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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 THOMAS ALLEN GORDON,

7 Plaintiff,

8 v.

9 JOE BARNETT, et al,

10 Defendants.

No. C03-5524KLS

ORDER GRANTING DEFENDANTS'  
MOTION FOR SUMMARY JUDGMENT

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12  
13 This matter comes before the Court on defendants' second motion for summary judgment  
14 filed pursuant to Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 56, concerning plaintiff's  
15 remaining due process claim. (Dkt. #200). The parties have consented to have this matter be  
16 heard by the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil  
17 Procedure ("Fed. R. Civ. P.") 73 and Local Rule MJR 13. After reviewing defendants' motion  
18 and the remaining record, the Court hereby finds and ORDERS as follows:  
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20 FACTUAL AND PROCEDURAL BACKGROUND

21  
22 On April 3, 2008, the Court issued an order granting defendants' first summary judgment  
23 motion, and dismissing plaintiff's complaint. (Dkt. #162). On July 6, 2009, the Ninth Circuit  
24 Court of Appeals issued its opinion regarding plaintiff's appeal of the Court's order, finding the  
25 Court properly granted summary judgment on plaintiff's claim that his placement on Nutraloaf  
26

ORDER - 1

1 violated the Eighth Amendment’s prohibition against cruel and unusual punishment. (Dkt. #188,  
2 p. 2). The Ninth Circuit, however, also went on to find in relevant part that:

3 . . . [Plaintiff] also claimed that he was placed on Nutraloaf without a  
4 hearing and that defendants were therefore prohibited from punishing him.  
5 The Fourteenth Amendment’s Due Process Clause prohibits a jail from  
6 “punishing” a pretrial detainee without a due process hearing. There is no  
7 dispute that Gordon was placed on the Nutraloaf diet as punishment for his  
8 disciplinary infractions; as such, he was entitled to a due process hearing. . . .

9 We remand for further proceedings on Gordon’s due process claim  
10 consistent with this disposition.

11 (Id.) (internal citations omitted). On July 29, 2009, the Court of Appeals issued its mandate.  
12 (Dkt. #196).

13 On July 31, 2009, this Court issued an order directing defendants to file by no later than  
14 November 26, 2009, a motion for summary judgment in regard to the above procedural due  
15 process issue to be noted for consideration on November 27, 2009. (Dkt. #197). On October 27,  
16 2009, defendants filed a motion for extension of time to file their summary judgment motion  
17 (Dkt. #198), which the Court granted on November 10, 2009, re-noting the date for consideration  
18 thereof to December 25, 2009 (Dkt. #199). On December 1, 2009, defendants timely filed their  
19 motion for summary judgment. (Dkt. #200). Although plaintiff was granted the opportunity to  
20 file a response to that motion, none to date has been received by the Court. Accordingly, this  
21 matter is now ripe for review.

## 22 DISCUSSION

23 Summary judgment shall be rendered if the pleadings, exhibits, and affidavits show that  
24 there is no genuine issue as to any material fact and that the moving party is entitled to judgment  
25 as a matter of law. Fed. R. Civ. P. 56(c). In deciding whether summary judgment should be  
26 granted, the Court “must view the evidence in the light most favorable to the nonmoving party,”

1 and draw all inferences “in the light most favorable” to that party. T.W. Electrical Serv., Inc. v.  
2 Pacific Electrical Contractors Ass’n, 809 F.2d 626, 630-31 (9th Cir. 1987). When a summary  
3 judgment motion is supported as provided in Fed. R. Civ. P. 56, an adverse party may not rest  
4 upon the mere allegations or denials of his pleading, but his response, by affidavits or as  
5 otherwise provided in Fed. R. Civ. P. 56, must set forth specific facts showing there is a genuine  
6 issue for trial. Fed. R. Civ. P. 56(e)(2).  
7

8 If the nonmoving party does not so respond, summary judgment, if appropriate, shall be  
9 rendered against that party. Id. The moving party must demonstrate the absence of a genuine  
10 issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986). Mere  
11 disagreement or the bald assertion that a genuine issue of material fact exists does not preclude  
12 summary judgment. California Architectural Building Products, Inc. v. Franciscan Ceramics,  
13 Inc., 818 F.2d 1466, 1468 (9th Cir. 1987). A “material” fact is one which is “relevant to an  
14 element of a claim or defense and whose existence might affect the outcome of the suit,” and the  
15 materiality of which is “determined by the substantive law governing the claim.” T.W. Electrical  
16 Serv., 809 F.2d at 630.  
17

