Prison Disciplinary Procedures: Creating Rules

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Given that prisons are total institutions, it is hardly surprising that the maintenance of discipline within correctional facilities has always been regarded as extremely important. The purpose of disciplinary rules has been thought by prison administrators to be a necessary part of the treatment orientation of the prison which seeks to regulate inmate behavior within predetermined and sociably approved modes of behavior. They are designed not only to assist in the inmate's rehabilitation, but of course, to insure the security, control, and orderly administration of the institution. Whether disciplinary procedures actually contributed to rehabilitation was until the last two years or so beyond the scope of judicial review, the courts taking the attitude that disciplinary procedures were routine internal practices which had best remain unexamined "[so] long as the punishment imposed for an infraction of the rules is not so unreasonable as to be characterized as vindictive, cruel, or inhuman, there is no right of judicial review of it . . . . Such questions have consistently been held to be nonjusticiable, for routine security measures and disciplinary action rest solely within the discretion of the prison officials and their superiors in the Executive Department."

In addition to a lack of interest by the courts, prison officials received little direction from state legislatures. The general statutory provisions grant board powers to a designated member of the executive branch with no apparent restrictions on exercise of that power. The rules developed by prison officials have often been themselves worded vaguely giving inmates little idea of conduct which is expected of them.

Within the past two years, the courts' reluctance to scrutinize disciplinary proceedings has largely melted away and been replaced by a willingness to act to provide some measure of due process protection for inmates in the disciplinary process. No longer is the disciplinary process regarded as internal and routine. Instead, protection of the inmate's due process rights has come to be regarded as of

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paramount importance. "The nature of a disciplinary proceeding is adjudicatory and the interest at stake in such a proceeding, that is, personal liberty, is of the highest value. Neither institutional rehabilitation programs nor the maintenance of discipline and security are seriously threatened by the assurance of due process; a governmental desire to conserve funds, while valid, must yield to the protection of fundamental constitutional rights." What the courts have come to realize is not that disciplinary procedures are inherently suspect but that standards of fundamental fairness applied to other administrative proceedings are relevant to the prison disciplinary situation as well. The U.S. Bureau of Prisons has noted:

No judicial decision precludes appropriate disciplinary action for misconduct that is imposed in a fair manner. Adverse court decisions have been founded mainly upon what appears to have been arbitrary and capricious actions resulting in unwarranted loss of privileges or the imposition of unduly harsh physical conditions of confinement.

More than anything else, repeated horror stories about arbitrary disciplinary action by correctional officials against inmates appear to have been the cause for the courts' abandoning the "hands-off" doctrine in this area. For many years, inmates have criticized inconsistency on the part of individual officers which has made it impossible for them to know the types of conduct which are proscribed. Although the U.S. Bureau of Prisons seeks to control inmate behavior in a "completely impersonal, impartial, and consistent manner," rules and procedures have rarely been so clear that the line officers, the persons who actually implement the rules, could enforce them in a knowledgeable, consistent, or fair manner. Many commentators have noted this problem, but it is only recently that either an Eighth Amendment or Fourteenth Amendment Due Process challenge had a reasonable chance of being taken seriously. As the President's Commission on Law Enforcement and the Administration of Justice argued, "[I]t is inconsistent with our whole system of government to grant such uncontrolled power to any official, particularly over the lives of persons. The fact that a person has been convicted of a crime should not mean that he has forfeited all rights to demand that he be fairly treated by officials." Typical of the emerging scrutiny which prison disciplinary procedures have received from

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9 Supra note 7.
the courts is this statement from the United States Court of Appeals for the Fourth Circuit:

Under our constitutional system, the payment which society exacts for transgressions of the law does not include relegating the transgressor to arbitrary and capricious action. . . [W]e cannot, without defaulting in our obligation fail to emphasize the imperative duty resting upon higher officials to insure that lower echelon custodial personnel are not permitted to arrogate to themselves the functions of their superiors. Where the lack of effective supervisory procedures exposes men to capricious imposition of added punishment, due process and Eighth Amendment questions inevitably arise.12

The effect of the courts' changed attitude has been that disciplinary hearings have come to be regarded as procedures in which inmates face the possibility of serious losses through the imposition of arbitrary punishment. As with procedures on the outside, some of which involve less serious potential consequences, prison disciplinary procedures are being scrutinized for their conformance with an emerging strict notion of due process.13

