the fact that written witness statements were not returned to the hearing officer; and

(vii) The decisions and reasons.

(b) The written report shall be placed in the inmate's institutional file if he/she is found guilty.

(c) All reports and attachments shall be maintained by the clerk as part of the hearing officer's permanent records. A complete taped record of the hearing shall be taken but the tape shall not become a part of the inmate's file, and may be destroyed one hundred twenty days after the date of the hearing unless the hearing officer becomes aware that an appeal or court proceeding is pending.

(2) In reaching a decision on the guilt or innocence of the inmate, the hearing officer must rely solely on evidence considered at the hearing. However, during the dispositional stage of the hearing, other factors, such as the inmate's institutional file, prior conduct, mental status, and overall institution adjustment, may be considered.

(3) The hearing officer may not find an inmate guilty of committing a #728(a) or #728(b) infraction if the inmate possesses sexually explicit materials depicting **only** actual penetration and such sexually explicit material was screened and approved by a mail room staff member prior to delivery to the inmate. Nothing herein shall be construed to limit the ability to remove such material from the inmate's possession and cell.

(4) The hearing officer shall consider mitigating factors in determining whether to reduce a #728(b) serious infraction to a #728(a) general infraction.

(5) The hearing officer is authorized to find an inmate guilty of a lesser included offense without issuing a new infraction report or conducting a new hearing.

(6) 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 separate hearing on the new charges and may allow the hearing officer to enter a finding of guilty or not guilty and impose sanctions.

(7) The inmate shall be informed of the decision of the hearing officer in writing within three working days of the hearing, unless extended by the superintendent.

~~((+))~~ (8) The inmate shall be informed of his/her right to appeal the decision of the hearing officer to the superintendent.

AMENDATORY SECTION (Amending WSR 97-03-041, filed 1/10/97, effective 2/4/97)

WAC 137-28-350 Sanctions--Authority to impose. (1) If the hearing officer determines that an inmate is guilty of a serious infraction, he/she may impose one or more of the following sanctions:

(a) Any of the sanctions available for general infractions;

(b) Any of the sanctions available under (~~DOF~~) DOC 320.150

(~~disciplinary sanctions directive~~);

(c) Loss of a privilege or privileges as specified by the hearing officer not to exceed: Thirty days on a first offense, ninety days on a second offense, and one hundred eighty days on a third offense, within a one-year period;

(d) Evening lockup or confinement to quarters for ten days;

(e) Weekend and/or holiday lockup or confinement to quarters for a period of one or more weekends but not to exceed twelve consecutive weekends per incident. For purposes of this rule, a "weekend" shall begin at the end of the Friday workday and terminate at the beginning of the Monday workday;

(f) Confinement to quarters except for meals, or with meals in cell, with or without curtailment of job assignment for a period not to exceed thirty days;

(g) Recommendation to the unit team/classification committee/assignment officer for reconsideration of custody classification or program change;

(h) Recommendations to the classification committee/classification officer for transfer to another institution when, as a result of the infraction committed, the inmate is unable to function in the institution of present confinement, or if other disciplinary methods have been attempted and failed;

(i) Confinement on segregation status for a period not to exceed thirty consecutive days;

(j) Confinement on isolation status for a period not to exceed ten consecutive days; however, where a serious infraction occurs during a period of isolation imposed under this rule, additional periods of isolation not to exceed ten days may be imposed. In situations where an inmate is in isolation for more than ten consecutive days, the director's prior approval is required unless the inmate is released from isolation for at least seventy-two consecutive hours between the end of one isolation sanction and the beginning of another;

(k) Restitution (~~or fines~~);

(l) Recommendation to the superintendent that he/she not certify good conduct time credit for an inmate subject to the jurisdiction of the indeterminate sentence review board, pursuant to RCW 9.95.070 or that he/she approve the denial of good conduct time credit for those inmates not under the jurisdiction of the board.

(i) The recommendation will be consistent with guidelines established by the secretary of the department of corrections.

(ii) Any sanctions for loss of good conduct credits in excess of the guidelines established by the secretary of the department of corrections must have final approval by the (~~director, division of prisons~~) deputy secretary.

