THE IMPACT OF WOLFF V MCDONNELL ON THE DISCIPLINARY PROCESS OF THE MICHIGAN DEPARTMENT OF CORRECTIONS

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ABSTRACT

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This is a study on the effect/ramifications the Wolff v McDonnell, 418 U.S. 539, a U.S. Supreme Court case, had on the Michigan Department of Corrections. The structural reformation that was undertaken by the Department significantly transformed a largely discretionary, informal disciplinary system into a disciplinary system characterized by formal, uniform procedures.

The Wolff standards were ineffectual in totally eliminating discretionary administrative abuses within the Michigan Department of Corrections. It was not until he advent of P.A. 140 (MCLA 791.251 et. seq.) was passed by the Michigan State Legislature in 1979 that the transition from informal to formal disciplinary process system was completed.

The specific focus of this study, therefore, is to evaluate the effect Wolff and P.A. 140, in conjunction with each other, had on the ability of the Department to maintain internal order and control within its institutions.

DEDICATION

This thesis is dedicated to my parents, Cyril and Clara Maxsam, who insured I had access to the best educational facilities in Baltimore, Maryland. Also, to my wife, Celestine, who motivated me to finish my graduate studies.

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INTRODUCTION

Progressive Legacy

There is a well-known axiom in social science that all social/political/economical sub-groupings are impacted by the ideological base of the dominant culture. While there is general acceptance of the above cited position, its application/ramifications it holds for those citizens society incarcerates in penal institutions is novel. Those of us who progressed through the decade of the 1960's are familiar with such humanistic terms as "civil rights", "due process", and "equal protection of the law". However, the application of such conceptions in our penitentiaries is of relatively recent origins. Even today, the task of operationalizing these concepts provokes vigorous debate. However the number of prison administrators who will not conform even superficially to the dictate of due process, even while lamenting the "good old days" when such precepts were not dominate, are relatively few. This advancement has been gradual and replete with regressions. To those who would contend that given the complexities that permeate the corrections arena, that such intermittent advancement is to be expected, graphic illustrations will be present to demonstrate how expeditiously the corrections system and respond when it perceives an innovation is not inimical to its interests.

Between the 1900's and 1920's, thanks largely to the group of men and women known as the Progressives, innovations in the American penal system were introduced and adopted with unheard rapidity. These initiatives were the concepts of probation, parole, indeterminate sentencing, and juvenile courts.[1] The notion of probation was certainly in existence prior to the 1900's. Reference is made to John Augustus, a Boston shoemaker in 1850's who convinced certain judges to give him custody over juvenile offenders. However, once introduced by the Progressives, the establishment of probation spread like an epidemic, expanding from only six states in 1900, to 1915 with 33 states, to 1920 with every state in the union providing for juvenile probation and 33 for adult probation.[2]

The same rapidity of growth occurred in parole and indeterminate sentencing. Prior to 1900, judges dictated the exact term of incarceration (fixed sentencing), with the concept of parole utilized by only a handful of states, and normally applied to youthful offenders in reformatories. By 1923, almost 50 percent of prisoners sentenced to prisons were under indeterminate sentencing, with over 50 percent of all releases to parole supervision.[3]

The same miraculous growth is paralleled in the creation of the juvenile court systems. In 1899, the first juvenile court was established in U.S. a scant 21 years later, every state in the union, minus three had established

a juvenile court.[4] While not underestimating the motivation/intentions of the Progressive, nor the zeal and energy utilized in the pursuit of their goals, the extreme rapidity the correctional system embraced such radical transformation of the methods by which business had been conducted for slightly less than one hundred years substantiates Rothman's analysis that perceived systematic interests were being served.

The institution of the notions of probation, indeterminate sentencing, parole and juvenile court had two primary consequences:

1. The power of the State increased in scope and expanded its exercise of power.
2. Discretionary powers of correctional officials correspondingly increased enormously.

A quote by Julia Lathrop, who later became chief of the Children's Bureau, succinctly recapitulates the Progressive credo:

> The success of our future civilization lies in government adding to their responsibility and taking on work which people have not hitherto been willing to entrust to them.[5]

However, in retrospect, Hawkins' quote from "The Prison" noting the proclivity of the best of intention to go array is quote apropos.

> . . . benevolent intentions do not necessarily produce beneficent results.[6]

For it was for administrative convenience the correctional system so fervently embraced the Progressive proposal. The Progressive recommendations, establishing a rehabilitation

paradigm greatly expanded the discretionary authority of judges, district attorneys, warden, etc., thereby greatly facilitating their daily operations. Additionally, the expanded scope of State authority created numerous new employment opportunities, e.g., parole board members, parole agents, etc. The purpose of this brief review of the Progressive legacy is not evaluative, but to show how the overly enthusiastic endorsement of the Progressive proposals is in stark contrast to the systematic reception the institution of the due process mandates has generated. Again, to fully comprehend the complexities/ramifications involved in the imposition of due process procedural requirements within prison setting the manner in which judicial involvement has cyclically waxed/waned in prison disciplinary matters must be reviewed.

LEGAL BACKGROUND

Hands Off Doctrine

The focus of this section will deal with the cases which acted as catalyst for judicial activism in the correctional arena, with particular emphasis on those cases which acted as precedent for Wolff v McDonald. An in-depth analysis of Wolff and the implication for future case law will also be presented.

It was not until well into the 1960's that the courts began to intervene into prison operations. Prior to that date, the courts relinquished absolute, unreviewable discretion to prison administrators over prisoners incarcerated within their penal institutions. Their view of a prisoner was typified by the 19th century Virginia case which stated:

> A convicted felon [is one] whom the law in its humanity punishes by confinement in the penitentiary instead of with death . . . For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State.
>
> He has as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being a salve to the State![7]

With this deprived status, prisoners remained subject to the whims/capriciousness of penal officials, with no entitlement to judicial relief. The courts extreme reluctance to

intervene in prison matters was stated emphatically and succinctly in (per curium) cert denied 348 U.S. 859 (1954):

> Courts are without power to supervise prison administration or to interfere with the ordinary prison rules or regulations.[8]

This policy became known as the "Hands-Off Doctrine", and it was vigorously adhered to by Federal and State courts. Despite the fact that acceptance of the above-mentioned policy did not preclude judicial intervention in "exceptional circumstances" in which there was evidence of beatings, torture, or physical abuse of the sort that tends "to degrade the individual and destroy the sense of personal honor." However, the record is full of instances where the courts adamantly refused to examine prisoners' claims in respect to: (1) being secluded in totally dark, solitary confinement cells for extended periods of time without clothes or necessary hygienic materials, or (2) frequent impositions of whippings and/or similar forms of corporal punishment, as well as other severe/degrading conditions of prison life.

In spite of what should have been regarded as legitimate complaints of prisoners, the courts blithely continued to routinely/rotely reiterate their powerlessness to intervene in prison matters. In Haas' analysis of the "Hands-Off Doctrine", he notes four underlying presumptions he feels were primarily responsible for the widespread acceptance and prevalence of the abstinent policy:

1. traditional view of prisons as appropriate places for punishment.

2. general hostility to prisoners as a class of litigants.

3. acceptance of the retributive principle that a person who violates the law is not entitled to the same protections/considerations as the law abiding citizen.

4. prison officials possess sovereign immunity and therefore cannot be forced to appear in court.[9]

The above noted considerations, however, rarely were openly stated by the court as justification for the "Hands-Off Doctrine." To provide a rational basis for their policy of non-intervention, the following five distinct rationales were developed:

1. theory of separation of powers.

2. view that considerations of federalism preclude federal intervention on behalf of state prisoners.

3. lack of judicial expertise in penology.

4. belief that cognizance of inmate complaints would lead to an avalanche of petitions, thereby leading to judicial supervision of day-to-day routines.

5. fear that judicial intervention would undermine prison discipline.[10]

Thus, the de facto civil death of prisoners was fiat accompli. There were a few courts who adopted a principle directly at odds with the Hands-Off Doctrine. This principle was best expressed by Coffin v Reichard, which stated:

> A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[11]

However, barely four years later, the U.S. Supreme Court reaffirmed the dominance of the Hands-Off Doctrine with Price v Johnson, that emphasized:

> Lawful incarceration brings about necessary withdrawal or limitation of many privileges and rights a retraction justified by the considerations underlying our penal system.[12]

One year later, the Illinois Supreme Court did its part to maintain status quo in the case of Siegel v Ragen by recognizing the rights of prisoners to invoke provisions of U.S. Civil Rights Acts, i.e., 42 USC E 1983, as well as Fourteenth Amendment to the Constitution (Due Process), then dismissing all of the inmates' complaints (except ones to do with physical injury) as matters of internal administration and best left to the expertise of prison officials.[13]

> The Government of the United States is not concerned with nor has it power to control or regulate the internal discipline of the penal institutions of its constituent states. All such powers are reserved to the individual states.[14]

Thus, the reign of the Hands-Off Doctrine, despite an occasional variance, achieved virtual unity among federal/state courts, and prison administrators continued to enjoy unbridled discretion in respect to prisoners. The trend that initiated in the latter 60's/early 70's has culminated in the demise of the Hands-Off Doctrine and emergence of prisoners' rights. To show how this was accomplished, a re-examination of the rationales for the Hands-Off Doctrine will be presented, along with the arguments/legal strategies

which have effectively undermined/terminated the once formidable barriers to judicial review of the constitutionality of prison life.

Demise of Hands-off Doctrine

Separation of Powers

The first rationale for maintaining the Hands-Off Doctrine was the separation of powers theory. The basis of this argument was that the administration of a prison system was an executive, not judicial, function. To support this position, relevant statutes of most states and federal government were cited.

Those statutes delegated responsibility for prison administration to the executive branch of government, with correctional agencies having unfettered discretion to handle day-to-day operations. Emphasis was placed on the view that the Legislative Branch had given correctional authority complete/utter discretion over their institutions, thereby eliminating the judiciary from having any authority/ jurisdiction over inmates. This approach was aptly demonstrated in Williams v Steele:

> Since the prison system of the United States is entrusted to the Bureau of Prisons under the discretion of the Attorney General . . . the courts have no power to supervise the discipline of the prisoners nor to interfere with their discipline.[15]

Nevertheless, there were instances in which certain "extreme cases" led some courts to the realization that review of prison officials' actions which were not

"reasonably necessary to effectuate the purpose of imprisonment." Gradually, a few courts began to chafe under the strict interpretation/imposition of the non-justifiability rule enunciated in the Williams case, and realize the necessity of extending fundamental rights to prisoners. The United States ex rel. Yaris v Shaughnessy expressed the courts' sentiment well.

> It is hard to believe that persons . . . convicted of crime are at the mercy of the executive department and yet it is unthinkable that the judiciary should take over operation of the . . . prison. There must be some middle ground between these extremes.[16]

A view of law cases in 1962 led the commentator to conclude:

> A study of the cases involving alleged mistreatment indicates the courts have been so influenced by the dogma of the independence of prison authorities that judicial intervention has been limited to the extreme situations.[17]

However, growing criticism of this rationale has resulted in its diminishment as an effective argument against judicial intervention. In 1963, one legal commentator indicated the argument for separation of power was sophism at its best:

> Administrative decisions made by duly appointed authorities are not subject to judicial review because they are administrative decisions, and are therefore not subject to judicial review.[18]

Administrative law has clearly established that no administrative agency possesses any special protection from judicial scrutiny. In fact, during the latter 60's, early

70's, the courts began to adopt the posture that when constitutional issues were involved, the separation of powers doctrine could not preclude judicial review of legislatively delegated authority. A prime example of this view was the 1971 Fourth Circuit case Brown v Peyton, which emphatically stated prison administrators were not immune to judicial review.

> [P]rison officials were not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions . . . We do not denigrate their views but we cannot be absolutely bound by them.[19]

In 1972, the Supreme Court virtually eliminated the omnipotent, ubiquitous authority prison administrators had exerted over prisoners in the case of Haines v Kerner. The primary issue in Haines was whether the absence of due process prior to his placement in solitary confinement constituted a deprivation of sufficient magnitude to mandate judicial review of administrative action. The Seventh Circuit Court had dismissed the case, stating "only under exceptional circumstances should courts inquire into the internal operations of state penitentiaries."

The Supreme Court reversed, stating:

> Whatever may be the limits of the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioners, however inartfully pleaded, are sufficient to all for the opportunity to offer supporting evidence.[20]

The separation of powers justice was also vulnerable to the argument the very nature of the American criminal justice system make judicial involvement germane to the correctional process.

As it is the judiciary who is responsible for sentencing of inmates to penal institutions, it is only logical that the judiciary have the authority to verify that the perceptions/intentions of the courts, particularly in respect to rehabilitation, are carried out by prison officials.

The final argument which completely nullified the separation of powers doctrine is that it was ludicrous to assume the executive or legislative branches of government would protect the constitutional rights of prisoners from encroachment. In fact, numerous federal/state laws preclude prisoners/ex-felons from access to the political process. This exclusion, coupled with the fact convicted offenders are disproportionately minority and poor, there is virtually no pressure on politicians to take unpopular stances on moderating the harshness of the prison environment. Thus, the courts have become the only viable option for assistance prisoners have for redressing their grievances.

Federal Abstention Rationale

The second major justification for the Hands-Off Doctrine that federal courts should refrain from exercising jurisdiction over petitions filed by state prisoners because

of considerations of federalism and comity. The Siegal v Ragen case quoted earlier in this chapter clearly delineates the reluctance once felt by the courts to intervene where it was perceived they possessed little authority to enforce/ supervise their decisions. Additionally, the courts were swayed by the view that to accept grievances of state prisoners would promote conflict between state and federal authorities. This perspective resulted in the wholesale rejection of state prisoners' petitions, even when constitutional rights were allegedly violated.

> Inmates of State penitentiaries should realize that prison officials are vested with wide discretion in safeguarding prisoners committed to their custody . . . A prisoner may not approve of prison rules and regulations, but under all ordinary circumstances that is no basis for coming into a federal court seeking relief even though he may claim that the restrictions placed upon his activities are in violation of his constitutional rights.[21]

This rationale began to decline with the advent of the Monroe v Pape case, a landmark decision that utilized section 1983 of the Federal Civil Rights Act of 1871. The Supreme Court held that the function of section 1983 was:

> To provide a federal remedy where the state remedy, though adequate in theory, [is] not available in practice.[22]

Therefore, the Supreme Court interpreted the Civil Rights Act as obligating the federal courts to review claims of those who alleged state officials were violating federally protected rights, irrespective of whether all

state remedies had first been exhausted. The mandate the federal courts received in the Monroe case virtually eliminated the federal abstention rationale. The philosophy which developed can be summarized by the statement:

> A good cause of action under the Civil Rights Act gives rise to an 'exceptional circumstance' where the federal court will not abstain from [a case involving a state prisoner] and the petitioner need not pursue his state court remedy.[23]

This Monroe mandate was greatly enhanced by the tendency of the Supreme Court and other Federal/State tribunals to expend the scope of prisoners' retained constitutional rights, thereby facilitating the ease by which prisoners were able to convince federal judges that a particular violation was constitutional in nature, thus requiring their intervention. The Clutchette v Procumies case aptly portrays the court's perspective at the termination of the federal abstention rationale:

> It is now well settled that federal courts have jurisdiction . . . to examine into conditions at state prisons when allegations of unconstitutional deprivations are made.[24]

Lack of Expertise Rationale

The third rationale for the Hands-Off Doctrine was that judges, lacking a background and/or skills in the corrections area, would defer to the experience/expertise of prison officials. This deference was supposedly justified by the dangers inherent within the prison environment, and

the critical need of prison administrators to command unquestioned authority over prisoners. To compliment this perspective, the negative ramifications judicial meddling would have on the "noble penological objectives as public protection, deterrence, and rehabilitation." Prison officials, therefore, were portrayed as individuals possessing great insight/ability into the disciplinary/ rehabilitative needs of prisoners, and the capability of selecting the best programs/treatment modalities to effectuate accomplishment of the "noble penological objectives." Any restrictions imposed by the courts, therefore, would frustrate the prison administration in their efforts to implement programs/treatment modalities that would "simultaneously help the prisoner and provide protection for society."

This rationale was rapidly disregarded during the growth of judicial activism. Three considerations were primarily responsible for decline of this rationale: (1) lack of demonstrable success in the correctional arena, (2) arbitrary/capricious conduct prisoners normally request relief from are guards claiming little rehabilitation expertise, and (3) courts have established precedent in reviewing institutions similar to prisons, e.g., mental hospitals, welfare offices, draft boards; therefore, no reason to exclude prisons when issues of constitutional rights protection arise. The eroded judicial respect/faith

in the so-called rehabilitative skills of prison administrators has resulted from the all-encompassing perception that the prison has failed in its rehabilitative and crime prevention functions. Even with allowances made for distortions and/or exaggerations in the recidivism rates, the rates are unacceptably high, and lead to the conclusion that "crime is a product of those who have already spent time in a correctional facility." Another axiom generated by the apparent lack of measurable success is that "any success is in spite of imprisonment, not because of it."[25]

Second, majority of complaints filed by prisoners are not the result of the prison administrator who can claim high level of skill/expertise, but against arbitrary and/or callous treatment from custodial officers--the keepers. It is the correctional officer who has daily contact with prisoners, with the responsibility for implementing policy/ procedures. However, despite their pivotal role, prison guards are typically underpaid, overworked, and inadequately trained.

These factors, coupled with the changed expectation in respect to the role of the correctional officer (formerly guard) and the high levels of stress/tension/frustration inherently present in the prison environment act as catalysts for arbitrary and/or capricious behavior on the

part of the keepers. It is this behavior that demands judicial scrutiny, much as negative police behavior resulted in the court surveillance of police practices.