The argument for an application of some standard of due process to prison disciplinary hearings has another basis, corollary to the above-discussed notion that the potential for arbitrary action must be curtailed. The latter argument, taking its cue from Goldberg v. Kelly,14 a case which required adequate hearings before welfare benefits could be cut off, states that whenever a governmental action may deprive an individual of some substantial benefit, the basic protections of due process must be provided. The argument analogizes prison disciplinary hearings to most other administrative proceedings and requires the same or at least similar protections.15

Although, as will be discussed in greater detail infra, courts have differed as to the elements of due process required in prison disciplinary hearings and the rationale for requiring such procedures, they have rather uniformly dismissed the contentions of prison administrators that no safeguards should apply. As one court wrote:

[W]e cannot accept defendants' contention that the essential elements of fundamental procedural fairness . . . must be dispensed with entirely because of the need for summary action or because the administrative problems would be too burdensome. Although a prisoner does not possess all of the rights of an ordinary citizen, he is still entitled to procedural due process commensurate with the practical problems faced in prison life.16

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15 See K. Davis, ADMINISTRATIVE LAW TEXT §7.02 at 115 (1959).
As this opinion indicates, courts have engaged in a balancing of of societal and individual interests in formulating a standard. "The difficult question, as always, is what process was due" was the pithy manner in which one court described its task. The process of balancing can best be seen in relation to particular issues. A discussion of the major issues follows.

Notice of Rules and Regulations

Although specific disciplinary rules exist in every jurisdiction they are rarely codified into a rule book which is given to inmates. As a result, inmates often have little idea of what activities are proscribed. Further, the possibility for arbitrary action by correctional officers increases in the absence of clear rules. One commentator has shown how formulation of a clear rule alleviated difficulties arising from the vagaries of the previously unwritten disciplinary code. One court has specifically held that notice of written regulations is required by due process. The formulation of such a rulebook, although not yet clearly mandated by the courts, would appear to be desirable.

Charging and Investigation

When a line officer observes conduct which he regards as a violation of the rules, he has four choices: he can ignore the misconduct, let the inmate off with a warning, impose a summary punishment in the form of a withholding of privileges, or write up a disciplinary report. Because of the wide discretion which this set of choices leaves officers, at least one commentator and one court have required investigation by a superior officer to substantiate the material in a line officer's report. The act of bringing a charge would be taken from the line officer and given to supervisors except in emergency situations. Such a system is in use in a few states and many states permit investigation by officers when necessary. In all states where the prison disciplinary rules were examined, there is an exception permitting summary action when evidence of an imminent disorder exists and in many states some summary action is

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17 Sostre v. McGinnis, 442 F.2d 178, 196 (2d Cir. 1971); cf. Nolan v. Scafati, 430 F.2d 548, 551 (1st Cir. 1970), "While all the procedural safeguards provided citizens charged with a crime obviously cannot and need not be provided to prison inmates charged with a violation of prison discipline, some assurances of elemental fairness are essential when substantial individual interests are at stake."

18 Note, Administrative Fairness in Corrections, supra note 8.


20 Kraft, supra note 2, at 26.

21 Id.

22 Id. at 70.

23 E.g., Missouri State Penitentiary, Personnel Informational Pamphlet: Rules and Procedures (1967); New Mexico Penitentiary, Memo: Classification Committee and its Subcommittees (1971); Connecticut Dept. of Corrections, Discipline Procedures (Sept. 1, 1971).

24 E.g., Mass. Dept. of Corrections, supra note 5.
permitted in the case of minor offenses.\textsuperscript{25} Generally, some writeup of the action taken is required after the fact.\textsuperscript{26}

The rationale for the limitations on line officer discretion in normal situations is that superior officers generally comprehend better what the rules are, should be less likely to act arbitrarily, and should be more concerned with an overall perspective on discipline, rather than being so intimately involved in the routine of control of the inmate population.

The arguments for requiring investigation by a superior officer have considerable merit. With the courts apparently inclined to demand restrictions on arbitrary action, regulations which fail to require some review of line officer discretion would appear headed for conflict with the emergent standard of due process.