18 Mere “[d]isputes over irrelevant or unnecessary facts,” therefore, “will not preclude a  
19 grant of summary judgment.” Id. Rather, the nonmoving party “must produce at least some  
20 ‘significant probative evidence tending to support the complaint.’” Id. (quoting Anderson, 477  
21 U.S. at 290); see also California Architectural Building Products, Inc., 818 F.2d at 1468 (“No  
22 longer can it be argued that any disagreement about a material issue of fact precludes the use of  
23 summary judgment.”). In other words, the purpose of summary judgment “is not to replace  
24 conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.”  
25 Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990). For the reasons set forth  
26

1 below, the Court finds plaintiff has not shown the existence of any genuine issue of material fact  
2 regarding his procedural due process claim. The Court further finds, therefore, that defendants  
3 are entitled to summary judgment.

4 At all times relevant to this matter, plaintiff was a pretrial detainee at the Clark County  
5 Jail. Pretrial civil detainees “retain at least those constitutional rights . . . enjoyed by convicted  
6 prisoners.” Bell v. Wolfish, 441 U.S. 520, 545 (1979). The constitutional analysis the Court  
7 employs in evaluating a constitutional claim, however, is different depending on whether the  
8 individual asserting the right is a pretrial detainee or a convicted prisoner. See Simmons v.  
9 Sacramento County Superior Court, 318 F.3d 1156, 1160 (9th Cir. 2003) (“Different criteria  
10 apply to restrictions placed on prisoners who are held *before* convictions.”) (emphasis in  
11 original). With respect to the former, the issue for claims that are grounded in the Due Process  
12 Clause is whether the particular restrictions imposed amount to punishment. See Valdez v.  
13 Rosenbaum, 302 F.3d. 1039, 1045 (9th Cir. 2002) (pretrial detainees have due process right  
14 against restrictions that amount to punishment) (citing United States v. Salerno, 481 U.S. 739,  
15 746 (1987); Bell, 441 U.S. at 535).

16 A pretrial detainee’s due process rights will be found to have been violated, therefore, if  
17 the restrictions are “imposed for the purpose of punishment.” Id. (quoting Bell, 441 U.S. at 535  
18 (“[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of  
19 guilt in accordance with due process of law.”)). There is no violation, though, if the restrictions  
20 “are ‘but an incident of some other legitimate government purpose.’” Id. In such circumstances,  
21 the restrictions are permissible. Id. (citing Salerno, 481 U.S. at 747); see also Bell, 441 U.S. at  
22 537 (“Not every disability imposed during pretrial detention amounts to ‘punishment’ in the  
23 constitutional sense, . . . [o]nce the Government has exercised its conceded authority to detain a  
24  
25  
26

1 person pending trial, it obviously is entitled to employ devices that are calculated to effectuate  
2 this detention.”).

3 The first step “[i]n distinguishing between permissible restrictions and impermissible  
4 punishment” thus is to examine whether the restriction is based on “an express intent to inflict  
5 punishment.” Valdez, 302 F.3d. at 1045. If there is no indication of such intent, the Court next is  
6 to consider “whether punitive intent can be inferred from the nature of the restriction.” Id. This  
7 latter determination generally turns on “whether an alternative purpose to which [the restriction]  
8 may rationally be connected is assignable for it, and whether [the restriction] appears excessive  
9 in relation to the alternative purpose assigned [to it].” Id. (quoting Bell, 441 U.S. at 539).