Finally, as previously noted, the corrections arena is merely one of many areas that traditionally were the prerogative of administrators claiming specialized training/expertise that the judiciary has intervened. The use of judicial activism is the result of our post-industrial society and myriad problems/complexities generated by contemporaneous living. The prison environment is contemporary society in microcosm, subject to many of the same vicissitudes of the larger society.

Flood of Litigation Argument

The fourth rationale for the Hands-Off Doctrine is the apprehension that the continued concession/expansion of constitutional rights/protections to prisoners would generate a cascade of prisoner petitions, thereby coercing the courts to become perpetually enmeshed in the day-to-day operations of the prison. Once the courts become entangled to this degree in the myriad of prison complexities, the demands would strain, if not exceed, the resources and/or capabilities of the judicial system. Inmate complaints, therefore, could easily lead to:

> Judicial supervision of penal institutions in such minute detail as to encompass even the selection and makeup of daily menus and the direction of the service of coffee three times a day.[26]

These critics were joined by a number of federal appellate judges who were highly critical of the Supreme Court decisions which allowed state prisoners to seek section 1983 relief in federal district courts without exhausting all possible avenues of state redress. The consequence of "The Supreme Court's unabashed love affair with the Civil Rights Act of 1871", as stated by a strident federal judge, has been heightened tension in federal-state relations, and acted as a catalyst for a landslide of ambiguous and poorly written petitions from state prisoners, largely devoid of constitutionally relevant issues. Even the former Chief Justice Berger, when discerning the petty nature of many prisoner claims, wondered why those cases could not:

> Be more promptly disposed of without calling on the entire panoply of the federal courts.[27]

The total number of prisoner cases filed in 1976 was 19,809, as compared to 2,177 in 1960. However, it would appear from the data available that litigation filed reached crisis proportions during the 1960's, years before many of the landmark Supreme Court cases signaling the decline of the Hands-Off Doctrine were decided. Additionally, with the exception of section 1983 cases, the rate of petitions filed by prisoners has significantly declined since 1970.[28]

When the overall civil filing is viewed, the rate of prisoner petitions is lagging far behind the federal civil cases filed in free society. It must have been noted that

the flood of litigation argument has never been successfully applied outside of the corrections arena. In fact, a number of courts have blamed the immoderate number of frivolous prisoner petitions as the legacy of the Hands-Off Doctrine itself, the deprivation of legal assistance for prisoners resulted in our environment "which encouraged unsound legal thinking and unrealistic expectations of judicial relief."

> In the last analysis, however, the problem of petitions for collateral review that are frivolous, incoherent, false because copied slavishly from winning patterns, or otherwise lacking real merit, seems likely to plague the courts until a system is established for providing legal counsel to federal prison inmates on a reasonably broad base.[29]

Studies evaluating prison legal services programs show that institutions that provide legal services for prisoners experience a significant reduction in meritless suits filed. This trend, coupled with federal and state prisons developing/implementing administrative grievance have drastically reduced frivolous prisoner claims.

Finally, the flood of litigation argument, if not the Hands-Off Doctrine itself, has suffered irremediable damage from the tendency of contemporary, distinguished federal judges to activism in the area of prisoners' constitutional rights. Judicial forbearance of blatant constitution violation/deprivation cannot be justified under any circumstance. While day-to-day supervision of prison operations is repugnant, if unlawful practices and regulations continue after court prohibitions, the courts

have had no other option but to establish some type of supervisory authority or develop extensive regulations for conformance. Thus, the exercise of judicial responsibility necessitates the surveillance of prison policies/practices, particularly if the courts are to fulfill their mandate to preserve constitutionally protected rights.

Subversion of Prison Discipline

The subversion of prison discipline rationale contends that judicial intervention, without proper regard to the nature of prison environment, i.e., critical necessity of maintaining discipline, would ineluctably result in total loss of control. Additionally, there existed an apprehension that if courts were perceived by prisoners as being contemptuous of institutional rules and regulations, this perception would instill in the inmate body the proclivity to defy the prison administration through disobedience. Prior to rise of judicial activism, courts accepted the presumption that rigid, ubiquitous disciplinary standards were indispensable for maintenance of security and control of the prison. The case of O'Brien v Olson enunciated this principle quite clearly:

> Lax control . . . will inevitably lead to defiance of authority and muting . . . so as to endanger the lives of the prison officers and the maintenance of our prison system.[30]

In fact, this view became so dominant among some proponents that one law review commentator stated:

> Perhaps even more serious is the potential effect of this trend on the ability of prison staffs to maintain order in the prison . . . If the elaborate security rules made necessary by the near-impossible task of keeping several thousand ingenious felons where they do not wish to remain are made subject to constant modification or abrogation by the courts, the ability of prison officials to prevent [disruptive] activities will be seriously impaired. A progressive decay of authority, with a corresponding increase in assaults, escapes, and riots, is greatly feared.[31]

Prison administrators were successfully able to manipulate the fear this rationale engendered to invoke this rationale on prison policies that only had peripheral relationship to prison discipline. The case of Golub v Krimsky provides an excellent example, inasmuch as the court denied a prisoner's suit against the warden for failure to provide proper medical treatment. The court felt "to allow such actions would be prejudicial to the proper maintenance of discipline."

Courts were persuaded to invoke the subversion of discipline rationale against specific prisoner groups, e.g., Black Muslims, "jailhouse lawyers," based on prison administration's prediction of dire consequences of allowing any inmate group to acquire the slightest degree of power/ influence. The extensive efforts made by Black Muslims to obtain First Amendment right to freedom of religion initially met stiff resistance from the judiciary due to

their apprehension that the militancy and cohesiveness that characterized the sect could easily be mobilized for violence and rebellion. Until Johnson v Avery, jailhouse lawyers, likewise, experienced judicial obstacles in their desire to assist other prisoners in legal matters, due to prison officials' insistence that to allow this practice would condone: (1) manipulation/deception of weaker, naive prisoners, (2) create false expectations of early release, and (3) establish competing power structure which would endanger prison policies/procedures. Thus, for a period of time, this rationale as espoused in Price v Johnston (denial of rights based on considerations underlying our penal system) dominated judicial opinion.

Gradually, however, the rationale stated in Coffin v Reichard was resurrected and became the dominant perspective of the court.

> A prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.[32]

To enact this orientation, the courts developed a balancing test by which the importance of the right being asserted by prisoner litigation was weighed against the considerations advocated by the prison administration. To this end, the courts began to require that prison security and disciplinary policies be only minimally restrictive of retained constitutional rights of prisoners. Thus, courts ceased to defer to perceived administration expertise of correctional officials (Price) and shifted the burden of

proof to prison administration to show why denial/ limitations of a prisoner's right was necessary to maintain order and stability. One of the first landmark cases in this areas was Washington v Lee, in which the racial segregation policies of Alabama penal system was challenged by a group of Black prisoners. The federal court categorically rejected the argument of prison officials that segregation was necessary to maintain security and discipline, and instituted a standard that required the state to show a "reasonable basis" for its belief that its established rules served a legitimate government interest.

> [T]he Due Process and Equal Protection clauses of the Fourteenth Amendment follow them [prisoners] into prison and protect them there from . . . unconstitutional action on the pat of prison authorities.
>
> [T]his court can conceive of no consideration of prison security or discipline which will sustain the constitutionality of state statutes that on their face require complete and permanent segregation of the races.[33]

Following the Washington decision, judicial cynicism waxed among critics of the subversion rationale. Its proponents were accused of unmitigated distortions and fabricating a facade for the express purpose of augmenting social dominion over the poor.

> No valid reason, other than the shibboleth of prison discipline has been advanced for the denial of this right in the case before us. I believe that the courts should look behind inappropriate slogans as often offered up as excuses for ignoring or abridging the constitutional rights of our citizens.[34]

The fears of prison administrators exposed in respect to continual, callous interference by judiciary were considered to be without substance. In fact, the tenacity of the Hands-Off Doctrine influence aptly demonstrates the court's cognizance of the difficulties/complexities inherent in operating a penal institution. Consequently, the courts have tended, both in the past and present, to refrain from intervening in prison practices/policies, unless the policy/practice in dispute cannot be related to a legitimate state interest and/or unnecessarily infringe/limit the retained constitutional rights of prisoners. Thus, the prison administration is given every opportunity to put its own house in order prior to court involvement.

The argument that prisoners' challenges of prison policies would inevitably lead to disorder and chaos within penal institutions has not yet manifested itself. The explanation for this failure is twofold: (1) time lag, and (2) immediate consequences.[35] Even when a prisoner has successfully challenged a prison policy, there exists an extensive period of time between when the regulation/policy/practice is disputed and eventual judicial vindication. Consequently, he cannot predicate his daily behavior or conformance to prison regulations on the hope one day the courts will invalidate the policy in dispute, as his disobedience will have immediate, punitive consequences upon him in terms of withdrawal of privileges, change in custody

status, etc. Furthermore, the courts have been cautious in respect to giving prisoners the slightest indication that the punitive sanctions imposed by prison authorities for disobedience of a prison regulation, later found invalid in subsequent litigation, would be rescinded. Therefore, with the immediacy of punishment, little expectation of its abatement even if the challenge is successful, has been more than adequate to forestall any large scale refusal to follow prison regulations.

The belief that control/discipline is maintained strictly by policies/procedures is hopelessly naive and erroneous. Numerous studies have shown that discipline, in fact, is maintained by tacit cooperation and interdependence between prisoners and guard--"hacks and cons," or the keepers and the kept. It is this "corruption of authority," based on selective enforcement of prison regulations, that is the mainstay of prison stability and order. This reality makes it impossible for prison administrators to maintain that each and every prison regulation is indispensable in maintaining control and discipline and, therefore, should be precluded from judicial scrutiny.

Finally, critics of the subversion of discipline rationale focused on the deleterious impact judicial abstention has had on the rehabilitative process within penal institutions. Rehabilitation of prisoners is an expressed goal/function of our correctional institutions.

As previously noted in the Introduction, this paradigm has been wholly incorporated into our correctional system for decades. Even the label changes, e.g., guards-correctional officers, reflect this philosophical shift in priorities. Though some, like Martinson, would argue change has been only semantical and superficial in nature. In spite of glaring structural and programmatic inadequacies, given that rehabilitation is an expressed goal of prisons, it is essential the inmate perceptions be subjected to as many positive influences as possible. Given the fact that the majority of prisoners come from social/economic/political strata of society which view the dominant society with a great deal of hostility and resentment, society can ill afford to substantiate this perception through the perpetuation of arbitrary and capricious prison practices. To instill the desire within the prisoner to want to successfully reintegrate into society, the positive aspects of society must be emphasized, i.e., respected concepts of fairness and justice (due process) are present even in our prison system. It would, therefore, be inimical to the rehabilitation process to tolerate unjust prison practices. In fact, the central theme of this research is directly related to this salient point--due process requirements in respect to prison practices/policies are an integral component in maintaining stability and control, thereby facilitating the disciplinary process within penal institutions.

FOOTNOTES

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13 Siegel v Ryen, 88 F Supp (N.D.F. 1949).

14 Ibid.

15 Williams v Steele, 194 F 2d 32 (8th Cir, 1950).

16 United States ex rel Yars v Shaughnessy, 112 F Supp 143 (S.D.N.Y. 1953).

17 Note, "Constitutional Rights of Prisoners: The Developing Law," 110 U. Pa. Law Review 985, 986-87 (1962).

18 Coent, "Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts," 72 Yale Law Journal, 506, 515 (1963).

19 Brown v Peyton, 437 F 2d 1228 (4th Cir, 1971).

20 Haines v Kerner, 404 US 519 (1972) (per curiam).

21 Supra, note 13.

22 Monroe v Pape, 365 US 167 (1961).

23 Gallington, "Prison Disciplinary Decisions," 60 J Cri. L.C. & P.S., 152, 154 (1969).

24 Clutchette v Procunies, 328 F Supp 767 (N.D. Cal 1971).

25 Supra, note 9.

26 Haas, supra, note 9.

27 Address by Chief Justice Burger, ABA (8/6/73).

28 Haas, supra, note 9.

29 United States v Simpson, 436 F2d 162, 167 (D.C. Cir 1970).

30 O'Brien v Olson, 42 Cal App 2d 449, 459, 109, P2d 8, 15 (Dist Ct. App 1941).

31 Ibid.

32 Coffin v Reichard, supra, note 11.

33 Washington v Lee, 263 F Supp at 331.

34 Brabson v Wilkins, 19 NY 2d 433, 440, 227 NE2d 383, 386, 280 NY S2d 561, 566 (1967).

35 Haas, supra, note 9.

CHAPTER II

WOLFF v MCDONNELL

Wolff's Precedents

As the previous chapter has shown, the road to judicial activism was long and tortious, and replete with regressions. While there are a number of court cases that laid the foundation for Wolff v McDonnell from Coffin, Weems v U.S., Lee v Fashash, Trop v Dalles, Gregg v Georgia, Holt v Sarver, etc. all which enlarged the substantive rights of prisoners' there are three cases in particular that the U.S. Supreme Court relied upon in reaching its decision in Wolff. Those cases were Goldberg v Kelly, Morrissey v Brewer and Gagnon v Scarpelli. Though the Goldberg case was a welfare case, unlike the latter two which were correctional cases, its importance, from the next section, is undeniable.

Goldberg v Kelly

The issue in the Goldberg case was whether or not the State of New York could terminate public assistance to a welfare recipient without providing an evidentiary type hearing prior to the termination of the assistance. The State of New York conceded a full trial type hearing should be available to the recipient who disagreed with the termination. However, in the interest of administrative fiscal efficiency the State wished to utilize newly-adopted procedures to allow the termination of financial assistance

through summary action, with a post-termination evidentiary hearing available as remedy for disputed terminations. For while the 14th Amendment to the U.S. Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law," its application differs in varied factual situation.

> "Due Process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. Thus, when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.[36]

In this particular instance, the Court held that pre-termination evidentiary hearing was mandated to fulfill the requirements for due process. It has been long established that an individual is entitled to due process protection, whenever the government makes a decision unique to that individual, that has a substantial negative impact upon the affected individual's life, liberty, or property. The Court established a two prong balancing procedure, subsequently known as Goldberg balancing test, to determine the application of due process procedures. The courts have traditionally relied upon one of two analytical models in

determining whether due process protection is necessary. The first is "entitlement analysis" which requires the existence of independent legal right. Therefore, entitlements deriving from specific provisions of constitutions, statutes, administrative rules, or regulations would suffice to trigger due process protections. Theoretically, the concept of fundamental or inalienable rights and/or protections could also be viewed as entitlements, however, the courts have been reluctant to utilize such a broad scope. The impact analysis model focuses on substantive values of importance to an individual in a particular decisional context. Unlike entitlement analysis, impact analysis focuses on effect of state action on the individual, as opposed to any specific variable being present. In its balancing test, the Goldberg court formulated two factors:

1. If interest is a constitutionally protected "property" or "liberty" interest.
2. Beneficiary's interest in avoiding loss must be balanced against governmental interest.[37]

In this case, the court rejected the traditional motions of property, and redefined welfare assistance as "property" and not "gratuity". By the above mentioned action, welfare payments became a "protected interest," thereby invoking the right to due process safeguards. Next, the Court examined the nature of the loss the termination of welfare benefits by the State of New York would have on the individual.

> The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss" and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria Restaurant Workers Union v McElroy, 367 U.S. 886, 895 (1961); "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action."[38]

While the Court noted there existed some governmental benefits that could be terminated without a pre-termination evidentiary, this was not the case in terminating welfare assistance.

> . . . when a welfare recipient's assistance is terminated, "his situation becomes immediately desperate" because he lacks [the] independent resources necessary to live on while he awaits the decision in the post-termination evidentiary hearing."[39]

The above emphasis of the Court, however, was not to be construed to mean the cost of protection of a constitutional right was to be the determining factor in whether or not due process was afforded. The Court was quite careful to emphasize that:

> . . . the cost of protecting a constitutional right cannot singularly justify its total denial.[40]

In addition, to establishing the balancing test, the Goldberg court defined the elements of "rudimentary due process." They were, as follows:

1. timely and adequate notice detailing reasons for proposed termination of assistance.

2. opportunity to present oral statement and to confront and cross-examine witnesses.

3. allowance for recipient to obtain attorney, who may assist in the recipient oral statement.

4. decision made must be based on legal rules and evidence present at the hearing, and decision maker must state reasons for his determination and evidence relied upon.

5. decision must be make by impartial decision maker.[41]

With Goldberg as precedent, the stage was set for judicial intervention into the correctional arena, focusing on administrative due process.

Morrissey v Brewer

In the Morrissey case, the Supreme Court determine what due process procedures were applicable in parole revocation hearings. Parole is defined as:

> Parole is a temporal and spatial variation of imprisonment. Its function is to reintegrate individuals into society as constructive members as soon as they are able, without confirming them for the full term of the original sentence. The essence of parole is release from prison before completion of the sentence, on the condition that the prisoner abide by certain rules during the balance of that sentence.[42]

The facts of the Morrissey case are as follows. Mr. Morrissey was convicted of uttering and publishing checks in 1967, and sentenced to a maximum term of seven years. In

June 1968, he was paroled from the Iowa State Penitentiary. Seven months after his parole, he was arrested in his home town as a parole violator, and after a brief stay in the county jail was returned to the prison, 100 miles from his home town. The violations he was charged with were:

1. buying a car under an assumed name and operating it without permission.
2. giving false statements to police with respect to his address and insurance company after a minor accident.
3. obtaining credit under an assumed name.
4. failing to report address to his parole officer.[43]

His return to prison was based on Iowa Board of Parole review of the parole agent's written report. Prisoner Morrissey contended a right to a hearing prior to the revocation of his parole status. Prior to this case, the Court had taken the position that parole was a privilege not a right, therefore, the State could freely terminate what it had extended. However, the Court altered its stance with this case.