\textbf{Pre-Hearing Detention}

The issue of pre-hearing detention raises virtually identical issues as does the issue of charging responsibility. First, there is the question whether the line officer who first observes misconduct can order the inmate locked up prior to the hearing and whether there should be a presumption of release prior to hearing. Almost none of the recent prison disciplinary cases appear to have considered this issue directly. The most comprehensive discussion was in Morris \textit{v. Travisono},\textsuperscript{27} a case arising from a challenge to the prison rules of the Rhode Island prison system. The court, following the logic of its conclusions regarding charging and investigation of misconduct, determined that only a superior officer could order pre-hearing detention and then only in strict accordance with rules for preventive segregation. Furthermore, a presumption of release is to exist unless a superior officer determines that the alleged violation could constitute a threat to institutional order or the safety of particular inmates.\textsuperscript{28}

Most prison regulations provide for the detention of an inmate prior to hearing where the incident has created an immediate threat to prison order. However, the state regulations tend to permit detention for unlimited periods of time, generally by any correctional officer.\textsuperscript{29}

\textsuperscript{25} See infra Circumstances When Due Process Standards May Not Apply.
\textsuperscript{26} Missouri State Penitentiary, supra note 23.
\textsuperscript{28} Id. at 871.
\textsuperscript{29} N.H. State Prison, Disciplinary Procedures; Conn. Rules, supra note 23; Arkansas Dept. of Corrections, Rules and Regulations: Institutional Discipline and Disciplinary Committees. Mass. Rules, supra note 5, require that an inmate be given written notice of the reasons for his commitment within 48 hours, but the rules appear to recognize that a lengthy incarceration may follow since they require the Deputy Commissioner of Institutional Services to interview the inmate within two weeks of the date of his commitment. The rules do not set out any rules regarding termination of the commitment.
Although the nature of prisons necessitates some right to order immediate pre-hearing incarceration to punitive segregation, it is apparent that definite restriction, on the amount of time which can elapse before written notice of the reasons for the action must be given and before the formal hearing on the charges is held, must be formulated. The limitations on detention are, of course, directly related to the standards of adequate notice of the charges.

Notice of the Charges

The issue of notice of the charges has been the one where the courts have been most insistent in applying a due process standard to the prison disciplinary hearing. Furthermore, it is not uncommon for prison regulations to provide for mandatory written notice already.\textsuperscript{30} The rationale for requiring notice of the charges is to give the inmate sufficient information to comprehend exactly what he did that was wrong and to be able to answer these charges with an adequate defense.\textsuperscript{31} One commentator sees the need for adequate notice as a means for making comprehensible the vagaries of the system of prison discipline.

The right to both specific notice of the charges and a written decision containing the evidence relied upon and the reasons for the decision takes on added significance when the exact nature of the conduct in question is either unknown or vaguely and generally described. In such a case, specific notice not only informs the accused, perhaps for the first time, of his alleged conduct, but also serves the accused with initial notice that such conduct is considered improper.\textsuperscript{32}

There have been a few attempts to determine more precisely the kind of notice which should be provided. Kraft, in his article, wants (1) a code of conduct which sets out clear and fair categories of misbehavior and (2) notice of alleged misbehavior which should be given orally as soon as the decision to charge has been made and in written form as soon as practicable. The notice will include a description of the specific act of misconduct alleged, a complete summary of the results of the supervisor's investigation, and a listing of the time and place for the hearing.\textsuperscript{33} In the Clutchette case, Judge


\textsuperscript{33} Kraft, supra note 2, at 71.
Zirpolis, reasoning from the holding in Goldberg v. Kelly, attempted to formulate a minimum acceptable standard for notice.

While Goldberg did not establish constitutional minimums, it seems clear that to satisfy constitutional requirements, notice of at least seven days of any charge requiring procedural due process or disciplinary committee action, is the minimum acceptable period. Furthermore, to constitute meaningful notice, at least a brief statement of the facts upon which the charge is based, as well as the name and number of the rule allegedly broken must be included.

The current practices are not as strict as those suggestions, but several states do specify time restrictions between giving of notice and the holding of the hearing. In Virginia, for example, the period is forty-eight hours. More commonly, the hearing is to be held as soon after the alleged infraction as is practicable.

While due process requires that notice of the offense be given, regulations in this area must set out not only a description of the act of misconduct alleged, and a summary of the factual situation, but must also give the inmate information about operations of the prison disciplinary system and list the time and place of the meeting.