11 As such, “if a particular condition or restriction of pretrial detention is reasonably related  
12 to a legitimate governmental objective, it does not, without more, amount to ‘punishment.’” Id.;  
13 see also Simmons, 318 F.3d at 1160 (same). “Conversely, if a restriction or condition is not  
14 reasonably related to a legitimate goal – if it is arbitrary or purposeless – a court permissibly may  
15 infer that the purpose of the governmental action is punishment that may not constitutionally be  
16 inflicted upon detainees.” Bell, 441 U.S. at 539. In terms of such legitimate governmental goals,  
17 the Supreme Court in Bell went on to state:

19 The Government . . . has legitimate interests that stem from its need to  
20 manage the facility in which the individual is detained. These legitimate  
21 operational concerns may require administrative measures that go beyond  
22 those that are, strictly speaking, necessary to ensure that the detainee shows up  
23 at trial. For example, the Government must be able to take steps to maintain  
24 security and order at the institution . . . Restraints that are reasonably related  
25 to the institution’s interest in maintaining jail security do not, without more,  
26 constitute unconstitutional punishment, even if they are discomforting and are  
restrictions that the detainee would not have experienced had he been  
released while awaiting trial. We need not here attempt to detail the precise  
extent of the legitimate governmental interests that may justify conditions or  
restrictions of pretrial detention. It is enough simply to recognize that in  
addition to ensuring the detainees’ presence at trial, the effective management  
of the detention facility once the individual is confined is a valid objective that

1 may justify imposition of conditions and restrictions of pretrial detention and  
2 dispel any inference that such restrictions are intended as punishment.

3 Id. at 540 (internal footnotes omitted). In addition, “[i]n determining whether restrictions or  
4 conditions are reasonably related to the Government’s interest in maintaining security and order  
5 and operating the institution in a manageable fashion, courts must heed our warning that ‘[s]uch  
6 considerations are peculiarly within the province and professional expertise of corrections  
7 officials, and, in the absence of substantial evidence in the record to indicate that the officials  
8 have exaggerated their response to these considerations, courts should ordinarily defer to their  
9 expert judgment in such matters.” Id. at 540 n.23 (quoting Pell v. Procunier, 417 U.S. 817, 827  
10 (1974)).

11  
12 As noted above, the Ninth Circuit ruled that there is no dispute here that plaintiff was  
13 “placed on the Nutraloaf diet as punishment for his disciplinary infractions,” and that “as such,  
14 he was entitled to a due process hearing.” (Dkt. #188, p. 2). “[A] pretrial detainee may not be  
15 punished without a due process hearing.” Mitchell v. Dupnki, 75 F.3d 517, 524 (9th Cir. 1996).  
16 This does not mean pretrial detainees “are free to violate jail rules with impunity.” Id. (noting, as  
17 discussed above, that Bell recognizes need for preserving internal order and discipline among  
18 pretrial detainees as well as convicted prisoners). Rather, pretrial detainees “may be subjected to  
19 disciplinary” action, but only if first accorded “a due process hearing to determine whether they  
20 have in fact violated any rule.” Id.

21  
22 In terms of the specific elements of due process required here, first a “written notice of  
23 the charges must be given to the” inmate – informing him “of the charges and to enable him to  
24 marshal the facts and prepare a defense” – at least 24 hours prior to the disciplinary hearing.  
25 Wolff v. McDonnell, 418 U.S. 539, 564 (1974). The inmate also “should be allowed to call  
26 witnesses and present documentary evidence in his defense when permitting him to do so will

1 not be unduly hazardous to institutional safety or correctional goals.” Id. at 566. In addition,  
2 “there must be a ‘written statement as to the evidence relied on and reasons’ for the disciplinary  
3 action.” Id. at 565 (quoting Morrissey v. Brewer, 408 U.S. 471, 489 (1972)).

4 Plaintiff alleges in his complaint that he was served Nutraloaf without a hearing or notice  
5 that he would “be sanctioned to a segregated diet.” (Dkt. #140, pp. 7-8). It is not exactly clear  
6 from the complaint when plaintiff is alleging that this occurred, though it appears he is claiming  
7 it occurred sometime in or after late October 2001. See id., pp. 6-8. Defendants, however, have  
8 come forth with evidence that plaintiff received three hearings in November 2001, for a series of  
9 minor and major infractions of jail rules he committed. See (Dkt. #201, pp. 2-3; Dkt. #201-2-  
10 #201-4; Dkt. #202, pp. 6-10; Dkt. #202-8-#202-10). That evidence further shows that plaintiff  
11 was given at least 24 hours notice of each hearing, that he was provided the opportunity to attend  
12 the hearings and testify and call witnesses on his behalf, and that a written notice of each hearing  
13 decision indicating the findings made and sanctions imposed – including placement on Nutraloaf  
14 – was issued. See (Dkt. #202, pp. 9-10; Dkt. #202-4-#202-7).