> This court has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege".[44]

Utilizing the Goldberg balancing test, the court found that despite the fact a parolee's liberty is conditional, he does enjoy many of the core values of unqualified liberty. Deprivation of enjoyment of those liberties, through

revocation thus inflicts a grievous loss upon the parolee. Therefore, under impact analysis, the parolee's conditional liberty became a constitutionally protected interest, and thereby qualifying for due process protection.

In balancing the State interests against that of the parolee, the court conceded the State had substantial interest in returning parolee violators to prison with the burden of a new criminal trial. On the other hand, there also existed a State interest in restoring the parolee to a normal and productive lifestyle as expediently as possible, a desire which would seem to preclude erroneous revocation. In balancing the competing interest of the State and the parolee, the Court concluded that while the parolee was not entitled to the full panoply of rights due a defendant in a criminal trial, he nevertheless was entitled to pre-determination hearing prior to return to prison. The revocation hearing process was divided into two distinct stages: (1) preliminary hearing - to determine if reasonable grounds for revocation exist; and (2) final evaluation of contested facts and consideration as to whether revocation warranted, based on any mitigating circumstances. At the latter hearing, the parolee had the following procedural rights:

1. written notice of the claimed violations.
2. disclosure of evidence against him.

3. opportunity to be heard and present witnesses/ documentary evidence.

4. right to confront and cross-examine adverse witnesses (unless good cause exists for not allowing confrontation).

5. impartial decision maker.

6. written statement as to evidence relied upon and rationale for revoking parole.[45]

The only Goldberg standard not applied in this case was the right to representation by counsel, although a qualified right to an attorney was gained retroactively through the next landmark case, Gagnon v Scarpelli.

Gagnon v Scarpelli

In the Gagnon case, the U.S. Supreme Court dealt with the issue of probation revocation. Probation, like parole, is a form of temporal and spatial variation of imprisonment. The difference is it is utilized in lieu of imprisonment after conviction. The probationer serves his sentence in the community, with stringent conditions/limitations placed upon their behavior. Given the fact the probationer has not been to prison, probation revocation inflicts an even greater loss upon the probationer.

The facts of the Gagnon case are as follows. Mr. Scarpelli was convicted of armed robbery in Wisconsin. He received a sentence of 15 years imprisonment, but the sentence was suspended, and Mr. Scarpelli was placed on probation for seven years. Under an inter-state compact

agreement, his probation supervision was transferred to Illinois. While residing in Illinois, Mr. Scarpelli was apprehended in a burglary attempt. After admitting his involvement, his probation was revoked, and he was returned to Wisconsin to begin serving his original fifteen year sentence at Wisconsin State Reformatory. At no time did he receive any type of hearing prior to his probation being revoked.

While the Court mentioned an earlier case dealing with probation revocation, i.e. Mempa v Rhay, primary relevance was allocated to their previous holding in Morrissey. Given the fact the probationer, like the parolee suffers grievous loss, impact analysis model demands due process protections be invoked. Consequently, the Court rule the probationer is also entitled to a two stage revocation hearing. However in Gagnon the Court went one step beyond Morrissey by taking a hard look at the assistance of counsel issue. In looking at the rights to present evidence or cross-examine witnesses, the Court conceded that those tasks may be beyond the limited abilities/capacity of the average parolee or probationer.

> . . . the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess.[46]

Therefore, given the above, the Court reasoned the assistance of counsel might prove critical. Conversely, the introduction of counsel would fundamentally alter the nature

of the revocation hearing, giving it an adversarial orientation. Undoubtedly, the State would be forced to obtain its own legal representation which would extend the hearing process and increase the financial obligation of the State. To resolve the situation the Court decided:

> [t]he decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.[47]

Thus, both probationers and parolees gained a qualified right to counsel during a revocation hearing. The three cases - Goldberg, Morrissey, and Gagnon emphasize that due process is a flexible concept whose applicability/magnitude is determined strictly by specific factual situation.

Wolff v McDonnell

With the portrayal of judicial activism, and a brief review of the precedents of Wolff, i.e., Goldberg v Kelly, Morrissey v Brewer, and Gagnon v Scarpelli, the Wolff decision may now be presented in proper perspective. Prior to an analysis of the impact the Wolff decision had on correctional disciplinary proceedings nationwide, the facts of the case will be presented.

On behalf of himself, and other prisoners similarly situated, Mr. McDonnell challenged the constitutionality of a number of administrative practices of the Nebraska Dept.

of Corrections.[48] In respect to the disciplinary proceedings, the complaint focused on the lack of procedural safeguards, thereby asserting non-compliance with the 14th Amendment Due Process clause. The magnitude of this absence of due process requirement becomes self-evident when section 16 of the Nebraska Treatment and Correction Act is reviewed. The act provides for forfeiture of earned good time and/or confinement in disciplinary cell for "flagrant or serious misconduct". Given the serious nature of the sanctions imposed for serious misconduct, the former extending the term of confinement, the latter altering the condition of confinement, the necessity the punishments be imposed fairly is inescapable. Based on oral testimony of Warden Wolff, the following procedures were in effect at the time Mr. McDonnell initiated his civil suit under section 42 U.S.C. 1983:

a. chief corrections supervisor reviews the "write up" on the inmate by the officers of the Complex daily;

b. the convict is called to a conference with the chief corrections supervisor and charging party;

c. following the conference, a conduct report is sent to the Adjustment Committee;

d. there follows a hearing before the adjustment committee and the report is read to the inmate and discussed;

e. if the inmate denies the charge he may ask questions of the party writing him up;

f. the Adjustment Committee can conduct additional investigations if it desires;

g. punishment is imposed.[49]

The State of Nebraska asserted is procedural was an internal matter devoid of any constitutional issues. The State also contended that consideration of validity of procedures revoking good time could not be properly considered in a civil rights suit brought under §1983. In this contention, they relied on the holding in Preiser v Rodriguez, which held that as state prisoners were challenging the tenure of their confinement, their sole federal remedy was by writ of habeas corpus.[50]

Both contentions were rejected by the court. In respect to proper federal remedy, the court concurred that if the Nebraska prisoners were simply seeking restoration of good time credits, they would be compelled to use writ of habeas corpus as their sole remedy. However, as damages were also being sought by the prisoners, there was nothing in Preiser to preclude the damage claim from being immediately processed under §1983.

In respect to classifying the disciplinary procedure as internal matter devoid of constitutional issues, the court stated:

> If the position implies that prisoners in State Institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable.[51]
>
> There is no iron curtain drawn between the Constitution and the prisons of this country.[52]

Thus, the Supreme Court reiterated the Price decision, in which a prisoner retains his constitutional rights, although diminished by lawful incarceration. In analyzing this situation, the Court utilized the entitlement analysis approach. The court took the position that the State of Nebraska created the statutory right for good time credit through legislation, with the provision it could only be forfeited for misconduct. Given the prisoner's interest in not losing good time credit arbitrarily, the State created a "liberty interest" sufficient to invoke the constitutional protection of the 14th Amendment. Once having substantiated the protection of constitutional right was involved, the Court moved to define the procedural safeguards mandated prior to forfeiture of good time credits.

Upon review of the procedures utilized by Nebraska Dept. of Corrections, the Court found them inadequate. The deficiencies included:

1. lack of advance notice of changes.
2. inability to summon, confront, or cross-examine witnesses.
3. no allowance for legal assistance for preparing defense.
4. no written statement as to evidence relied upon by disciplinary board in imposing punishment.[53]

However, given the Court's stance that due process was/ is flexible concept whose application must be situation-specific, the Court declined to order the full panoply of

procedural rights ordered in Morrissey and Gagnon. The procedural safeguards they did order were:

1. advance written notice of changes at least 24 hrs.
2. hearing before an impartial examining body.
3. right to call witnesses and present evidence.
4. right to assistance from inmate legal assistant a staff member when prisoner is illiterate or issue complex.
5. written statement by fact-finders as to evidence relied on and reasons for punishment imposed.[54]

The Court demurred in respect to prisoner's right to counsel, or to confront/cross-examine adverse witnesses. Even the right to call witnesses and present documentary evidence was qualified by the phrase, ". . . when permitting him to do so will not unduly be hazardous to institutional safety or correctional goals." Once the Court has defined a protectable liberty or property interest, through utilization of the Goldberg balancing test, it was required to weigh State interest against the impact State action would have on the individual. Yet, in this instance, in spite of the utilization of both entitlement analysis and impact analysis, the court deferred to State interests in respect to a prisoner's right to cross-examinations of adverse witnesses and right to counsel. In a rationale that inferred the resurrection of hands off doctrine, the Court stated to require the prison to provide the opportunity to

cross-examination of adverse witnesses or right to counsel would conflict with stated correctional goals, i.e., rehabilitation and control/security of the institution. The court reached this decision, in spite of its acknowledgment in Morrissey of society stake in insuring prisoners received equitable treatment and fairness. The court also declined to make the due process requirement it did establish for disciplinary hearings retroactive. The only acknowledgment the Court gave of the limited parameters of the Wolff decision is the following statement:

> Our conclusion that some, but not all, of the procedures specified in Morrissey and Scarpelli must accompany the deprivation of good time by state prison authorities is not graven in-stone.
>
> As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further considerations and reflection of this court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[55]

Criticisms of Wolff

The most vocal criticism of the U.S. Supreme Court Wolff decision came from the bench itself. Both Justices Douglas and Marshall were vehement in their dissent with the majority decision for Justice Douglas, the right to cross-examine adverse witnesses is intrinsic to the concept of due process.

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact-finding, the evidence used to prove the government's case must be disclosed to the individual so that he has opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be prejurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination.[56]

Justice Douglas was also opposed to having a prisoner's right to call witnesses on his own behalf qualified by institutional safety, which would be an exercise of the prison officials discretion. He reiterates the lesson learned from the Holt v Sarver case where an entire prison system was declared in violation of the 8th Amendment (cruel and unusual punishment prohibited), i.e., court cannot defer to expertise of prison officials in respect to constitutional rights of inmates.

For Justice Marshall, the qualified right to call defense witnesses and present documentary evidence is critical.

> The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard.[57]

In response to the majority citing possible interference with swift punishment, where the privilege allowed, he retorts:

> Due Process Clause "recognized higher values than speed and efficiency."[58]

Justice Marshall also concurs with Justice Douglas on the importance of prisoner's right to confront and cross-examine adverse witnesses. He dismisses the Courts concern with administrative efficiency as adequate rationale for the exclusion of the right. Likewise, he states the number of cases where informants provide the evidence is so relatively few, that to make a ruling for all based on such a small fraction of cases, is absurd.

> But this concern for safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse witnesses.[59]
>
> . . . [C]ross-examination is the principal means by which the believability of a witness and the truth of lies testimony are tested, and [T]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.[60]

Justice Marshall goes beyond Justice Douglas by also emphasizing the importance of counsel in disciplinary hearings. In failing to require the presence of counsel at disciplinary hearings, the Supreme Court has disregarded its own conclusion in the Scarpelli case.

> the effectiveness of the rights guaranteed by Morrissey may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the

> informal nature of the proceedings and the absence of technical rules of Procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence.[61]

Given the recognition the Court made of the limited educational attainments of the majority of prisoners in Johnson v Avery, for Justice Marshall assistance, whether it be from a competent fellow prisoner or staff member, should be given to the accused prisoner. In summation, Justice Marshall agreed with his brethren Justices that minimum due process procedural safeguards for disciplinary hearings were essential. His criticism of the holding in Wolff is that the exclusion of two critical procedural safeguards (cross-examination of adverse witnesses and right to counsel) reduced the decision to "these noble holdings as little more than empty prisoners."[62]

An assumption not addressed by the court in Wolff is whether or not prisoners are informed as to what the prison rules and regulations are. Without the promulgation and dissemination of what conduct is prohibited, prisoners cannot be certain how to conduct themselves to avoid punitive sanctions. The connection between proscribed behavior and resultant consequences must be clear and concise. The presence of vague/ambiguous regulations can only promote arbitrary rule enforcement and/or abuse of

official discretion by staff. It is obviously impossible to institute regulations to cover with precision every nuance of prison misbehavior, however, it is essential that the fundamentals of good conduct be adequately communicated to the prisoners. Unfortunately, there is an established tendency for prison regulations to be overly-broad and pervasive.

> [P]rison officials, because of their intense preoccupation with security, sometimes lose their sense of judgment in adopting disciplinary rules. Many prison disciplinary rules punish conduct which does not threaten the security of the prison and are not necessary for maintaining security and order. Certainly, if an inmate commits an act which would constitute a crime in free world, or jeopardizes the security of the institution or the safety of inmates or staff; he should be appropriately punished . . . however, prison disciplinary codes often transcend the criminal code, regulating every aspect of the lives of inmates. They punish trivial innocuous conduct.[63]

Specificity is another element that must be present in prison regulations. The degree of specificity is not as strict as those required in criminal statutes, however ". . . courts have held that due process does require certain minimum standards of specificity in prison regulations, the regulations must at least be intelligible."[64]

While the failure to implement the full panoply of due process procedural safeguards was paramount for the dissenting Justices, for others the established safeguards warranted further examination. The Supreme Court

established a requirement for written advance notice at least 24 hours prior to the hearing. It did not establish criteria to be satisfied in order to constitute adequate notice. Consequently, the lower courts have adopted two basic approaches to deal with the adequacy issue.

1. notice is adequate if accused informed he has been charged and that a hearing will be held.[65]

2. notice is adequate only if it minimally provides both the specific rule allegedly violated and summary of facts underlying the charge.[66]

One of the most liberal construction of the notice requirement came from Rinhart v Brewer.

1. Date and general time the alleged incident took place, as well as the place the alleged incident occurred;

2. A general description of the alleged incident itself for which the prisoner is being charged and the citation for the prison rule allegedly violated; and

3. the identity of the persons, if any, involved in the incident.[67]

The above requirements stress the need for the prisoner to have as much information as possible in order to prepare his defense. The more vague or incomplete the notice given to the prisoner, the less likely he is able to devise an adequate defense.

The use of a prison informant presents another set of myriad problems. Typically, the statement of the informant is forwarded to the disciplinary committee by a third party,

with the identity of the informant remaining concealed. The rationale for allowing the informant to remain anonymous is to protect him from reprisal from the accused and/or other prisoners. The possibility of retaliation was clearly uppermost in the Court's mind in the Wolff decision when it denied prisoners the right to confront and cross-examine adverse witnesses. This recognition, however, should not be construed as endorsement of the use of the informant. Such secret testimony denies both the accused and the disciplinary committee the ability to ascertain the credibility/reliability of the informant. To impose discipline based primarily on hearsay would violate the principle that discipline must be based on substantial evidence.

The Wolff decision also fails to specify any procedural time limitations, other than the minimal 24 hour advance notice of charges. Thus, there is no time requirement required between the time the misconduct report is issued and the disciplinary hearing must be commenced. Even when the correctional department established procedural time limits, they are subject to be suspended or ignored. The Courts have typically accepted suspension of procedural time limits under emergency/crisis situations. However, should the suspension be unwarranted, i.e., no justifying exceptional circumstances, some courts have held the disciplinary report must be dismissed. Despite

institutional aversion to misconduct reports being dismissed on "technicalities," as primary source of law within prisons, regulations must be equally binding on both staff and prisoners. The disciplinary process loses its validity as a rehabilitative and/or control tool if the staff capriciously violates its own institutional rules.

In respect to composition of disciplinary board, the Wolff decision merely implied the board should be impartial. It was left to the lower courts to determine the necessary prerequisites. Most courts have generally agreed that a board made up of prison staff does not in and of itself violate the requirements of due process. In fact, one court went as far as to state:

> [I]nsofar as knowledge of the conditions of the prison environment is important to an understanding of the significance of events which occur therein prison officials and offenders theoretically comprise an ideal disciplinary hearing committee.[68]

On the other hand, while an individual status as a prison official would not disqualify him being a member of disciplinary board, the nature of that persons job could do so. It would be deemed a conflict of interest for a staff member to sit in on judgment of a charge brought by a superior. Generally, neutrality is considered achieved if one or the other has occurred:

1. no member of the board has participated in the case either as an investigative or reviewing officer, or is a witness, or has personal knowledge of material facts.[69]

2. if members of the board who have participated in the investigation or have personal knowledge of material facts make those facts known and reveal their participation at the hearing.[70]

The Wolff decision held that due process did not require the right to retained or appointed counsel at disciplinary hearings unless the prisoner was illiterate or the issues complex. Given the mandate from the Court, lower courts have tended to defer to prison authorities to ascertain prisoner competence, and adopt one of two approaches:

1. burden upon prisoner to show he needs representation.[71]

2. require the prison to make prisoner aware that assistance is available if he is deemed incompetent; and then develop procedure to determine if prisoner qualifies for assistance.[72]

Despite the fact the Wolff decision did not establish a right to counsel at disciplinary hearings based on their interpretation of the U.S. Constitution, there was nothing to preclude such a right being established by State Constitution and/or Legislature, or corrections department. The presence of an attorney fulfills four essential roles that the accused prisoner cannot:

1. investigator-interview all witnesses and gather information.

2. instructure-explain prison regulations and consequences for violation to ad hoc boards; present applicable case law to permanent boards.

3. guardian-presence of outside insures observance of prison regulations.

4. advocate-experienced in presenting case arguments.[73]

Therefore, in concurrence with Justice Marshall's dissent in the Wolff decision, certain States/departments have found that presence of counsel is an essential element in providing due process for prisoners in disciplinary hearings.