(iii) For inmates not under the board's jurisdiction, all awards of good conduct time shall be considered tentative and therefore all good conduct time credits earned or to be earned may be addressed under this rule;

(m) Recommendation to the indeterminate sentence review board for a disciplinary hearing or reconsideration of minimum term should occur only with infractions providing for actual time loss of twelve months or more and consistent with guidelines established by the department;

(n) Interruption of visitation between the offender and a specified individual(s) for a period of up to one hundred eighty consecutive days when there has been an infraction for visit related behavior or behavior that presents a security or safety threat. In cases of multiple or very serious offenses, recommendations may be made to the superintendent for extended or permanent loss of the privilege of visitation with a specified individual(s);

(o) Restrictions, interruption or termination of correspondence, and/or telephone privileges with specified individuals. Sanctions for offense(s) within any one-year period may not exceed: Up to ninety consecutive days for the first offense, one hundred eighty consecutive days for the second offense and permanent loss for the third offense. Termination of correspondence and/or telephone privileges may be permanent for the first offense if:

(i) The recipient so requests; or

(ii) A parent or guardian of the recipient, if a minor or an incompetent person, so requests; or

(iii) A felony was involved in the incident; or

(iv) If the contact violates a court order;

(p) The sanction for infraction # 557 shall be the loss of available earned release credits and other privileges as outlined in division directives. Progressively more severe sanctions will be utilized for subsequent infractions # 557.

(2) If the hearing officer determines that more than one infraction occurred as a result of the same incident, he/she shall not impose consecutive sanctions for the separate infractions but shall consider them together and impose penalties for the group of infractions.

(3) The hearing officer may suspend the execution of a disciplinary sanction for a fixed period of time, not to exceed three hundred sixty-five consecutive days, subject to the good behavior of the inmate or to meeting other conditions as specified by the hearing officer. If the subsequent behavior of the inmate is appropriate, the hearing officer may, at or before the end of the fixed period, cancel the sanction. A suspended sanction may be imposed if the inmate has been found guilty of a general or serious infraction or of violating the conditions attached to the original suspension. A suspended sanction may be imposed by the hearing officer following notice to, and an in-person meeting with, the inmate.

(4) The hearing officer may review any decision he/she previously made and may modify downward any sanction previously imposed.

(5) Sanctions shall not be imposed while an appeal from the hearing officer's decision is under consideration by the superintendent.

(6) In all cases, regardless whether an appeal is taken, the superintendent may review a sanction imposed and may reduce its severity.

(7) Nothing in this section limits the superintendent's discretion to grant, deny, suspend, or revoke any privilege.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-380 Appeal to superintendent. (1) An inmate or the inmate's staff advisor may appeal the decision of the hearing officer to the superintendent by filing a written request for review with his/her reasons with the clerk within (~~((twenty-four hours))~~) fifteen days, exclusive of weekends and holidays, after receiving notice of the decision of the hearing officer. The superintendent may consider appeals filed beyond the (~~((twenty-four hour))~~) fifteen-day period.

(2) The clerk shall promptly transmit the appeal and the hearing record to the superintendent.

(3) The superintendent shall act on the appeal within ten working days of its receipt. The superintendent may affirm the decision of the hearing officer; reduce the charge to a lesser included offense; reduce a #728(b) serious infraction to a #728(a) general infraction based upon mitigating factors; reduce the severity of the sanctions imposed; vacate the judgment of the hearing officer; or remand the matter for a new hearing. Any new hearing may not result in an increase in the severity of the sanctions originally imposed unless the inmate is charged with related or additional offenses.

(4) Pending the decision of the superintendent, disciplinary sanctions shall not be imposed on the inmate.

(5) The inmate shall be notified promptly of the decision of the superintendent.

AMENDATORY SECTION (Amending WSR 95-15-044, filed 7/13/95, effective 8/15/95)

WAC 137-28-420 Continuances. (1) At any time during the disciplinary process, the hearing officer may continue the hearing for any reasons, including the following:

- (a) To determine the inmate's mental status or competency.
- (b) To appoint a staff advisor.
- (c) To obtain an interpreter.
- (d) To obtain witnesses or witness statements.

- (e) To order an investigation into the incident.
- (f) To correct errors.
- (g) To obtain a replacement hearing officer.
- (h) To obtain crime lab reports or other documentation.
- (i) Due to the inmate's and/or witness' unavailability.
- (j) Because the inmate is on escape, court-ordered custody, at a non-DOC facility, in transit, etc.
- (k) A reasonable request by the inmate.
- (l) To determine restitution costs.
- (2) Continuances shall be for no longer than necessary, but shall not exceed twenty working days, unless approved by the superintendent.
- (3) Hearings for inmates on escape status, court-ordered custody, in transit at a (~~nondivision of prisons~~) nondepartment of corrections' facility or otherwise unavailable may be continued up to a period not to exceed twenty working days after their return to the facility where the infraction originated.

REPEALER

The following section of the Washington Administrative Code is repealed:

WAC 137-28-320

Lesser included and related infractions.