In many respects, the adequacy of notice is directly related to the adequacy of the rules and regulations since there can be no adequate notice of a vague and incomprehensible rule.

Further, Judge Zirpolis' decision in Clutchette seems correct in its requirement that adequate notice requires a sufficient interval between receipt of the notice and holding of the hearing to permit the inmate to prepare a defense. The seven-day period suggested there seems a bit long except in exceptional circumstances. A better rule might require a three or four-day period with automatic continuance up to eight or ten days at the request of the inmate. Those inmates who have been placed in pre-hearing punitive segregation would not be well served by an absolute rule requiring a seven-day lapse before the hearing. A proposal requiring a longer wait for those not in detention is not merited because the alleged offenses charged to the detainees will doubtlessly be more serious.

The Need for a Hearing and Composition of the Hearing Board.

Need for a Hearing.

In some jurisdictions, certain offenses can be adjudicated on the basis of written reports without the need for holding a formal hearing. This is the permissible procedure in the federal system, for example,

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36 Virginia Dept. of Corrections, Inmate Discipline (No. 500, 1971).
38 Note, Administrative Fairness in Corrections, supra note 8.
which permits the disciplinary board to withhold good time credit-
able for the month when the violation occurred in this manner.\(^5\)
In part, the issue of whether a hearing is required is determined by
an analysis of whether a hearing is required is determined by an
analysis of whether procedural due process applies to all violations
of prison disciplinary rules or only to some definable group of more
major violations. That issue will be discussed later. As to the specific
issue whether some form of hearing is required, it would appear
that if due process applies to prison disciplinary procedures, a hearing
must be held. The Court in Landman v. Royster required a hearing for
the following reasons:

Dispose of charges on the basis of written reports is
insufficient. Prisoners are not as a class highly educated men
nor is assistance readily available. If they are forced to
present their evidence in writing, moreover, they will be in
many cases unable to anticipate the evidence adduced against
them.\(^4\)

Disposition by the Board on the basis of written reports would
be justified only for the most trivial of offenses where the inmate,
arguably at least, does not face loss of serious privileges.

Need for Impartial Tribunal.

In several of the cases, one or more of the persons sitting on
the hearing committee was either the officer who originally reported
the violation or the investigating officer. The Courts', following lan-
guage in Goldberg v. Kelly or from notions of fundamental due process,
have held that members of the disciplinary board must be impartial
and must not include any previous participants in the case.\(^4\)

Presently, hearing boards generally consist of several members
of the staff. Often the rules require that representatives of the ad-
ministrative, custodial, and treatment staffs be present.\(^4\) One impor-
tant variation in Indiana is the requirement that at least one of
the members of the disciplinary hearing board be from a minority
group.\(^4\) Although the term minority group is not defined in the
rules, one can probably assume that the rules recognize the increasing
racial polarization in prison and society at large and seek to insure
the presence of black and Spanish-surnamed representation on the
disciplinary panels. Whether the rule is successful in providing any-
thing more than a symbol in this regard is not known.

\(^4\) E.g., Mass. Rules, supra note 5.
\(^4\) Indiana Rules, supra note 1.
Two other suggestions would attempt in part or completely to remove disciplinary proceedings from the control of prison staff. One suggestion would require that at least one of the members of the disciplinary board not be a member of the prison staff. It is suggested that with the ever-increasing interest in penology among the general citizenry, well qualified persons can be found who would gladly serve on a disciplinary board.

A similar suggestion would require that disciplinary hearings be conducted by one state-employed hearing officer whose sole function would be to conduct hearings. The theory behind such a proposal as this and the one above is that correctional officers are part of a group or system who are likely to regard the word of one of their number highly. In addition, there may be problems of "command influence," particularly in controversial cases. Proposal of some outside involvement appears warranted. The second proposal, by removing disciplinary decision making from the correctional staff entirely, is the more direct attempt to meet the problems inherent within prisons which may prevent impartiality. Experiment with hearing officers would appear to be warranted.

Inmates' Rights at a Hearing

Cross-Examination and Right to Call Witnesses.

One of the major points of dispute among the courts has been the rights which prisoners possess at disciplinary hearings. The split has occurred on the more controversial and potentially disruptive issues, particularly cross-examination. The courts have been unanimous on the issues of the right of prisoners to defend themselves at hearings when they would not necessarily have to involve guards or other prisoners directly. As the Court in Sostre v. McGinnis held:

In most cases it would probably be difficult to find any inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions.