The right to present witnesses and evidence on one's behalf, and the right to cross-examine adverse witnesses has been the keystone of American jurisprudence. However, in the Wolff case, the right to call witnesses and present evidence was qualified in deference to institutional discretion. A prisoner was allowed to exercise this right only

> . . . when permitting him to do so will not unduly hazardous to institutional safety or correctional goals. In respect to confrontation and cross-examination of adverse witnesses, that right was deemed inappropriate for disciplinary hearings. Lower courts have generally supported to prison board decisions to deny a prisoner the right to call witnesses on his own behalf. Such exclusion however, cannot be automatic, and must be based on the fact that to allow the calling of such witnesses would interfere with institutional security or be irrelevant or unnecessary. In most instances, written explanations for such denials have not been required. However, as the court will review such denial to determine merit, the record must reflect the rationale/ support for the denial.[74]

The Wolff decision did not address what standard of evidence must be satisfied prior to the imposition of punitive sanctions by the disciplinary committee. Quantum of proof relied upon by most disciplinary committees is "preponderance of evidence". However, the criteria needed to satisfy this evidentiary standard, in absence of established criteria from Wolff, varies from jurisdiction to jurisdiction.

Such a variance is also evident in the written record of the disciplinary proceedings. Some states' record include the incident, summary of evidence presented, decision and rationale for the decision. Other states merely provide the prisoner with a copy of the verdict. Again, the Wolff decision fails to note what elements should be present in the written recording of the disciplinary proceedings has perpetuated variance and/or inconsistency.

Summary Assessment of Wolff

Despite the limitations of the Wolff decision, there are some positive accomplishments as a consequence of the decision:

1. disciplinary processes previously characterized by loose structure and substantial/unreviewable discretion of prison officials became more formalized in structure.
2. recognized the certain constitutional rights of prisoners.

3. provided some checks on exercise of official discretion while simultaneously requiring accountability for decisions made.

4. placed restraints on those charged with enforcing institutional rules through procedural safeguards.[75]

Thus, over-all the effect of mandating due process requirements in disciplinary hearings, i.e., strengthening procedural safeguards and limiting official discretion, has been positive. However, as the preceding sections show, there was/is a great deal left unfinished.

> Wolff and the succeeding case law and prison regulation have gone a long way in restricting the discretion of prison guards to discipline inmates, and . . . both the courts and the corrections agencies have expanded the due process safeguards established by Wolff . . . however, much of the change has been in form and not in substance, and . . . although some of the discretion has been restricted, a great deal of arbitrariness and discretion still exists at the various levels of the disciplinary process.[76]

Additionally, such intervening factors such as volume of disciplinary cases referred reliance on good faith efforts of prison officials, and social structure of prison, have had an impact on the quality of due process afforded. The next section will depict the case law resulting from some of the limitations of Wolff.

Wolff Antecedents

In the Wolff decision, Justices recognized the Wolff case as not being a finished product (". . . not engraven in stone"),[77] and that involving standards through applicable

case law could be expected. In the first post-Wolff decision by the Supreme Court Baxter v Palmigiano, the Court conservatively delineated the rights of prison to counsel-substitutes during disciplinary hearings. Despite the fact that Mr. Baxter was informed State prosecution might follow the disciplinary hearing for inciting a prison disturbance, he was not allowed the presence of an attorney during the disciplinary hearing.

Although the prisoner had a right to exercise his Fifth Amendment Right to remain silent, remaining silent would be used against him by the disciplinary board. Both the exclusion of counsel and the drawing of adverse conclusions from remaining silence were up-held by the Supreme Court. Additionally, the Supreme Court held disciplinary boards were not required to give written rationale for denying the privilege of confrontation and/or cross-examination of adverse witnesses. However, there was a recognition by the Court that the possibility of criminal charges stemming from disciplinary hearings could require additionally due process rights.

In Meachum v Fano, the Supreme Court restricted the application of due process in relationship to prison classification/transfer. Relying on an entitlement analysis, the Court held that there was not statutory right to remain at a particular institution or involved in a particular program.[78] The court rejected any attempt to

utilize impact analysis, i.e., "grievous loss", and up-held the institutional right to make disciplinary transfer to other institutions, even if conditions were more adverse at the other institution. Thus, like Baxter, the Court narrowly construed the due process rights necessarily extended to prisoners. In Montanye v Haynes, a case which focused exclusively on prison disciplinary transfers, the Court reached the same conclusion it reached in Meachum, i.e., no due process requirements were necessary prior to transfer.[79] In its refusal to utilize impact analysis the Court significantly reduced the scope of its Wolff decision. Given the reliance the Court had placed on impact analysis in Wolff (both modes of analysis used in Wolff), its subsequent refusal to utilize impact analysis in Meachum and Montanye generated confusion among the lower courts.

In Wright v Enomoto and Hewitt v Helms, the disarray caused by the Court's earlier stance dissipated somewhat. In Wright,[80] the district court held where prisoners were placed in maximum security for administrative reasons were entitled to due process protections. In reaching its conclusion, the district court clearly relied on impact analysis, i.e., loss generated by removal from general population to maximum security writ engendered a severe loss of liberty. By equating the placement in maximum security units to administration segregation units discussed in Wolff, the district court was able to base its decision on Wolff.

The district court decision was affirmed by the Supreme Court. Yet, in Hewitt[81] the Supreme Court returned to entitlement analysis when it ruled Helms had no right to Wolff-type hearing prior to confinement to administrative segregation. The court found no protectable liberty interest in Pennsylvania State Law which would require Wolff type hearing prior to Helms confinement in administrative segregation. This stance was in line with the posture generally taken by the court, i.e., statutes/regulation governing daily operations of prison were insufficient to create a protectable liberty interest (Wright case exception). The dissenting minority in this case took a view diametrically opposed to the concept of "entitlement". All citizens possess a degree of freedom which cannot be legislatively created or destroyed. They define this liberty as "residuum of liberty that the ordinary citizen enjoys in any organized society."[82]

> All general laws, whether designed to protect the health of the community to control urban traffic, to improve the environment, or to use tax revenues curtail the individual's freedom to do as he pleases. Thus, the residuum of liberty is far removed from license to ratify every whim without restraint. It is more akin to the characteristic of independence which played a special role in our early history.[83]

The concept of "residuum of liberty" was drawn directly from the philosophy of John Stuart Mills. This liberty is retained even when an individual is incarcerated. Justice Stevens, in his dissent states:

> In Wolff, the Court squarely held that every prisoner retains a significant residuum of constitutionally protected liberty following his incarceration. Though the prisoner's rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country . . . [Prisoners] may not be deprived of life, liberty or property without due process of law.[84]

Justice Stevens goes on to elaborate that given the citizen/prisoner innately possesses a degree of freedom which cannot be abrogated, any infringement upon the retained right to liberty should trigger the due process clause of the 14th Amendment.

> [N]either the Bill of Rights nor laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen . . .[85]

> I had thought it self-evident that all men were endowed by their creator with liberty as one of the cardinal unalienable rights. It is the basic freedom which the Due Process Clause protects, rather than the particular rights and privileges conferred by specific laws or regulations.[86]

Justice Stevens took the position that anytime a prisoner is subjected to severe, desperate treatment, he should receive the full protection of due process. However, the holding in Hewitt is that the due process clause does not create a protectable interest in remaining in general prison population.

In cases following Hewitt, the Federal District Court of Massachusetts followed the Supreme Court's lead in deciding an administrative segregation case.

> . . . the due process clause of 14th Amendment independently creates no such interest [remaining within general prison population], but . . . state statutes and regulations may create liberty interests triggering constitutional protection.[87]

The conclusion being, unless a specific statute or prison regulation specified due process requirements had to be followed prior to placement in administrative segregation, there was no expectation on part of the prisoners to remain in general population. Hence, no statutory expectation of liberty was created, therefore due process clause was not triggered.

In Olin v Wakinehona,[88] the Supreme Court utilized its Hewitt rationale to rule neither intrastate or interstate transfers directly implicate the due process clause.

Synopsis

Taken as a whole, as previously noted, Wolff corrected a lot of systematic abuses that surrounded the disciplinary hearing process. Discretion was limited to a degree, and the system shifted from informal to formal format. However, Wolff did not require the full panoply of procedural rights required in Gagnon and Morrissey, and it still allowed a degree of retained discretion to prison administration. It

also generated a certain amount of confusion by simultaneously utilizing impact analysis and entitlement analysis in reaching their holding. Their short-coming generated such cases as Avant v Clifford,[89] in which lower courts or State Legislature would grant procedural rights beyond Wolff dictates. The danger in relying exclusively on entitlement analysis, rather than impact analysis (residuum of liberty) is the inference prisoners had no constitutional rights unless granted by statute or prison regulations. It is therefore up to the lower courts to give substance to the "noble promises".[90] In conclusion, the Supreme Court or procedural rights stated its position was ". . . not graven in stones",[91] and the case has served as a basis for many improvements in the misconduct hearing process.

FOOTNOTES

36 Maring, D. S. "Due Process Safeguards in Prison Disciplinary Proceedings: The Application of the Goldberg Balancing Test," North Dakota Law Review.

37 Goldberg v Kelly, 397 US 254 (1970).

38 Ibid at 262-63.

39 Ibid at 266.

40 Bounds v Smith, 430 US 817, 825 (1977).

41 Id at 268-71.

42 Gooding, Jr., Thompson H. "The Impact of Entitlement Analysis: Due Process in Correctional Administrative Hearings," Univ of Florida Law Review, Vol XXXIII, Winter 1981, no. 2, p. 156.

43 Morrissey v Brewer, 408 US 471 (1972).

44 Graham v Richardson, 403 US 365, 374, 91 S Ct 1848, 1853, 29 L Ed 2d 534.

45 Op cit, at 670.

46 Gagnon v Scarpelli, 411 US 778 (1973).

47 Id, at 790.

48 Wolff v McDonnell, 418 US 539, 94 S Ct 2963, 41 L Ed 2d 935 (1974).

49 Id, at 435.

50 Preiser v Rodriguez, 44 US 475, 93 S Ct 1827, 36 L Ed 2d 439 (1973).

51 Op cit, at 437.

52 Wolff, supra, note 38, at 437.

53 Id at 439.

54 Id at 439.

55 Id at 446.

56 Green v McElroy, 360 US 474, 496-497, 79 S Ct 1400, 1413, 3 L Ed 2d 1377.

57 Clutchette, supra, note 24, at 818.

58 Fuentes v Shevin, 407 US 67,90-91, n.22, 92 S Ct 1983, 1999, 32 L Ed 2d 556 (1972).

59 Op cit, at 819.

60 Davis v Alaska, supra, 415 US at 316, 94 S Ct at 1110.

61 Gagnon, supra, note 36, at 1761-1762.

62 Wolff, supra, note 38, at 581.

63 Jones, Rhine, supra, note 8, at 98.

64 Mote, supra, note 17, at 157.

65 Id at 153.

66 Id at 153.

67 Rinhart v Brewer, 483 F Supp 165, 169 (SD Iowa 1980).

68 McGinnis v Stevens, 543 P2d at 1228.

69 Note, supra note 17, at 161.

70 Id at 161.

71 Grever v Oregon State Correctional Institution, Corrections Division, 28 Or App 829, 561 P2d 669 (1977).

72 Clutchette v Enomoto, 471 F Supp 1113 (N.D. Calif. 1979).

73 Note, supra note 17, at 166.

74 Id at 168-169.

75 Op cit, at 103-104.

76 Id at 105.

77 Wolff, supra, note 35, at 446.

78 Meachum v Fano, 427 US 215, 96 S Ct 2532, 49 L Ed 2d 451 (1976).

79 Montanye v Haynes, 427 US 236 (1976).

80 Wright v Enomoto, 462 F Supp 397 (ND Cal 1976), aff'd, 434 US 1052 (1978).

81 Hewitt v Helms, 459 US 460 (1983).

82 Id at 229.

83 Id at 229.

84 Id at 229.

85 Id at 232.

86 Id at 232.

87 Parenti v Ponte, 565 F Supp 987 (D Mass 1983).

88 Olin v Wakinehona, 461 US 238 (1983).

89 Avant v Clifford, 67 NJ 496, 341 A2d 629 (1975).

90 Wolff, supra, note 38, at 581.

91 Id at 446.

CHAPTER III

MICHIGAN DISCIPLINARY PROCESS

HISTORICAL ANALYSIS

From the legal aspect of the disciplinary process, we now turn to a historical analysis of the development of the disciplinary process in the Michigan Department of Corrections.

Control Practices Prior to Wolff

Prior to the Wolff decision, all major misconduct was handled by what was referred to as the Deputy's Committee. Minor misconduct was reviewed and punishment meted out by certain designated employees. The Deputy Committee was composed of: 1) Deputy/Superintendent or persons authorized to serve as duty deputy; 2) member of treatment staff; 3) custodial officer or assignment supervisor. After the inmate was charged with an alleged violation, he was informed of the charge, and received a copy of the charge from the reviewing officer. The reviewing officer was a custodial officer, normally sergeant or above. Depending on whether or not the alleged charge was a non-bondable, i.e., a charge serious enough to warrant restrictive detention prior to the hearing, the reviewing officer would then release the inmate on his own recognizance, confinement to

his cell/room, or placed in temporary segregation. Each facility maintained a list of non-bondables for the reviewing officer and that list was approved by the Deputy Director of the Bureau of Correctional Facilities in Central Office, Lansing. Once before the Deputy Committee, the inmate would receive a disposition based on the misconduct report and his statements. The range of the dispositions are indicated below.

a. A finding of not guilty.

b. Counsel and reprimand.

c. Suspended sentence. A specific penalty assigned but held in abeyance, contingent on future good conduct, should not be in effect for more than 90 days.

d. Temporary loss of privilege.

e. Restitution for property damage.

f. Confinement to cell or room, not to exceed 5 days.

g. Detention, not to exceed 7 days for the most serious offenses, and usually 5 days or less.

h. Segregation - The Disciplinary Committee may place in segregation because their behavior has demonstrated that they cannot be managed with general group privileges, because they need protection from other prisoners, because they are a threat to the members of the staff or other inmates, or because they have demonstrated that they are a serious escape threat.

i. Good time forfeiture - In cases of 1) more than one infraction of institution rules in any month, 2) any serious act of insubordination, 3) escape or attempt escape, the committee may recommend that the head of the institution order forfeiture of all or a portion of the good time earned by the inmate.

j. Recommend intra or inter facility transfer.[92]

Although no statistics were being compiled at this time, past recollection of several staff members, one who later became a hearing officer, that the conviction rate was nearly 100 percent. At that time, the attitude was reminiscent of Ruffin, i.e., inmates had no rights. The fact that a staff member thought the inmate had violated the rules was normally sufficient. It is noted at this time that no investigator was part of the process. Thus, the burden was on the inmate to prove his innocence, and not on the Committee to ascertain guilt. There were also a number of affiliations, e.g., "good-ole-boy network," among staff members, so even marginal and/or weak charges were sustained. The only appeal process was to the Warden/ Superintendent, who invariably supported his Deputy. Another deficiency of the disciplinary process at this time was the list of non-bondables maintained at each institution. Although review by the Deputy Director was mandated, at this time the Department was at the same stage Statesville in Illinois was at, i.e., although nominally a centralized system, in fact, the Warden Superintendents were autocrats, able to operate their penal empires in any manner they chose, as long as the appearance of conformance to directives/procedures was there. Thus, charges considered threats to security or order and disliked by the head of the institution were placed on the non-bondable list. In addition, no deputy every made the mistake of rendering

dispositions that would conflict with the Warden's desire. Basically, at this time, the disciplinary process was extremely discretionary and informal, with the primary participants - reviewing officer, Committee and Warden Superintendents - exerting enormous discretionary power.

ABA Survey

The manner in which Michigan Department of Corrections handled its disciplinary process was hardly unique. A survey conducted by Resource Center on Correctional Law and Legal Services for American Bar Association's Commission on Correctional Facilities and Services, a few months prior to the Wolff decision, indicates Michigan falls somewhat in the middle of the pack. As that survey gives an excellent overview of the state of prison disciplinary process nationwide, a brief synopsis is in order.

The survey identified 21 components considered essential for due process within a disciplinary proceeding. They were:

1. written rules specifying offenses.
2. Rules provide specific sanctions for specific offenses.
3. inmate receives copy of rules.
4. inmate receives written notice of charges before hearing.
5. inmate receives prior notice of time of hearing.
6. impartial tribunal conducts hearing.

7. continuance allowed to prepare defense.
8. inmate personally appears at hearing.
9. inmate hears evidence.
10. inmate may make own statement.
11. inmate may call relevant witnesses.
12. inmate may confront adverse witnesses.
13. cross-examination of averse witnesses allowed.
14. inmate may be represented by counsel.
15. inmate may be represented by counsel substitute.
16. decision based solely on evidence at hearing.
17. decision rendered in writing.
18. records made of hearing.
19. inmate may appeal decision.
20. inmate notified of appeal.
21. record expunged if guilt not established.

The survey found three primary group of practices in which the majority of respondent states and federal government subscribe to. First, all the state/federal government provided the following procedural protections:

1. written rules that specify conduct violative of rules.
2. impartial tribunal to sit in judgment of alleged violations.
3. right to personally appear before the tribunal.
4. right to hear the evidence of the violation.
5. the right to make a statement on his own behalf.

The second group of practices were followed by 90 percent of jurisdictions with clear polices.

1. accused inmate receives copy of the rules of the institution.
2. inmate is given a written notice of charges against him in advance of a hearing.
3. he also receives advance notice of the time of the hearing (although this may not be written).
4. inmate may appeal an adverse determination.
5. some hearing record is made.