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16  
17 Plaintiff has not presented the Court with any evidence to show that such was not the case  
18 in regard to any of the above three disciplinary hearings. Indeed, as noted above, plaintiff failed  
19 to respond at all to defendants’ motion for summary judgment. Accordingly, the Court finds that  
20 defendants have met their burden of showing plaintiff received a disciplinary hearing in regard to  
21 each instance in which he was placed on the Nutraloaf diet for purposes of punishment – i.e., in  
22 response to his continuing infractions of jail rules – which met the due process requirements set  
23 forth by the Supreme Court in Wolff. Nor does the Court find the decision to “administratively  
24 extend” plaintiff’s “term on ‘Nutraloaf’” due to the need “to maintain order in the jail,” violated  
25 his due process rights. (Dkt. #201, p. 3).  
26

1 As a result of his third disciplinary hearing on November 29, 2001, plaintiff was found  
2 guilty and “sanctioned to two weeks of ‘Nutraloaf’,” ending December 13, 2001. (Dkt. #201, p.  
3 3; Dkt. #201-4). According to defendant Joe Barnett, the period of administrative extension  
4 lasted from December 28, 2001, to January 9, 2002. (Dkt. #201, p. 3). This followed a period  
5 during which plaintiff “continued to disregard jail rules,” which involved, among other things,  
6 failure to follow orders and destruction of property. (Id.; Dkt. #202, pp. 8-9). As discussed  
7 above, absent any indication of an express intent to inflict punishment, if a restriction is  
8 rationally related to a legitimate governmental purpose, which is not excessive in relation to that  
9 purpose, the restriction does not amount to punishment. Such is the case here.

11 Also as discussed above, the government has a legitimate interest in maintaining security  
12 and order in its correctional institutions, including its jails housing pretrial detainees. Restraints  
13 reasonably related to that interest thus do not constitute impermissible punishment. Defendants  
14 attest that “[t]he use of ‘Nutraloaf’ was the only effective means to restore order in the jail” with  
15 respect to plaintiff’s demonstrated extensive disregard for jail rules. (Dkt. #201, p. 3; Dkt. #202,  
16 pp. 6-9). Given that un-rebutted attestation – and the other unchallenged evidence presented by  
17 defendants concerning plaintiff’s destructive behavior – the administrative use of Nutraloaf by  
18 defendants in this case was neither unconstitutional nor unreasonable. See Bell (holding effective  
19 management of detention facility constitutes valid objective justifying imposition of restrictions  
20 and dispelling any inference such restrictions are intended as punishment). This is particularly  
21 evidenced by the fact that “[o]nce plaintiff agreed to follow the rules and order was restored, the  
22 use of ‘Nutraloaf’ was suspended.” (Dkt. #201, p. 3).

25 It is true that the record indicates plaintiff received at least three further infractions during  
26 the fifteen-day period between December 13, 2001, when the Nutraloaf diet imposed as a result



1 of plaintiff's third November 2001 hearing ended, and December 28, 2001, when that diet was  
2 first administratively imposed. See Dkt. #202, pp. 8-9. However, there is nothing in the record to  
3 suggest – and, once more, plaintiff does not otherwise show, let alone allege in his complaint –  
4 that the decision to administratively extend the Nutraloaf diet was expressly done with the intent  
5 to punish him for those infractions. In so finding, the Court has kept well in mind the Supreme  
6 Court's admonition that considerations regarding maintaining security and order, as well as jail  
7 management and operations generally, are considerations that are "peculiarly within the province  
8 and professional expertise of corrections officials," and that the courts should ordinarily defer to  
9 the expertise of such officials in determining whether their response thereto is exaggerated. Bell  
10 at 540 n.23 (quoting Procunier, 417 U.S. at 827).

#### 12 CONCLUSION

13 Defendants have met their burden of demonstrating that there are no genuine issues of  
14 material fact and that they are entitled to judgment as a matter of law. Plaintiff has failed in all  
15 instances to allege facts sufficient to form a procedural due process violation. Accordingly,  
16 defendants' motion for summary judgment (Dkt. #200) hereby is GRANTED, and, therefore,  
17 plaintiff's complaint hereby is DISMISSED.  
18

19 DATED this 16th day of February, 2010.

22   
23 Karen L. Strombom  
24 United States Magistrate Judge  
25  
26