The differences among courts have arisen in such issues as cross-examination and calling of witnesses. Some courts have feared that the necessary relationships in a prison would be disrupted if these rights were allowed prisoners. Judge Wyzanski made the argument this way.

Cross examination of a superintendent, a guard, or a fellow prisoner would almost inevitably go beyond the usual

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44 Milleman, supra note 32, at 55.
45 The proposal comes from a recent bill proposed in the New York State Legislature, Assembly Bill 6257 of the 1971-72 regular assembly.
consequences of such probing in court. It would tend to place
the prisoner on a level with the prison official. Such equality
is not appropriate in prison. And it is hardly likely that in
the prison atmosphere discipline could be effectively main-
tained after an official has been cross-examined by a prisoner.
There are types of authority, which do not have as their sole
or even principal constituent, rationality. Parents, teachers,
army commanders, and, above all, prison wardens have the
right to depend to a large extent (though not arbitrarily)
upon habit, custom, intuition, common sense, not reduced to
express principles and other forms of judgment based more
on experience than on logic. .

. . . A judicial examination of one’s fellow prisoners in an
atmosphere of a prison might easily prejudice discipline,
security, and degree, priority, and place. . . .

The holding in Nolan has been severely criticized by comment-
tors who argue that the restrictions approved there effectively
prevent an inmate from defending himself. “[I]t is anomalous to
suggest that the inmate should be afforded ‘an opportunity to be
heard in his own defense,’ while at the same time denying him the
corollary right to present witnesses and cross-examine.”

The same conclusion can be drawn from language in Goldberg v. Kelly which
requires “in almost every setting where important decisions turn on
questions of fact, due process requires an opportunity to confront and
cross-examine adverse witnesses.”

One commentator has argued that the prison disciplinary situation is not one of the exceptions
where Goldberg would not apply.

Considering the significant quantum of personal liberty
which is threatened, the quasi-criminal nature of the disci-
plinary proceeding, the constructive and rehabilitative effect
of a fair disciplinary hearing, and the rather unique pressures
and relationships existing in prisons, it would seem that the
requirement that prison disciplinary proceedings guarantee
inmates the rights to confrontation and cross-examination is
well-founded, though novel.

One Court attempted to balance the concerns of prison admin-
istrators about the maintenance of discipline with the need for ade-
quate procedures at disciplinary hearings. The Court concluded that
cross-examination and calling of witnesses are necessary but that
the witnesses must appear voluntarily and the disciplinary tribunal
can restrict questioning to relevant matters in order to preserve
decorum and limit repetition.

On balance, cross-examination does appear to be a necessary part of prison disciplinary hearings. Al-

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548 (1st Cir. 1970); cf. Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), reversing

48 Jacob, supra note 39, at 246.


50 Milleman, supra note 32, at 51.

though the fears of prison officials and of Judge Wyzanski are not without merit, the need for ascertainment of the facts at a hearing would appear to outweigh any possible disruptive effects for maintenance of security and discipline. I am in accord with Jacob who argued for cross-examination because:

The probable effects of granting these safeguards hardly justify the fear that somehow inmates will suddenly become the equals of their wardens. Yet, even assuming this to be true, the negative effects of granting the right would seem to be a small price to pay for the ascertainment of the truth. The truth has a poor chance of emerging in any adjudicative proceeding in which the witness against the alleged offender is not present, the proof consists of a written hearsay statement of the prosecuting witness, and the defendant is not given an opportunity to cross-examine or present his witnesses.52

Counsel.

The issue of right to representation by counsel is another where the courts have shown unanimity in their decisions. Following the lead of several state regulations,53 they have rather uniformly rejected a requirement that attorney-counsel is required but have either permitted or required a counsel-substitute. However, the reasoning for the decisions has varied. The conservative line of cases represented by the District Court opinion in Nolan v. Scafati and the opinion of the Second Circuit in Sostre v. McGinnis has emphasized the need for maintenance of authority in their rejections of the right to counsel. As Judge Wyzanski wrote:

It is to be borne in mind that neither the superintendent, nor the committee, nor any guard had a lawyer. Lawyers are not customarily involved in prison disciplinary matters . . . Whatever may be the rights of persons who have the full freedoms of civic life, those who have been placed under the control of a prison authority are not entitled to the full panoply of a trial, before disciplinary steps are taken. When society places a man in prison, it has a most important interest in preserving the executive authority of the prison superintendent. While the warden is not to be an arbitrary autocrat, he has no need to listen to quibbles and quiddities before he exercises his commanding authority to secure both the outside community and the prison community from danger, reasonably apprehended.54

The cases on the other side approach the issue from the perspective that prisoners have due process rights which lawyers can protect. Analogizing from right to counsel cases in the criminal area, they argue that the rudimentary standard of due process applicable

52 Jacob, supra note 59, at 247.
53 E.g., Mass. Rules. supra note 5; Mo. Rules supra note 23.
to prison disciplinary hearings should contain a right to appear with counsel.\textsuperscript{55} However, they retract from a firm rule that counsel is required because of the practical difficulty which could be created in supplying counsel in all disciplinary hearings. Despite the practical difficulties, there is some suggestion that retained counsel be permitted to appear in serious cases with non-lawyer counsel appearing at other times.\textsuperscript{56} A recent bill introduced in the California legislature\textsuperscript{57} would permit inmates to have representatives of their own choosing, including lawyers, represent them at all disciplinary hearings. However, the bill would not require appointment of attorney-counsel for inmates except in the case of violations of state law. The potential difficulty with the bill, of course, is an equal protection argument. Once counsel is permitted for some, the state will have great difficulty refuting a contention that counsel is requisite for all especially if prison disciplinary hearings are regarded as "critical stages" in either the criminal law sense or the Goldberg v. Kelly sense since serious rights are involved. If one were going to permit counsel at all, the obligation to provide counsel for indigents arises. With estimates of 90\% indigency among prison inmates, it has not been surprising that the courts have shied away from rules permitting counsel. If a system of prison public defenders can be established, that idea has considerable merit. Otherwise, sticking to counsel substitute may be a necessary, if unsatisfying, compromise.

\textit{Record of the Proceedings.}

The need for maintenance of some record of the proceedings is based upon the proposition that with a record some idea of what transpired at the hearing can be learned. Several states already require that some form of record be kept.\textsuperscript{58} Generally the record need not be a complete transcript but is generally a summary of what transpired. The courts and commentators which have discussed the issue have been unanimous in urging that summary records of disciplinary proceedings be maintained.\textsuperscript{59} There seems to be no reason not to follow the practice.

\textit{Decision.}

\textit{The Board Must Give Reasons for Its Decision}

To insure that the decisionmaker's conclusions about the guilt or innocence of an alleged violator of prison disciplinary rules rests


\textsuperscript{56} Clutchette v. Procunier, 328 F.Supp. 767 (N.D. Cal. 1971); Jacob, supra note 39.

\textsuperscript{57} New York State Legislature Assembly Bill 2904, Isolation and Segregation of Prisoners for Disciplinary Purposes (1971); cf. NLADA Proposed Revisions for Lorton Correctional Complex (1971).

\textsuperscript{58} E.g., Mass. Rules, supra note 5; Mo. Rules, supra note 23; U.S. Bureau of Prisons, supra note 30.

solely on the proper legal foundation, several states require that reasons be stated for the decision. Generally, the courts have used due process to require that statements of the reasons for the decision be given even "though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law." This requirement should be followed.

The Decision Must Be Based on The Evidence

Similarly, there are requirements in several states that the decision by the disciplinary board be based on the evidence presented. The courts have consistently found that it is "fundamental to due process that the ultimate decision be based upon evidence presented at the hearing, which the prisoner has the opportunity to refute." Several courts have set the standard of proof for finding the prisoner guilty of the alleged infraction as being substantial evidence rather than proof beyond a reasonable doubt, the standard in criminal cases. The reduced standard is apparently a determination that disciplinary hearings are better analogized to administrative hearings than criminal trials. The standard of substantial evidence does not appear to be sufficient given that to some degree, the liberty of an individual is at stake. Although the standard of proof need not be that of a criminal trial, a standard of proof such as "preponderance of the evidence" which would more clearly place on the prison officials the burden of overcoming a presumption of innocence for the inmate seems better suited for disciplinary hearings.