The third group of practices was followed by at least 75 percent of respondents.

1. inmate may have counsel-substitute at his discipline hearing.
2. tribunal renders the decision in writing.
3. tribunal bases its decision solely on the evidence presented at the hearing.
4. inmate is notified that he may appeal an adverse finding.
5. inmate may secure a continuance in order to prepare his defense for the hearing.

The final group of practices that have majority support among those states with adopted positions were:

1. inmate may confront accusing witnesses.
2. inmate may call relevant witnesses.
3. cross-examination of adverse witnesses is permitted.

However, the practices enumerated in the above four groupings were not absolute, and subjected to restrictions and/or limitations. A closer examination of the 21 elements

of disciplinary process reveals some of the deficiencies present in the states' disciplinary procedure.

In respect to the first three elements pertaining to rules, i.e., reception of copy of rules, specificity of offenses and specificity of sanction vis-a-vis to offenses; while all states promulgate rules and distribute same to prisoners, only 25 percent offer guidance regarding sanctions imposed for violations. Second, while offenses may be enumerated, the infractions themselves may be so vague/ indefinite as to provide little guidance to prisoners wishing to avoid a violation. Finally, the majority of rule books do not correlate specific penalty (or range of penalties) for each specific offense, thereby giving the impression of arbitrariness.

In respect to the second three elements, written notice of charges and notification of hearing prior to actual hearing, and allowance of continuance to prepare defense, there are also shortcomings. Typically, the notice of charges is the misconduct report written on alleged violation. Therefore, the inmate is dependent on accurate and complete report filed by the reporting staff member. Second, as the hearing date is almost uniformly set for a few days after the incident, the inmate may have insufficient time to prepare defense, particularly if pre-hearing confinement occurs. Finally, although continuances are allowed to assist the prisoner in preparing

his defense, some jurisdictions make this allowance at the discretion of the hearing body. All jurisdictions limit the span of time available for such a continuance.

In respect to the next four elements, impartial tribunal, personal appearance at hearing, hearing of evidence, and right of prisoner to make his own statement, all states recognize these as fundamental rights. However, given the similarities of background coupled with shared work experience, there always exists the potential for one or more of the tribunals to be inclined to favor the staff's side over the prisoner's side. There also is a strong tendency in correctional institutions for staff to back up other staff. Both of these above mentioned tendencies would significantly impact on a tribunal's impartiality. In regard to the latter two elements, while appearance at the hearing appears universal, the hearing body does reserve the right to receive evidence privately, which is not shared with the prisoner. However, given the anonymity of the source, the prisoner is not in position to refute/invalidate the source, thereby possibly subjecting him to vindictiveness/biases of his fellow prisoners. Finally, although all states allow prisoners to speak, only 20 percent of the states give effective information on the consequences of a guilty disposition. This obviously reduces the effectiveness of opportunity to speak, as he is unable to argue for mitigation of punishment without

knowledge of available sanctions. Additionally, a number of prisoners may be inarticulate and/or under-educated, thereby further diminishing the utility of the opportunity to speak.

The next five elements are among the most controversial. These are calling of relevant witnesses, confrontation and cross-examination of adverse witnesses, and representation by counsel or counsel-substitute. First of all, only 50 percent of the states allow this privilege; and those who do limit the number of witnesses that may be called. Therefore, one of the most important corollary to the prisoner's personal statement is restricted. The second important corollary, i.e., confrontation/cross-examination of adverse witnesses, is denied in nearly 50 percent of the respondent states. Obviously, this denial significantly negates the essence of due process for the prisoner. Those jurisdictions which deny this privilege base their denial on institutional order/safety or need to protect an informant's identity. For the latter two elements, it was found 89 percent of states allowed counsel-substitute. Only 14 states allowed appointment of retained counsel at disciplinary hearings. The use of counsel-substitute, typically staff members, can be criticized on the grounds the staff member may not have requisite skill nor independence to properly represent the prisoner's interests.

Additionally, the prisoner himself may lack the skill/ knowledge of disciplinary procedures and consequences to properly represent himself, thereby making a skilled representative essential in order for the prisoner to receive due process.

The last five elements deal with the dispositional aspect of the proceeding, i.e., decision in writing and based solely on evidence presented, record made of hearing, right of prisoner of appeal, to be notified of outcome of appeal, and expungent of misconduct from prisoner record of appeal granted. Most states make a record of disciplinary proceedings and have mechanisms for appeal in place. Surprisingly, the survey revealed the prisoner is frequently not informed this right to appeal exists. A successful appeal is contingent on the completeness of the record of the disciplinary proceedings. Therefore, should only the violation and hearing decision be recorded, insufficient data is present to adequately sustain an appeal. Additionally, 15 percent of the states do not require the hearing decision be in writing, and close to 50 percent do not require decisions conformance to evidence presented at the hearing. The hearing decision not being in writing obviously complicates any potential appeal. The allowance of extraneous matters, e.g., inmate's attitude, past behavior, staff impressions, file material, etc., eliminates any concept of fairness or justice from the hearing body's

decision. Finally, only a few states expunge the misconduct from the prisoner's record, should the hearing result in a favorable decision to him. Most maintain a copy of violations, even if dismissed. Therefore, there is no assurance prior charges will not impact on future decisions.

In summation, the mere presence of elements of due process requirements is no guarantee that due process in disciplinary proceedings is in fact occurring. While all of the elements specified are essential, some are even more critical than others. The absence of one critical due process element can diminish the entire disciplinary procedure. Additionally, the manner in which the due process elements are operationalized is of paramount importance. If the due process element does not make a successful translation from written policy to operational procedure, it has become impotent and deceptive.

With the ABA survey as a preface, we will now examine Michigan's position during this timeframe. Based on information submitted by Michigan Department of Corrections, it rated positive on the following elements:

1. written rules specifying offenses.
2. inmate receives copy of rules.
3. inmate receives written notice of charges before hearing.
4. inmate receives prior notice of time of hearing.
5. inmate appears personally at hearing.

6. inmate hears evidence.
7. inmate may make his own statement.
8. decision rendered in writing.
9. inmate may appeal decision.
10. record expunged if guilt not established.

As the analysis of the ABA survey indicates, more than the presence of some of the due process elements is required in order to state due process is endemic to the disciplinary proceedings. There is nothing in the ten elements listed that negated the informal, largely discretionary system that preceded the Wolff decision. The rules may have been written, but they reflected the Warden's viewpoint, and were not standardized throughout the Department. Inmates may have received copies of rules, but if they were vague and ambiguous, and did not provide specific sanction for specific violations, they were useless. As the notice of charges the inmate received was the actual misconduct report, inmate was reliant on accuracy and completeness of the misconduct report. As there was no specific time requirement for notice, prisoner may not have received adequate notice to prepare a defense. Personally appearing at the hearing, hearing the evidence, and making a statement were exercises in futility if you were prejudged guilty on charging staff member's word. Likewise, having the decision in writing and having an appeal mechanism was farcical in system where conviction rate was virtually 100 percent and

the Warden rubber-stamped every decision of his surrogate. In addition to the above criticism, I note the survey shows two discrepancies, based on my personal recollection. I do not recall any prisoner having a counselor substitute present at the hearing. There was normally a counselor present, however, he served as a member of the disciplinary committee. Likewise, I note no responsible record made of the hearings. During my participation with the disciplinary I observed, and sometimes myself, dictated a record of the proceedings.

The critical omissions from the disciplinary procedure during this pre-Wolff timeframe were:

1. rules providing specific sanctions for specific offenses.
2. impartial tribunal conducts hearing.
3. continuance allowed to prepare defense.
4. inmate may call relevant witnesses.
5. inmate may confront adverse witnesses.
6. cross-examination of adverse witnesses.
7. inmate may be represented by counsel.
8. inmate may be represented by counsel-substitute.
9. inmate notified of appeal.

It is the absence of the critical elements of due process that perpetuated a highly discretionary disciplinary system. Without specifying specific sanctions for specific violations, the committee could be lenient or punitive at

whim. There was, in fact, a tribunal set up, however, with virtually all Deputies articulating from custody ranks and a custody representative on the committee, the deck was stacked. Without any recourse for continuation for defense preparation, or ability to call relevant witnesses, confront adverse witnesses, cross-examine adverse witnesses, or presence of counsel or substitute, the hearing became a meaningless formality, a validation of charging staff member's report. Finally, appeal to the individual who trained and personally selected the Deputy Warden - the Warden - was merely a permitted indulgence. However, in retrospect, Michigan's system was no worse than most correctional disciplinary systems of this day. All of the jurisdictions possessed systems characterized by discretion and definite absence of restraints on the exertions of power/authority. It is also noted that all of the elements identified by the ABA survey as being essential for due process were not required by the Wolff decision.

This largely discretionary system was formally terminated in 1976, when the Department revised the disciplinary policy to be in accord with the Wolff decision. The revised 1976 procedure provided for the following:

1. Advance written notice of the charges at least 24 hours prior to the hearing.

2. An opportunity to call witnesses and present documentary evidence in defense of the charges.

3. Staff assistance in preparing a defense to the charges if the prisoner is illiterate or the issues involved are complex.

4. An impartial fact-finder to decide guilt or innocence.

5. A written statement by the fact-finder containing the decision as to guilt or innocence and the evidence relied upon to reach that decision.[93]

To insure adequate compliance with the constitutional requirements, the three man committee was eliminated, as attempts to continue the utilization of the committee method and meet requirements proved unworkable. The responsibility for disciplinary hearings was placed with a single hearing officer. Policy Directive PD DWA 60.01 established the procedure for the disciplinary process.

1. At least 24 hours prior to a formal hearing, a resident shall receive written notice of the reason for the hearing. A resident may waive the 24 hour notice requirement by singing the appropriate wavier form.

2. A resident may be present at the hearing and speak or present written documents on his/her own behalf.

3. A resident may receive a copy of Department documents specifically relevant to the issue before the hearing authority.

4. A resident may call witnesses who are necessary, relevant and material to his/her defense when to do so would not be unduly hazardous to institutional or safety goals.

5. Either the resident or the hearing authority may request a staff investigator to gather and present factual evidence at the hearing. Where the hearing authority determines that a resident appears to be incapable of speaking effectively for himself or herself, the hearing authority shall request the staff investigator to present arguments on the resident's behalf.

6. The hearing authority shall render a written decision or recommendation in every case, which shall include reasons for denials of a resident' requests, if any, statement of the evidence relied on and reasons for the action taken.

7. The hearing authority shall have had no previous direct involvement in the matter under consideration.[94]

At this time, the formalization of charges/violations occurred. Certain charges were designated as major misconducts, with the prerequisite elements that had to be present to substantiate the charge. In addition, the non-bondable list became standardized throughout the Department terminating the practice of each facility maintaining a list. The non-bondable charges became:

1. Escape; attempt to escape.
2. Homicide.
3. Assault.
4. Intimidating or threatening behavior.
5. Sexual assault.
6. Fighting.
7. Incite to riot or strike; participation.
8. Dangerous contraband.[95]

Thus, the blatant abuses that predominated the disciplinary process prior to 1976 appeared to be eliminated. However, a 1977 evaluation by Ms. Penelope Clute (labeled as Hearings Coordinator despite the fact that the Hearings Division was not established until 1979) indicated that the conformance to the dictates of Wolff were

largely superficial.[96] On paper, the Department was in 100 percent compliance with Wolff; in actual practice, the discretionary mechanism continued to operate underneath the formalized facade. The quality of hearings improved immensely, i.e., inmates received fuller protection of the Wolff procedural rights. By reducing the number of people directly involved in the disciplinary process, efficiency, consciousness and accountability were increased. However, a number of deficiencies still persisted at other stages in the process. They were:

1. Procedural Deficiencies

    a. Charging violations - non-existent violations are still frequently charged.

    b. Review - time problems, reports not being reviewed within four day rule; improper charging, improper assignment of minor misconduct to major; improper segregation prior to hearings.

    c. Investigation - investigators overworked and under great time pressure.

    d. Appeals - lack of familiarity with disciplinary due process has resulted in improper granted appeals.

2. Institution Head Interference - Pressure for hearing officer to make decisions the way his supervisor Warden/Superintendent saw things.

3. Institutional Staff Pressure - Resentment and dissatisfaction with hearing officers surfacing as hearing decision now being made by personnel with no direct authority over them.

4. Hearing Officers Perceptions - Hearing officers, by being immersed in such a critical and unsupportive environment, feel abandoned slightly and feel they lack promotional potential.[97]

Wolff/P.A. 140 Impact

The problems described above are the typical problems inherent in the shift from an informal, decentralized system of administration where the institutions enjoyed carte blanche privileges to a restrictive formalized, centralized administration. Amidst this turmoil and strife, Public Act 140 (MCLA 791.251 et. seq.) was passed by the State Legislature in 1979. This act made some minor procedure changes, which are the following:

1. The prisoner must be allowed to submit written questions to the hearing officer to be asked of witnesses and there must be an answer to each question in the record or a statement by the hearing officer as to why the question was not asked.

2. If the hearing officer decides that certain evidence must be kept confidential s/he must give a reason on the hearing report as to why confidentiality is required.

3. A prisoner may file an affidavit of personal bias against a hearing officer and request her/his disqualification from the case, and the Department is required to reply to that affidavit.[98]

However, the primary change was not the procedural alterations listed above, but the establishment of the Hearings Division. Hearing officers were removed from the authority of Warden/Superintendents, and placed under the direct supervision of a Hearing Administrator located in Central Office, Lansing. In addition, all hearing officers hired after October 1, 1979 were required to be attorneys.

Currently, on paper, the Michigan Department of Corrections has one of the finest disciplinary procedures in the country. The process begins when a staff member observes a resident engaged in conduct that is prohibited by institutional rules and regulations. As previously noted, major misconduct violations have been standardized department-wide; and the most important rules emphasized in the Resident Guide Book, which each possesses. The staff member then details the violation noted, along with the specific facts of his observation. This report, formally known as a misconduct report; in prison vernacular, a ticket, is then submitted to Control Center. The resident is then called to Control Center to receive formal written notice of the charge(s). At this point, the resident has entered the reviewing stage of the disciplinary process. The Control Center officer who reviews the ticket with the resident is a supervisory level staff member, normally a lieutenant or captain, and known as the Reviewing Officer. His most important function is to ensure the resident is properly charged and has written notice of the charges. He is also responsible for double-checking the supporting evidence to make sure it conforms to the charges. If he ascertains evidence that does not conform to the charge, he is authorized to amend the charges, so they are in conformance with the body of the report. The following

summary of the duties/responsibilities of the reviewing officer documents the critical importance of the reviewing stage.

1. Receive misconduct report from reporting officer.

2. Ensure that a photograph or drawing and description is made of every piece of evidence that will not be available at the hearing. This includes weapons and other items that are placed in the State Police evidence box; evidence such as food, which has perished, or been returned to the kitchen; and evidence which has been destroyed, such as spud juice.

3. Read misconduct report and clarify any confusion with reporting officer; may add appropriate charge or return report for rewrite.

    a. Ensure that the report is not conclusory and that the conduct constituting the charge is described.

    b. Compare against checklist to see that all essential information is included.

    c. Ensure that all employee witnesses to the incident are named in the report.

4. Call out the resident and read the report to him or her.

5. Write down any statement resident wishes to make.

6. Check out readily verifiable aspects of resident's version which would warrant dismissing the report.

7. Decide whether the charge is major or minor misconduct.

8. If the charge is major misconduct, decide whether resident should remain in general population (on bond) or confined pending the hearing.

9. Inform resident of the right to a hearing investigator if one is needed to obtain documents, statements of witnesses or other evidence.

10. List names and numbers, whenever known, of witnesses requested in appropriate space on report.

11. List documents requested in appropriate space. The resident is entitled to copies of Department documents specifically relevant to the misconduct report. The hearing investigator will obtain these for the resident. The hearing officer will decide whether the resident may have a particular requested document.

12. If the resident requests a hearing investigator, but does not request witnesses or documents, explain to the resident that the investigator is for investigating only. Under the comments section, state that the resident requested a hearing investigator, but gave no reason for needing one, therefore, the reviewing officer is not assigning a hearing investigator. The hearing officer will make the final decision regarding whether a hearing investigator is needed in the case.

13. Despite #12, assign a hearing investigator if the resident appears incapable of speaking in his or her own behalf. This may be the case if the resident does not speak English or is mentally impaired. Notify the hearing investigator of the reason for assignment in these cases.

14. Have resident sign misconduct report and give him or her a copy. If resident refuses to sign, note refusal in the signature space and still offer a copy to the resident.[99]

After the above functions have been accomplished, the resident receives a copy of the misconduct report, unless he is charged with a non-bondable charge, he then leaves the Control Center. This terminates the reviewing stage, and the next stage is the investigative stage.

In the investigative stage, the focus is on thoroughly investigating the incident, with particular attention being placed on points of discrepancy between the misconduct

report submitted by the observing staff ember and the resident' version. Due to the resident's necessarily limited access to others, hearing investigators are provided to obtain witness statements and relevant documents. The hearing investigator is an important evidence gatherer and is not an advocate for either the resident or the officer. In addition to being thorough, the investigator need not be endless. Thus, he is not required to interview all witnesses the resident requests, but only those who he can determine:

1. Actually witnessed the event in question.
2. Have something relevant to say in respect to the issues in disagreement.
3. Not repetitious of other witnesses.