The Requirement of An Administrative Appeal

In most states, an inmate dissatisfied with the results of the disciplinary board hearing can appeal to the Warden or Deputy Warden. The Courts have divided on the issue whether due process requires an administrative review, although those not requiring one seem inclined to favor regulations which contain provisions for review as a further check on arbitrariness, review by the superintendent or warden is justified.


62 Virginia Division of Correction, Inmate Discipline (No. 800 revised 1971); Mo. Rules, supra note 23.


66 E.g., Mass. Rules, supra note 5; Mo. Rules, supra, note 23.

Circumstances When Due Process Standards May Not Apply

Emergency Situation

Most regulations presently contain a clause permitting summary action whenever the Superintendent determines that unusual or emergency situations exist. Inmates can be given the most drastic temporary punishments including segregation and transfer. Often, however, the same regulations place a limit on the time when temporary emergency sanctions can be imposed before written notice must be given to the inmate and a hearing on the issue held. When the United States District Court for Rhode Island supervised the writing of new rules for that state's prisons, it permitted an emergency discipline clause to stand which provided that the sanctions could be summarily imposed for no more than seventy-two hours, that the action had to be approved by a superior officer, and that the inmate had to be informed in writing of the reasons for the action. The Court did warn that "it would behoove the administration to construe the Emergency or Temporary Provisions as narrowly as their language suggests." No other case has scrutinized emergency provisions as carefully.

Emergency provisions are always the most difficult to square with due process because establishing the exception, creates the possibility of abuse of it. Given that prisons are not free institutions, it is not difficult to justify acceptance of summary action in emergencies. Nonetheless, the courts will have to be prepared to scrutinize the activities of prison administrators occurring under the rubric of an emergency which may not be justified. Regulations permitting emergency action will have to be drawn up so as to circumscribe the amount of time an emergency detention can last without approval of external authorities, and to provide procedures whereby the determination that an emergency exists can be quickly reviewed by officials outside of the prison.

Minor Offenses

In many jurisdictions procedural rights are accorded only for violations of the prison rules which are deemed to be major. Generally, the distinction between major and minor offenses depends upon the possible penalty which could be imposed. In Clutchette v. Procomier, the Court found five instances where due process protection should apply: (1) where the violations are punishable by indefinite commitment or segregation; (2) where violations may tend to increase a prisoner's sentence; (3) where violations may result in a fine or forfeiture; (4) where violations may result in any type of isolation confinement longer than ten days; and (5) where violations

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68 E.g., Mass. Rules, supra note 5.
69 Id.
may be referred to the district attorney for criminal prosecution. Justification for the distinction between major and minor offenses is done on the grounds that offenses carrying less serious penalties are analogous to the category of petty criminal offenses which may carry fewer Constitutional due process protections.

The critical issue may not be whether some offenses should be labeled petty, but whether some minimum standard for due process should exist. If the purpose of carefully enunciated rules is to reduce the probability of arbitrary action by prison officials, then perhaps line officers should not have even the power to order summary losses such as removal of movie privileges. The best solution is to develop a carefully drawn code of offenses which will give inmates and correctional officials alike an understanding of proscribed conduct and potential penalties for breaking of the rules and hopefully reduce the potential for arbitrary action. Given the current situation, a distinction between major and minor offenses is mandated as much by the systematic pressures caused by the numbers of disciplinary cases as anything else. If that problem must be accepted, then a division between minor and major offenses along the lines suggested in the Clutchette opinion seems warranted. Merely using forfeiture of good time as the standard fails to consider the severity of other penalties, even though those penalties may not directly affect the length of the sentence. One proposed standard would limit the summary power through informal sanctions to warnings, instruction, counsel and other “appropriate means of educating individual offenders.” Apparently, all actions which would lead to deprivation of privileges would require a hearing. If practical, that would seem to be the desirable standard.

71 Clutchette v. Procunier, 328 F.Supp. 767, 781 (N.D. Cal. 1971). These distinctions go beyond the federal rules when the standard is forfeiture of good time, Kraft, supra note 2. Sometimes, as in Indiana, the distinction is based on the type of offense, Ind. Rules, supra note 1. Massachusetts makes a distinction only in regard to right of appeal. Although good time is the standard for the federal system, it is a vague standard. Good time is revoked in approximately fifty percent of all disciplinary cases for such disparate offenses as assaulting an officer and being “out of place”, Kraft, supra note 2, at 74.


73 NLADA proposed revisions, supra note 57.