In respect to witnesses, despite questions of credibility and/or possible bias, the determination of the validity/acceptance of the testimony will be decided by the hearing officer. The hearing investigator's primary function is to assure the quantity and quality of evidence available at the hearing is the best possible. A summary of the duties of the hearing investigator is as follows:

1. Receive misconduct report on resident requesting a hearing investigator.
2. Interview resident; pinpoint any discrepancies between resident's version and the report.
3. Inquire whether resident wants witnesses interviewed; take names and numbers of necessary, relevant and material witnesses.

4. Interview and put statement of reviewing officer in writing with special attention to the areas of discrepancy. No case should go to the hearing without this interview if there are discrepancies between the report and the resident.

5. Interview requested witnesses and write down their statements. If any are not interviewed, give the reason in writing.

6. Interview all other known, relevant witnesses and write down their statements.

7. To the extent possible, resolve the factual questions in the different versions of the incident by checking out the resident's alibi, claim of permission, etc.

8. The hearing investigator's report should be in writing. This is not only helpful at the hearing, but since the report will be kept in the Record Office file, it will provide a complete record for the decision on appeal, inquiries from the Ombudsman and possible court challenge. All of these people will need to know exactly what the witnesses stated.

9. Hearing investigator is not required to appear at the hearing unless:

   a. The hearing officer so requests, or

   b. The reviewing officer or hearing investigator decides the resident is incapable of speaking in his or her behalf.

10. Give witness statements and misconduct report to hearing coordinator within time limits set by institutional procedure.

11. If the hearing investigator promised confidentiality to a witness, this should be made clear in the written statement so that the hearing officer will not reveal that portion to the resident. Confidentiality may be promised only when to reveal the informant's identity would present a hazard "to institutional or personal safety."[100]

Once the investigation is complete and forwarded to the hearing officer, the investigative phase is complete. The next stage is the actual hearing itself, before the hearing officer. The hearing officer's role is that of a judge, an "impartial decision-maker" who must determine solely on the basis of the evidence submitted, whether the alleged violation of conduct actually took place. To accomplish this, the hearing officer must:

1. Weigh the credibility of all the witnesses.
2. Determine the facts in the case.
3. Decide whether those facts amount to the alleged misconduct.[101]

If the information present appears insufficient, the hearing officer has the authority to relist the case and order further investigation. The hearing officer's primary responsibilities are:

1. Guaranteeing the resident's procedural rights.
2. Making findings and dispositions on the specific charges.[102]

A summary of the hearing officer's duties follows:

1. Inquire whether the resident requested witness statements or hearing investigator (compare against misconduct report). If requested to reviewing officers, check to see if obtained.
2. Read charge to resident; allow resident to make a statement relevant to the case.
3. Allow hearing investigator to read witness statements; if investigator not present, hearing officer reads the witness statements aloud.

4. Decide whether resident is guilty or not guilty of specific misconduct charged, or its lesser included violation, based only on the evidence presented at the hearing.

If guilty:

5. Allow resident the opportunity to make a statement regarding disposition.

6. Examine resident's past record and make disposition.

7. Inform resident of right to appeal and that the hearing officer will decide whether sentence should be held in abeyance or imposed pending appeal. Sentence must be imposed if:

   a. The resident is potential danger to institutional safety or security if immediately returned to the general population; or

   b. The appeal is clearly without arguable merit or is taken primarily to delay imposition of sentence (e.g., where resident admitted guilt).

8. Indicate on misconduct report whether resident desires to appeal. If appealing, give resident forms, notify of time limits, and decide whether to start sentence.

9. If referring resident to Security Classification, explain what that means and how it is distinct from discipline.

10. Complete hearing report; attach written witness statements and summarize any new evidence. If requested witness statements and documents denied, give reason in writing. Write finding and disposition and reasons therefore.

11. Have resident sign hearing report and give him or her a copy before departure.[103]

Once the resident has been found innocent or guilty; and if guilty, the disposition imposed, the hearing phase is concluded. Those residents who disagree with a guilty finding, however, have the right to appeal. Currently, per

Public Act 140 of 1979, there is no right to appeal within the Department; thus, the resident must process his appeal directly to the courts. Should the courts find any substantial violation occurred, the Hearings Administrator is responsible for conducting all rehearings.

Branham Study

This same conclusion was reached by Assistant Professor Lynn Branham, Cooley Law School, in a comparative study she did of the Michigan and Illinois disciplinary proceedings. Her evaluation was based on the minimal procedural protections required by the Wolff decision. There were:

1. Written notice of the disciplinary charge within at least 24 hours of the disciplinary hearing;

2. The right to call witnesses and present documentary evidence at the disciplinary hearing as long as effectuation of this right would not be "unduly hazardous to institutional safety or correctional goals;"

3. The assistance of another inmate in preparing and/or presenting a defense or other "adequate substitute aid" when the prisoner charged with the disciplinary infraction is illiterate or because of the complexity of the charge, will most likely be unable to adequately defend himself without such assistance or aid;

4. A written statement from the disciplinary hearing fact-finder describing the evidence relied on in arriving at the disciplinary decision and the reasons for the disciplinary action taken; and

5. Adjudication of the disciplinary charge by an impartial decision maker.

In respect to written notice, Ms. Branham noted the function of the reviewing officer, i.e., reviewing ticket with prisoner, providing him with a copy of the violation, and date of scheduled disciplinary hearing. This procedure adequately meets with the Court's twofold intent: (1) prisoner be fully aware of the charge he will be adjudicated upon at the hearing; and (2) adequate time to prepare defense to be presented at hearing. The reviewing officer, as noted earlier, also insures charges are correct and that misconduct report meets the standards ascribed in Hearings Handbook. This insures misconduct report is factual and complete.

Professor Branham noted that successfully met the objectives of Wolff's notice requirement through the following steps:

1. standardizing the factual content cited in misconduct reports through checklist (Hearings Handbook).
2. requiring that the facts cited support misconduct charges.
3. establishing an effective reviewing mechanism to eliminate poorly written or unsupported charges.
4. in-person review of ticket with prisoner charged.

In respect to right to call witnesses, Michigan has gone beyond the restrictions approved by the court. The right to call witnesses is likewise restricted. In-person testimony of witnesses is not considered "necessary" if testimony of witnesses would be "repetitious" or if

"complete written statement" has been obtained by either the hearing investigator or hearing officer. This rule substitutes written statement for oral testimony, thereby effectively supplanting the inmate's right to call witnesses. The Michigan Hearings Handbook states witnesses should not be permitted to testify personally unless the hearing officer judges the written statement inadequate, and witnesses presence/testimony would not threaten institutional security. This rule far exceeds the "unduly hazardous to institutional or safety goals" standard established by the court. In Professor Branham's view, the utilization of an alternative procedure, while having the appearance of causing no overt harm to inmates, does not justify the abnegation of a procedural right recognized by the Supreme Court. The state would have to prove that use of written statements instead of personal testimony does not alter procedural fairness of the disciplinary hearing. There are two difficulties that are envisioned the state would have to overcome:

1. A witness' credibility is an essential component in evaluating his testimony. The witness' demeanor could prove critical in that assessment.

2. Witness' absence eliminates any opportunity on the part of the hearing officer to further explore and/or validate the witness' observation.

Michigan statute does require written statement when neither testimony nor written statement is obtained from requested witness. However, this policy appears to be

adhering to the holding in Ponte v Real, rather than conformance to Wolff dictates.

In respect to the right to present documentary evidence, the Michigan statute has exceeded Wolff requirements. The only restriction in this area is consonant with Wolff. The hearing officer may exclude only evidence which is "irrelevant, immaterial, or unduly repetitious." This evidence is not limited to evidence the inmate may personally collect, but can also demand department documents be disclosed to him. The only limitation on this right is that documents requested must be "specifically relevant" to the case, and that disclosure will not imperil "institutional or personal safety." Thus, the department must be judged as having mixed success in dealing with this requisite.

In respect to assistance in preparing/presenting a defense, Michigan has exceeded the standard. Wolff specified inmate must be given assistance when he is illiterate or unable to cope with the complexity of the misconduct charge. The prisoner is then to be provided assistance of inmate of his choice or "adequate substitute aid." The "adequate substitute aid" is fulfilled by the hearings investigator. Although initially hearing investigators had to be requested by the inmate, given that reviewing officer and hearing officer may request assignment

of hearing investigator, it has become endemic to all misconduct hearings. This has expanded the right of Michigan prisoners to assistance.

In regard to written statements of evidence relied on and reasons for disciplinary action, Michigan has met the standard, with one qualification. Given the requirements of the Hearings Handbook, the hearing reports are quite specific in respect to the evidence presented or reviewed by the hearing officer. The hearing officers also identify the evidence relied upon for the guilty finding and why the evidence was credible. The inmate is provided with a copy of the hearing report with all detail specified above. The qualification stems from courts ambiguity surrounding its statement the prisoner has the right to reasons for disciplinary action. If interpretation is limited to why the inmate was found guilty, Michigan conforms to this standard. If the court's statement is in reference to type (amount of punishment imposed), no explanation, by statute or administrative provision, is provided. As no case law has as yet mandated the second interpretation, Michigan is judged to be in full compliance with Wolff's requirements in this area.

Finally, in respect to the right to an impartial decision maker, Michigan, thanks to P.A. 140, has exceeded the Wolff requirement. P.A. 140 mandated that all hearing officers after 1979 be attorneys and employees of separate

divisions within the Department of Corrections. This effectively removed the hearing officers from the jurisdiction of the Warden, thereby eliminating virtually all institutional pressures impacting upon their decisions. This neutrality is further preserved by having the hearing investigator accumulate all relevant information with no favoritism allowed.

In summation, the Michigan Department of Corrections has met or exceeded all of the mandates of Wolff with only one exception. The exception is the curtailment of prisoner's right to call witnesses to testify at disciplinary hearings. As of this date, the Department has not dealt with this shortcoming. Neither has the Department attempted to emulate those state departments who are more progressive in other areas. Wolff set no limitation on progressive improvement; in fact, it is "not graven in stone" phrase has been interpreted as being tantamount to a challenge for progression.

CONCLUSION

The preceding sections have emphasized the complexity of the disciplinary process. At this point, there are certain factors that bear reemphasis. As the legal section has shown, the requirements of due process are constitutionally mandated by the Supreme Court. In addition, the operational-historical section detailed the

condition of the disciplinary process prior to Wolff and by no conceivable means can it be said to have incorporated the "basic fairness" doctrine, inherent in due process. Philosophically and conceptually, it is only logical that the agency that purports one of its basic functions is to rehabilitate social deviants into social conformists, would accord them their constitutional rights to the full extent. There is no way the norms of society can be assimilated successfully unless the inmate can perceive he is respected by the rest of society, and not blatantly disregarded by an agency for administrative convenience. Long before a case like Wolff had been envisioned, the corrections components accepted the "paradigm of rehabilitation." Thomas Kuhn in "Structure of Scientific Revolutions" defined a paradigm as, "... the entire constellation of beliefs, values, techniques,... shared by members of a given community."[104] Revolution occurs when the reigning paradigm is succeeded by another, due to the fact the new paradigm:

1. has achievement that was sufficiently unprecedented to attract an enduring group of adherents from the previous paradigm.[105]

2. Sufficiently open-ended to leave all sorts of problems for the redefined group of practitioners to resolve.[106]

Utilizing Kuhn's concept of paradigm, it is our contention that a scientific revolution, in the Kuhnian sense, occurred when corrections terminated the paradigm of punishment and adopted the paradigm of rehabilitation.

Thus, current difficulties in correction are inherent in the current paradigm they have adopted. There is no doubt that when the Progressives emphasized rehabilitation and advocated the use of such techniques as indeterminate sentence and parole as means of accomplishing that goal, they were men motivated by "conscience." However, as noted by David Rothman in "Conscience and Convenience," the speed in which it was adopted, e.g., from 1900 to 1923, half of all offenders sent to state prisons under indeterminant sentence, is the result of perceived administrative "convenience." The individual justice design inherent in rehabilitation greatly expanded the discretionary powers of correctional officials. Though treatment-oriented in name, these programs (parole, probation) and techniques (indeterminant sentencing) actually produced a penal environment more coercive than the previous punishment era. Therefore, the first conclusion is that the present difficulties experienced by corrections in instituting constitutionally mandated due process in their disciplinary process, resulted from the transition from the punishment paradigm to the present reigning paradigm of rehabilitation. It is the acceptance of this paradigm by the judiciary that resulted in such decisions as Morrissey, Scarpelli, and Wolff.

Second, while the paradigm of rehabilitation has been accepted philosophically for decades, operationally it has yet to be firmly established. Transforming the "Big House"

to a correctional institution is a tremendous task. The burden for this transformation is placed on the institutional level staff who must successfully implement it on a daily basis. It meant the prison guard on the front line was expected to abolish a situation, described by Gresham M. Sykes as a custodian regime, and ascribe to a due process model. The disciplinary process is one small change of a much larger change that must be accomplished to obtain a constitutionally run prison, i.e., replacement of a discretionary, informal, de facto decentralized system with a system that is standardized, formal, and centralized.

FOOTNOTES

92 PD-DWA 60.01, Mich Dept of Corrections Policy Directive, 1974.

93 PD-DWA 60.01, Mich Dept of Corrections Policy Directive, 4/19/76-8/31/87.

94 Id at 1-5.

95 Attachment to PD-DWA 60.01.

96 Memo to Deputy Director Robert Brown from Penelope Clute, Hearings Administrator, dated 6/28/77.

97 Report on the Major Hearing Process by Marjorie M. VanOchten, Hearings Administrator, 1982.

98 P.A. 140.

99 Michigan Dept of Corrections Hearings Handbook, p. 10-15.

100 Id at 15-19.

101 Id at 19-22.

102 Id at 19-22.

103 Id at 19-22.

104 PD-DWA 60.01.

105 Wolff, supra, note 38.

106 Kuhn, Thomas. "The Structure of Scientific Revolution," Univ of Chicago Press, Chicago, Illinois 1962, 1970, p. 10.

CHAPTER IV

GUARDS

Background Factors

Before methodical issues are examined, in order to fully comprehend the persona of the correctional officer, additional background information is essential.

What motivates a person to become a prison guard? It is hardly at the top of the list of occupations most children play act. In reviewing the works of Lombardo, Crouch and Marquart, certain factors emerge as primary motivational factors in attaining prison employment. The first significant factor appears to be job security.

> I saw myself as a young man with a family, but I couldn't see any future in the local factories with the strikes and such. I talked with people about the civil service. Back in the 60's the pay wasn't that good, but it had security.[107]

> We were on strike (at the plant) and I took the test[108] then and wound up as a correction officer. I've never had a worry since then about layoffs. It takes a load off your mind. I'm secure now. I can go out and do the things I've always wanted to do.

The preceding chapters have briefly dealt with judicial intervention into the correctional arena, with particularly emphasis on the Wolff decision. The precedents and andecents of the Wolff case have been explored. The impact of the Wolff decision in fundamentally altering the procedural format of the Michigan disciplinary processes,

with the attendant P.A. 140 passed by State Legislature has been presented. An analysis of the procedural components of the disciplinary process of the Michigan system, with comparison with other state systems has also been depicted. The Michigan disciplinary process meets/exceeds the due process mandates of Wolff. Structurally, the misconduct process is a success; however, how line staff perceive the changes in procedure may be entirely different. The focus of this research is to determine the perception of officers to due process requirements imposed upon the misconduct process. Establishment of misconduct process which meets Wolff standards is only half the task. Proper utilization of the process is critical for the misconduct process to remain a valid disciplinary/management tool.

> When I graduated from high school I[109] worked as a welder and I liked it because it was a trade. They laid me off. So I joined the Navy and when I got out I did construction (built basements) until I as laid off. I went back to the welding shop and worked as an assistant pressman until I was laid off.

From the above examples, the strength of job security as a recruitment factor is discernible.

The second primary motivational factor appears to be pay and related benefits. Relatively speaking, the pay (benefits) in comparison to other jobs investigated and/or held were quite attractive.

> I went to college for three years and began interviewing for jobs. At that time (1949) the top

> paying job I interviewed for paid $2,600 per year. The prison paid $4,200 per year. The pay was good, so I took it.[110]
>
> I flunked out of college and was in the dumps. I just played around for three years, worked in a factory and got married. I hated the factory; not much money, hot and rotten. They were hiring guards in 1972-1973 and the pay was good; $12,000 per year and overtime. I took the test, sat around for a year and got called.[111]

It is significant to note that a number of individuals entered prison work after employment elsewhere. This suggests that for them prison work was their only viable alternative. As a consequence, they are, as the title of Lombardo's work suggests, "the guards imprisoned," i.e., totally dependent on prison to maintain their lifestyle. They are, therefore, coerced into adjusting to their work environment.

For others, the corrections field offered an alternative to police work. For those retiring from the military, the criminal justice system is a place where they can utilize any experience they may have obtained in military police or military corrections. If unable to get into police work, due to age or lack of opportunity, corrections became a viable option.

Other factors influencing individuals to become a prison guard are friends/relatives employed there, proximity to a prison, alternative to factory. Taken as a whole, it would appear a majority of individuals are prompted into prison work by situational factors as opposed to any deliberation and/or life-long aspirations.

The evidence reviewed her suggests that turning to correctional work is quite opportunistic and sometimes accidental. Typically, people do not have lifelong aspirations to become a prison guard. Rather, getting into correctional work seems typically to be a reaction to unanticipated job changes, the need for full-time employment, supplemental income, or other life circumstances marking the job histories of many working class males. Under such circumstances, men tend to select prison work when the prison is near at hand, offering a secure paycheck, and when a friend or relative has already paved the way.[112]

Before our typology of prison guard is complete, brief consideration should be given to those who may consciously select the occupation of guard. The motivations of such individuals can be categorized into two basic types: (1) those who possess social worker concerns; and (2) those who ascribe to obtain a position of dominance with inherent power/authority features.[113] In respect to the former case, once these well-intended individuals find that the realities of prison environment negates the establishment of effective treatment paradigm, they are coerced into radically altering their expectations/job definitions, or leaving the job in frustration.

In respect to power/authority factors of the job attracting, studies are inconclusive. Crouch cites studies done by Motivans (1963), Perdue (1966), Davidson (1974), and

Sykes (1958). Guard applicants were not found to be psychologically unique, not any more aggressive than police/fire departments, or construction gangs. Realistically, like those who possess unrealistic social work concern, the probabilities of any individual who entered guard work for dominance over prisoners being retained is low. Once they perceive their opportunity to exert unbridled authority is rare, and that the consequences of exercising their inclination would be high, given the certainty of inmate reprisal, these individuals must conform to the reality of their role. Now that the obtaining of employment as a prison guard has been depicted as essentially opportunistic, attention must now be given to the prison itself.

Work Environment

Given the range of their former occupations, most individuals enter the prison with little preparation for their role as prison guards. In fact, the entire conception of what a prison actually is/does is strictly media-derived. Part of this "invisibility" of the prison is due to its political/social/geographical isolation from normal society. However, another significant aspect is failure/reluctance of established prison guards to provide information to outsiders. This conspiracy of silence seems to stem from perceived inability of outsiders to comprehend prison realities due to the absence of shared experiences upon

which to base communication. Comments cited below from new guards clearly delineate the ignorance of the general public of the prison.

> I thought (officers) all worked in towers. I had no conception of the program. I thought all inmates were in one building and all the officers were on the walls.[114]

> Just watch and do nothing. I envisioned catwalks above the inmates. I didn't envision being mixed in with the inmates.
> I thought you were separated from inmates.[115]

> I didn't know much about it. Just asked my brother-in-law about inmates, their cells. He said it was okay. I just saw the guys on the front gate and the walls.[116]

The above mentioned comments of new guards are reflective of community viewpoints.

> I don't think I really gave it much thought. I saw it every day and didn't know it was there. It's an obvious thing, but I paid no attention to it.[117]

> I never gave it a thought . . . I've never gone to it. I was brought up in a prison city and never really thought about it. There were no riots or escapes in my lifetime.[118]

> I didn't know much about what went on. I knew it was a place of punishment, that's all. If I got caught doing something I might end up there. I played softball in there once, but never really thought about it.[119]

> I thought it was a place where all the guys who were criminals or who had committed crimes were sent.[120]

> That's where they send the bad guys. I'd go there if I didn't straighten out. At least that's what I was told.[121]

> I had a completely different idea from what it is. I had the old idea of a place of corporeal punishment. I picked that up from the TV and the movies more than from my father (who was a guard).[122]

Perceptions of prisoners by new guards suffered from the same fundamental misconceptions that characterized their job expectations.

> I thought they were all bad killers. The worst people on the earth. I thought they'd kill you as soon as look at you.[123]

> I more or less thought they'd be like the movies, like Cagney or Bogart.[124]

> I thought from watching the movies that they were surly, secretive and not very open.[125]

> I thought they were a different breed of people, all sitting on the ground with little caps on, looking out from under these caps with a sneaky look and talking out of the sides of their mouths.[126]

Given the pervasive misconceptions regarding the prison environment, it is obvious that training to fulfill the guard role would be critical. However, as the next section will show, this training was normally inapplicable to the prison environment.

Training - Formal and Informal

Prior to the early 70's when the movement to "professionalize" all occupations occurred, guards were simply tossed into the prison environment to make it on their own.

> I took the physical and went into the lineup room. They called off the officers and the jobs. I was supposed to go to A Block in the morning and C Block in the afternoon. I asked where these places were and the P.K. (Principal Keeper, now Deputy Superintendent for Security) went crazy. He even threw his hat on the floor. I asked him how I could be expected to do my job with no training and he just said, "That's the way it is."[127]

> I had two days notice that I was to start. I went in and got sent to a wall post. The guy in the tower didn't throw me the key. I yelled for about five minutes. I thought it was my fault, but there was nobody there. Then I had to go to the sergeant and tell him.[128]

> The first day I go in. They give me a badge and a new white stick. I was sent to the yard to check passes, it was great. Then at 11:30 the whistle blew and all of a sudden all the shops let out at once. Nobody told me about that, and I'm trying to check all the passes. It was ridiculous.[129]

With the advent of a formal training process, guards began to receive classroom instruction, ranging from a few days to 6 to 8 weeks. The training primarily emphasized the learning of practical/mechanic skills such as riot control procedures, first aid, disciplinary report writing, shakedown tactics, shackling of prisoners, legal rights of officers, and weapons maintenance.[130] Through prison tours, recruits also learned how to operate locks and keys, two-way radios, counting procedures and duties in respect to gun lovers, cellhouses, hospital and dining hall.[131] However, the guard really does not begin to learn his role until he completes formal training and is placed on the job.

It was/is the customary practice to pair rookie guards with older, more experienced officers. Prior to the early 70's, this practice proved a more detrimental than effective

means of transmitting the fundamentals of being a guard. Beyond such general platitudes such as "treat everyone as a human being and they'll treat you the same way," "do what you're told," and "they'll be watching," the recruit received little in respect to guidance/advice from the older guards.

> . . . you automatically get the cold shoulder. You'd get introduced and the guy walks away. No cooperation from the older officers. You had to be there a couple of years and go through the crappy jobs.[132]

> In the past they'd say, "Learn for yourself the way I did."[133] Then, if you goofed up, they'd blow you into a sergeant.

The rationale for this behavior on the part of the older guard was simple. Prior to the 70's, job assignments were discretionary, i.e., institutional politics and/or friendships determined placement on good assignments. Consequently, recruits were viewed more as potential threats rather than co-workers. This situation was rectified by introduction of the job bidding system based on seniority in the early 70's.

> It was easy. A lot of officers would tell you, "This is the job" and offer help. They'd tell you how to handle problems. Even now, if I work a different shift, somebody will tell me what to do if I'm not sure.[134]

> New officers are accepted right away. A new bunch of officers came in two or three weeks ago. If not for the officers, they would have been lost. These officers had no idea what to do until the other officers helped. I had no problems personally with the officers or the administration. But, they

> treat you as a kid. I'm not a kid. But there's no waiting to see how you'll do. Nothing like that. They'd help you. Bend over backwards.[135]

However, there remained one intervening variable in recruit-experienced officer relationship, i.e., absence of standardization for situational resolution. What works for one officer in one situation may be totally inappropriate for a different officer in a similar situation. This uncertainty factor makes experienced officers reluctant to give advice to recruits.

> . . . with my experience, I've got no desire to tell a new guy what's going on. But I don't know why. You just worry about what you're doing. It's hard to tell a new guy how to do things. I might tell him and he gets a reprimand. What does that make me look like?[136]

Another factor impeding the development of a positive relationship between recruit-experienced officer is the perception that guard was merely temporary stage in their movement upward to better positions or better employment elsewhere. Guards who entered corrections with few other employment options, and who have become "the other prisoners," feel little in common with recruits they believe to be transient.

The final variable to examine in the training of a guard is the pervasive influence of the prisoner body itself. Prior to the early 70's, when job bidding and training school concepts were initiated, recruits were forced to rely on prisoners to inform them about certain

aspects of their job function. It was an interesting paradox that the individual who was responsible for enforcing security regulations received security instructions from the person on whom the regulations were to be enforced. An interesting example of this phenomenon was located by Lombardo during his research at Auburn.

> . . . When I started, the inmates checked everything out in the mess hall to see if things were clean. An inmate broke me in. Inmates trained officers. Really! He told me to stand back and he showed me how and where to frisk. He hit the table top to sound it out. Rapped the bars to see if they were solid. Many times when you're running companies, or you're a new officer in a factory, there's an inmate that shows you the right way. On Sunday they let out the wing waiter to mop and clean cells . . . The wing waiter guided you right so there's no confusion. An inmate doesn't want to have any more problems than he has.[137]

There is little doubt that being forced to rely on prisoners for instructions resulted in recruits placing more trust in prisoners than with the administration/fellow officers. It could not also fail to generate doubts about the primacy of his security function. Inevitably, this situation resulted in recruit revising his stereotype image of inmates, i.e., they were not all hardened criminals. In an environment where deviance is the norm, the important facet of inmate behavior for the officer is how the inmate behaves in prison, not the crime he was convicted of.

> I probably thought the same as everybody else. They were madmen. Turn your head and you get a knife in the back - all murderers and rapists. But that's not true. You only run into it once in a while. They're probably all a little mentally

> unstable. I don't worry about that now, I take it for granted. I don't worry if this guy killed a couple of people, I just don't care.[138]
>
> In this prison you used to get a file on the guy if you had him in the shop. They kept cards and you knew what he was in for. They took that away. They didn't want you to prejudge anybody. The hardest thing was and is to have guys and get intimate with them and find out what he's in for. It's hard to associate the man with the crime.[139]

The establishment of a training school, while providing general instruction in related subject matter and assisting to structure the on-the-job training, has not really diminished the officer's dependence on prisoners to get the job done. In most instances, there exists little correlation between what is taught in training school and prison reality. As a result, a degree of cynicism develops from the recruit's observation that what the department says it does, and actually does, are diametrical opposed.

In summation, primary influences on new officers are training school, experienced officers, and inmates/prison environment. However, which variable attains ascendancy varies from state to state and individual to individual. Overall, attempts to prepare new officers for the prison environment have had mixed success. The ambiguity of training is the direct result of the prison environment, which itself is filled with conflictive/contradictory elements. In the formal sense, today's new officers are better trained than their predecessors. On the other hand, he appears to be even more dependent on prisoner cooperation

as a measure of his competence, given today's emphasis on treatment perspective. Now that our preliminary examination of guard development is complete, it is time to focus on our primary interest - the role of the guard.

Guard Role

The role of the guard has changed significantly in the last two decades. No longer can they be characterized as:

> . . . as low status (and sometimes brutal) guards who have little responsibility beyond the supervision and surveillance of prisoners.[140]

With the advent of the treatment paradigm, the correctional officer (which is the current synonym for guard) is expected to be an intrinsic element in the rehabilitation of the prisoners. Yet, the officer is not informed how or in what manner he is to accomplish his role in the rehabilitative process. The demand that the correctional officer simultaneously accomplish both custodial and treatment objectives have imposed contradictory/conflictive demands upon officers. The custody function of the officer has expanded beyond being merely a custodian.

> The major prison guard role in the United States is custodian, that is, preventing escapes, enforcing prison discipline, and maintaining social control.[141]

Today's officers are expected to accomplish the objectives noted above; and yet are expected to do so in a manner cognizant with good judgment and discretion.

Additionally, the prison is a conglomeration of work environments, each extolling different demands/expectations for the officers. The distinguishing factor normally is the amount of interaction/contact required with prisoners. Lombardo categorized the officer's potential work sites in the following manner:

1. Block officer
2. Work detail supervisor
3. Individual shop and school officer
4. Yard officer
5. Administration building
6. Wall post
7. Relief officer

While fulfilling their custodial functions, officers are also expected to be treatment agents. To accomplish this goal, officers must place less emphasis on strict enforcement of rules/regulations, and assume a more human service posture. However, the method of satisfying two conflictive goals - custody vs treatment - rarely is defined for the officer. Consequently, this multiplicity of goals and ambiguity of performance expectations has placed today's officer in a state of anomie.

> . . . anomie state of the custodians is the result of ambiguous and contradictory role definitions, which in turn are a function of the contradictory goals assigned to the prison and the resultant conflict among top administrators.[142]

Guards were comfortable with their role as guards. Also known as "screws," "bulls" or "hacks," the guard knew his function in the prison. His role was well-defined and had no higher expectations attached to it. However, with the treatment paradigm, he was expected to perform his custody functions in a therapeutic milieu fully cognizant of his responsibility as rehabilitative agent. It is the obligation to accomplish these mutually exclusive and contradictory goals which has generated extreme levels of stress and frustration among officers. The stress generated is presence and influences on-the-job decisions and peer/ prisoner relationships. As in police work, research has indicated stress level to be the primary factor in job performance. Cheek and Maller, in their study of officers attending the New Jersey Correctional Officer Training Academy, reported lack of clearly defined guidelines for job performance, poor communication of institutional policies, and conflicting orders from supervisors as primary stressors. Kronstadt characterized guards as an unhappy lot suffering from lack of clarity of work roles, fear, and boredom. Mag found guards to be suffering from confusion concerning relationships with prisoners, perceived lack of opportunity to provide meaningful input into management decisions, or low self-esteem. In a study focusing on job dissatisfaction at Auburn Correctional Facility at New York, Lombardo found the following variables:

1. relationship with inmates (physical danger and mental strain, prisoner behavior toward guards, maintaining impartiality).[143]

2. powerlessnes (lack of support, lack of responsibility, lack of effective input)[144]

3. inconsistency and inadequate communication (inconsistent policies and procedures, inconsistent supervisory direction, inconsistent and inadequate information from prison administration)[145]

Carroll located a substantial amount of anomie being experienced by guards at small eastern state prisons during the transitional period from traditional custody goals to treatment orientated goals. Finally, Crouch's analysis of impact of organizational and social changes on guards identified three primary influences:

1. establishment of rehabilitation as penal objective[146]

2. federal judicial intervention into daily prison operations[147]

3. demographic/size changes in inmate population[148]

Crouch's analysis was based on the premise of change in relationship between guards and prisoners as the result of imposition of treatment modalities. By expanding the prison bureaucracy to facilitate the delivery of specialized human services, e.g., educational, vocational, therapeutic, legal assistance, and religious programs, the prisoners had other sources of assistance/information than the guard. This decreased dependence on guards to satisfy prisoner's personal and social needs resulted in greater prisoner empowerment. The ascendancy of prisoners drastically

altered the previous prisoner/guard relationship from its original paternalistic orientation to one competitive in nature. Coincident with this loss of status/authority of guards was the rise of Black ideological perspective, which altered the nature of race relations between guards and prisoners. Both Arwin and Carroll detail how the increased rates of incarceration for Blacks and other minorities, coupled with severe over-crowding has imposed a tremendous burden on a guard force primarily composed of rural whites to perform their function in a manner perceived to be unbiased and non-discriminatory.

Carroll also located a secondary source for anomie state among officers. Merton defined a major source of anomie being:

> . . . disassociation between culturally prescribed aspirations and socially structured avenues for realizing these aspirations.[149]

Guards who have not embraced the treatment paradigm still maintain their commitment to custodial control despite institutional changes that make attainment of that goal by traditional means virtually impossible. These guards reject the treatment aspect of their role, and in the absence of treatment personnel, revert to strict enforcement of regulations. They deeply resent the erosion of their coercive powers/authority that has resulted from the establishment of treatment objectives. Their concept of

rehabilitation centers around discipline and control, and they regard treatment reforms as pacification of the prisoners by administration at their expense.

Merton identified several modes of adaptive behavior to anomie: (1) innovation, (2) ritualism, (3) retreatism, and (4) rebellion.[150] Two of the most prevalent ones utilized by custodians are innovation and rebellion. Innovation refers to goal attainment through proscribed means. The officers achieve compliance of prisoners through friendship, e.g., over-looking infractions, etc. This "friendship" is not designed for rehabilitative purposes, but to enable officers to maintain a facade of control. It is this interdependent relationship that Sykes defined as "corruption of authority." By this means officers maintain the appearance of control of their work area. Rebellion refers to collective efforts to modify social structure. This tendency has manifested itself in the formation of aggressive union. The purpose of the union is to protect the employees against the incursion of treatment modalities, through advocating hard custody line.

In summation, today's officers, both new and experienced, are in the difficult position of attempting to satisfy conflictive goals/performance expectations without a defined method of accomplishing that method. This has generated high levels of stress and frustration in officers, which is reflected in their work decisions and relationships

with peers/prisoners. Treatment paradigm has eroded their authority while empowering prisoner status by providing alternative sources of assistance/information (treatment personnel). The empowerment of prisoners/loss by officers occur at a time that changes in demographic and size of prisoner population is changing radically. Today's officer, therefore, must choose to accept rehabilitative ideals and adapt, or fight a losing battle to retain traditional custody values.

The above summation notes two of Crouch's noted influences, i.e., rehabilitation and changes in prisoners. However, it is the third primary influence - judicial intervention into prison operation - that is the focus of this research. We now turn our attention to how officers at Jackson State Prison -- the world's largest walled prison -- have coped with the due process requirements mandated by Wolff and P.A. 140.

FOOTNOTES

107 Lombardo, Lucien. Guards Imprisoned, Elsevier North Holland, NY, 1981, p. 20.

108 Id at 20.

109 Crouch, Ben. The Keepers, Charles E. Thomas, publisher, Springfield, Illinois, 1980.

110 Op cit, at 20.

111 Id at 21.

112 Crouch, supra, note 87 at 69-70.

113 Id at 70.

114 Lombardo, supra, note 85, at 23.

115 Id at 23.

116 Id at 23.

117 Id at 24.

118 Id at 24-25.

119 Id at 25.

120 Id at 25.

121 Id at 25.

122 Id at 25.

123 Id at 26.

124 Id at 26.

125 Id at 26.

126 Id at 28.

127 Id at 28.

128 Id at 28.

129 Crouch, supra, note 87, at 71.

130 Id at 71.

131 Lombardo, supra, note 85, at 29.

132 Id at 29.

133 Id at 30.

134 Id at 30.

135 Id at 30.

136 Id at 32-33.

137 Id at 33-34.

138 Id at 34.

139 Fox, James. Organizational and Racial Conflict in Maximum Security Prison. Lexington Books, Lexington, Mass, 1982, p. 29.

140 Ibid, at 29.

141 Lombardo, supra, note 85 at 39.

142 Merton, Robert K. "Selected Problems of Fieldwork in a Planned Community," American Sociological Review 12 (June 1947), 304-12.

143 Op cit, at 113-120.

144 Ibid at 120-125.

145 Ibid at 125-129.

146 Crouch, supra, note 87, at 6.

147 Ibid at 6.

148 Ibid at 6.

149 Merton, supra, note 120, at 134.

150 Ibid at 141-157.

CHAPTER V

METHODOLOGY

The preceding chapters have depicted how judicial and legislative activism into the prison disciplinary process culminated in the establishment of the Hearings Division. This division, along with newly mandated procedures, was to insure the implementation of due process requirements. However, while there has been extensive research done on conditions that necessitated the imposition of due process mandates on misconduct hearings, both operationally and from legal perspective, research analysis of this impact these changes have had on actual prison environment is limited. The purpose of this research is to correct that deficiency in respect to the Michigan Department of Corrections.

The first decision that had to be resolved is how to measure the impact due process mandates have had on misconduct process. That decision was determined by the data available. Chapter 3 detailed the transitional stages the Department went through, i.e., from Deputy Committee to single hearing officer under Warden to hearing officer as part of Hearings Division. Each stage was critical in the development of establishing due process requirement in misconduct hearings. Therefore, my analysis would have to be able to show what due process requirements were present or absent; as well as how each stage underwent revision/ procession.

During the first stage, prior to 1974, the misconduct process was handled by Deputy's Committee. Custody representation nominated this committee, and the process was characterized by high degree of discretion exerted by the committee. The list of violations considered serious enough to elicit serious primitive sanction, though tacitly approved by Control Office, in reality reflected the Warden's perspective. Thus, the committee existed to validate charging staff members' accusations and the Warden's viewpoint, rather than provide due process for prisoners.

After the Wolff decision in 1974, the misconduct process became formalized. The Deputy's Committee was eliminated and replaced with a single hearing officer. Non-bondable charges became standardized throughout the entire department. Department policy was rewritten to encompass the due process elements mandated by Wolff. However, hearing officers still received tremendous pressure from the institutional staff and the Warden to have their depositions conform to their expectations.

The final stage, 1979 to present, is the one that eliminated institutional input from the hearing process. By removing hearing officers from the Warden's jurisdiction and mandating that hearing officers be autonomous, P.A. 140 created a division insulated from institutional staff pressures.

Empirically, the logical thing to do would have been to collect misconduct hearing statistics from each of the time periods, and determine the impact of the changes through any increases/decreases in frequency of hearings or seriousness of violations. However, the Department did not begin compiling misconduct statistics until the creation of the Hearings Division in 1979. A diligent search for the old Deputy Committee minutes which included Central Office files and State archives was fruitless. This same situation occurred when looking for data for the 1975-1979 period. The hearing officer's decisions were not centralized; and dispositions were filed in the respective prisoner's Lansing, Record Office and counselor files. However, the potential of eliciting information from prisoner's files was thwarted by Department policy of file retention. Files for any prisoner out of the system for five years is automatically destroyed. While it was theoretically possible to have a list generated of prisoners who were incarcerated during those two time periods, the time to obtain such a list, as well as time required to manually search through prisoners' individual files, made this option unrealistic for the purpose of this study. Therefore, given the absence of empirical data for the significant time period, I was forced to rely on staff recollection for information. Given that guards experienced the changes first hand, they became the subject of this research.

Research Site

Second, the decision had to be made as to the research site. With 26 operating institutions statewide, it was obviously impossible to survey that many institutions, not to mention the time and cost of such a huge survey. Therefore, I decided to select the State Prison of Southern Michigan (SPSM) as my research site for the following reasons:

1. Out of approximately 20,000 prisoners, close to 5,000 are confined at SPSM.
2. Out of approximately 5,000 officers, about 1,200 are employed at SPSM.
3. SPSM is comprised of all four security levels - maximum, close, medium, minimum.
4. Administrative convenience, as I work at SPSM.

Once my target group and research site had been selected, I then needed to determine the specific question I wishes to research. My basic premise was: implementation of due process requirements on misconduct hearings had not made it impossible for correctional officers to maintain discipline. However, it appeared to be commonly accepted by staff, particularly officers, that the requirements had worsened the situation.

There appeared to be no objective basis for this assumption. Given the lack of empirical data to validate such an assumption, it was obvious the basis of such conjecture was purely speculative. The primary focus of

this study, therefore, is to measure the perception of misconduct process by line staff; and the impact this perception has had on the efficacy/utility of the misconduct process.

Research Design

The first underlying assumption I wished to investigate was that all officers felt/perceived the misconduct process the same way. Given the progression the development of the misconduct process underwent to reach the present due process model, it was impossible to envision an officer who hired in prior to Wolff decision reacting the same as recent hires. Therefore, the three significant time periods previously identified became extremely relevant. During the period of time prior to Wolff, an officer became accustomed to being a strong authority figure with enormous discretion. It was inconceivable that he would react the same to the limitations imposed by the due process model as less senior officers. Likewise, an officer hired during the transitional period after Wolff but prior to the Hearings Division perspective, would have an entirely different perspective than one hired after 1979. Aware of the limitations imposed by Wolff, yet given the fact that hearing officers were recruited directly from institutional staff, officers did not feel estranged from the process. In addition, any complaints about hearing officers'

dispositions could be referred to the Warden for resolution. Consequently, misconduct process was still regarded as an institutional control mechanism. This changed drastically with P.A. 140 in 1979, passed by the State Legislature. This act eliminated through attrition institutional personnel from serving as hearing officers. Instead, it mandated the position could only be filled by an attorney. Second, it removed the hearing officers from the auspices of the Warden and placed them under the direction of a Hearings Administrator in Lansing. A separate, autonomous division within the institution was created. There is no doubt that officers working prior to this change would have a different perspective of the misconduct process than an officer hired after these changes had been instituted. Therefore, any survey of officers would have to take the impact these procedural/structural changes had on officer perceptions into account. To accomplish this, I determined that it would be necessary to survey officers from each of the significant time periods. This would require a questionnaire specific to each time period. To insure the questions would possess enough commonality to be comprehendable to all three time groups, yet specific enough to reflect the differing perspectives and variance in attitude, five scales were developed. Each scale contains questions relevant to the respective timeframe, and provides a common basis to allow inter-group comparison.

Additionally, the scales were designed to be inter-related, i.e., negative response on scale 1 should correlate to a negative response on scale 2, etc.

The scales developed were:

1. comparison with the old system.
2. current complaints with present system.
3. confidence in current process.
4. perception of current process.
5. usage of current process.

(1) Comparison with old system.

For the first two groups, the questions focused on the formalization of the misconduct process and the corresponding diminishing of official discretion. The questions were also designed to elicit responses as to whether or not the officers felt a loss of status and/or control with the current system. Finally, the extent of disenchantment with the current system was measured by the willingness to revert back to their previous system. this scale was inapplicable to the post-1974 group due to the fact their brevity of tenure did not allow familiarity with any system but the current one.

(2) Complaints with current systems.

This scale was identical for all three groups. It was designed in this manner to see if there was group consensus on perceived deficiencies in the current misconduct process. Unity in criticism in this area was viewed as a possible

factor in the assumption under investigation, i.e., that due process requirements had affected the utility of the misconduct process as a disciplinary tool. I also wanted to observe any variance the procedural changes would have manifested on officer attitude. These questions focused on what line staff viewed as systematic bias.

(3) Confidence in process.

The questions in this scale were virtually the same for all three groups, although Group I had extra questions the other two didn't in respect to whether their confidence in the process increased/decreased with the establishment of hearings officers. This question, in regard to the hearings division, should have also been addressed to Group II, however, it was inadvertently overlooked. The question would have been inapplicable to Group III, as no such major structural changes occurred during their tenure. Despite the omission, questions addressed to all three groups adequately measured the confidence level of all three groups. Questions were designed to elicit respective group perspectives in efficacy of the process and degree of esteem they held for the misconduct process.

(4) Perception of process.

Questions within this scale were identical for all three groups. This was to insure any variance in response was the result of impact of the noted structural changes.

Questions focused on components of the process and how well they interacted. Their opinion was also solicited in regard to who they felt was the primary cause of changes in misconduct process, as well as the primary factor responsible for the increase in misconduct rate.

(5) Usage of process.

The questions within this scale were identical for all three groups. Consequently, any variance in response would be the result of structural changes instituted. Questions focused perceived utility of the process as well as the group's philosophy in respect to employing the misconduct process. Questions in this vein centered round Sykes' "corruption of authority" concept. An appraisal of hearing investigator and hearing officer function was also requested.

In summation, the scales were designed to provide a common foundation for inter-group comparison. Each question was specific enough to be relevant to the timeframe addressed, yet general enough to be addressed to all three groups. With the exception of the old system comparison scale, identical questions ensured variance in response could only be attributed to the impact of imposition of due process requirements and/or structural change. Each scale, broken down by group designation is as follows:

GROUP I (PRE-1974)

1. Comparison with old system:

	Value	Frequency	Percent
(1) Current disciplinary system is easier to use and more effective than the old system:			
Agree	1	1	4.3
Disagree	2	22	95.7
(2) Disciplinary process has become so formalized, its effectiveness as control mechanism has been drastically reduced:			
Agree	1	20	87.0
Disagree	2	2	8.7
(3) Correctional officers had more authority and better able to control prisoners when Deputy's Committee handled disciplinary hearings:			
Agree	1	19	82.6
Disagree	2	2	8.7
(4) Correctional officers commanded more respect from prisoners prior to establishment of Hearing Officers:			
Agree	1	19	82.6
Disagree	2	2	8.7
(16) Would you support a move to dump due process requirements and return to old Deputy Committee:			
Yes	1	18	78.3
No	2	3	13.0
(18) Misconduct rates have increased dramatically due to due process requirements imposed on disciplinary process:			
Agree	1	7	30.4
Disagree	2	8	34.8

2. Current Complaints:

(5) Current disciplinary process is too easily manipulated by prisoners:			
Agree	1	20	87.0
Disagree	2	1	4.3

(8) Number of cases in which prisoners "beat the ticket" has increased since Hearing Officers have been handling misconduct hearings:

Agree	1	17	73.9
Disagree	2	3	13.0

(9) Number of misconducts incurred by prisoners has increased since due process requirements were imposed by disciplinary hearings:

Agree	1	11	47.8
Disagree	2	6	26.1

(12) Hearings officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant:

Agree	1	17	73.9
Disagree	2	3	13.0

(14) Large number of misconducts are dismissed because of procedural violations:

Agree	1	12	52.2
Disagree	2	6	26.1

(21) Hearing officers appear easily manipulated by prisoners:

Agree	1	13	56.5
Disagree	2	3	13.0

(24) Prisoners are more aware of requirements of disciplinary process than officers:

Agree	1	14	60.9
Disagree	2	5	21.7

(31) Prisoners seem to have more rights under due process than officers:

Agree	1	18	78.3
Disagree	2	3	13.0

3. Confidence in Process:

(7) As a result of changes in disciplinary system, which category affects your level of confidence since establishment of Hearing Officers:

Greater than before	1	2	8.7
Same	2	3	13.0
Less than before	3	17	73.9

(17) Michigan Dept. of Corrections has one of the best disciplinary processes in the country:

Agree	2	1	4.3
Unknown	3	10	43.5
Strongly Disagree	4	6	26.1
Disagree	5	6	26.1

(26) Disciplinary process remains critical tool for maintaining control of prisoners:

Agree	1	13	56.5
Disagree	2	9	39.1

(27) Establishing due process standards has decreased prisoner hostility and misconduct:

Agree	1	2	8.7
Disagree	2	17	73.9

(28) Michigan Dept. of Corrections misconduct process could easily withstand scrutiny of any State or Federal Court:

Agree	1	13	56.5
Disagree	2	2	8.7

(29) Conformance to due process standards eliminates the possibility of judicial intervention into the disciplinary process:

Agree	1	8	34.8
Disagree	2	8	34.8

(30) As a whole, disciplinary process works well:

Agree	1	5	21.7
Disagree	2	14	60.9

4. Presentation of Process:

(6) Who do you believe is primarily responsible for change in disciplinary process:

Courts	1	9	39.1
Prisoners	2	1	4.3
Legislature	3	1	4.3
Outside Groups	4	2	8.7
Administrator	5	5	21.7

(11) Command staff who review misconduct reports seem more interested in the way report reads than what occurred:

Agree	1	15	65.2
Disagree	2	5	21.7

(13) What would you identify as the primary factor responsible for high misconduct rate:

Hearing Officers	1	1	4.3
Due Process	3	1	4.3
Untrained officers	5	4	17.4
More aggressive prisoners	6	8	34.8

(15) If you could change any aspect of disciplinary process, which area would it be in:

Review	1	1	4.3
Investigative	2	1	4.3
Hearings	3	12	52.2
Appeal	4	4	17.4

(19) Elements of successful report writing have been clearly communicated to officers:

Agree	1	15	65.2
Disagree	2	6	26.1

(20) Hearing officers perform a difficult function well:

Agree	1	6	26.1
Disagree	2	11	47.8

(22) Increasing the familiarity of hearing officers with prison environment would reduce number of "not guilty" dispositions:

Agree	1	20	87.0
Disagree	2	1	4.3

(32) Officers writing misconduct reports are fully confident their position will be upheld by hearing officers:

Agree	1	4	17.4
Disagree	2	16	69.6

(36) Indicate which option best describes your impression of disciplinary process:

Complex	2	2	8.7
Manipulated by prisoners	3	5	21.7
Fails to consider realities	4	10	43.5

5. Usage of Process:

(10) Indicate the level of cooperation you extent to hearings investigator when contacted for information:

Full	1	22	95.7
Little	2	1	4.3

(23) Hearing officers receive full support and cooperation from rest of institutional staff:

Agree	1	10	43.5
Disagree	2	5	21.7

(25) Usage of disciplinary process by officers has increased:

Agree	1	7	30.4
Disagree	2	11	47.8

(33) A good officer uses disciplinary process as last resort:

Agree	1	21	91.3
Disagree	2	2	8.7

(34) Officers make full use of disciplinary process by reporting each violation they see:

Agree	1	1	4.3
Disagree	2	20	87.0

(35) Officers sometimes ignore minor infractions in interest of maintaining tacit cooperation of prisoners:

Agree	1	20	87.0
Disagree	2	2	8.7

GROUP II

1974-1979

	Value	Frequency	Percent
1. Comparison with old system:			
(1) Institution lost control of disciplinary process when Hearing Officers stopped reporting to the Warden:			
Agree	1	18	56.3
Disagree	2	7	21.9
(2) Officers commanded more respect from prisoners prior to establishment of Hearings Division:			
Agree	1	22	68.8
Disagree	2	7	21.9
(6) Indicate your level of confidence in disciplinary process since the establishment of Hearings Division:			
Greater than before	1	2	6.3
Same	2	5	15.6
Less than before	3	23	71.9
(7) Rate of misconducts has increased since Hearings Division established:			
Agree	1	19	59.4
Disagree	2	5	15.6
(25) Misconduct rates have increased due to due process requirements imposed on disciplinary process:			
Agree	1	12	37.5
Disagree	2	9	28.1
(38) Would you support a move to return to experienced institutional personnel as hearing officers:			
Yes	1	27	84.4
No	2	3	9.4
(39) Would you support a move to return hearing officers to the jurisdiction of the Warden:			
Yes	1	25	78.1
No	2	4	12.5

2. Current Complaints:

(3) Current disciplinary process is too easily manipulated by prisoners:

Agree	1	26	81.3
Disagree	2	4	12.5

(5) Number of cases in which the prisoners "beat the ticket" has increased since creation of Hearings Division:

Agree	1	24	75.0
Disagree	2	5	15.6

(10) Hearing Officers appear easily manipulated by prisoners:

Agree	1	22	68.8
Disagree	2	1	3.1

(12) Prisoners are more aware of requirements of disciplinary hearings than officers:

Agree	1	24	75.0
Disagree	2	2	6.3

(13) Prisoners seem to have more rights under due process in disciplinary hearings than officers:

Agree	1	25	78.1
Disagree	2	4	12.5

(18) Hearing officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant:

Agree	1	20	62.5
Disagree	2	3	9.4

(19) Increasing the familiarity of hearing officers with prison environment would reduce the number of "not guilty" dispositions:

Agree	1	23	71.9
Disagree	2	4	12.5

(22) Large number of misconduct reports are dismissed on technicalities:

Agree	1	23	71.9
Disagree	2	5	15.6

(33) Prisoners seem to have more rights under due process than officers:

Agree	1	24	75.0
Disagree	2	4	12.5

3. Confidence in Process:

(8) Indicate level of cooperation you extend to hearings investigator when contacted for information:

Full	1	27	84.4
Little	2	4	12.5

(11) Disciplinary process remains a critical management tool for maintaining control in our prisons:

Agree	1	26	81.3
Disagree	2	5	15.6

(14) Officers writing misconduct reports are fully confident that position will be upheld by hearing officers:

Agree	1	4	12.5
Disagree	2	24	75.0

(24) Michigan Dept. of Corrections has one of the best disciplinary processes in the country:

Agree	1	1	3.1
Disagree	2	13	40.6

(28) Disciplinary process remains a critical management tool for maintaining control of prisoners:

Agree	1	26	81.3
Disagree	2	4	12.5

(29) Establishing due process standards for disciplinary process has decreased prisoner hostility and misconduct:

Agree	1	5	15.6
Disagree	2	19	59.4

(30) Michigan Dept. of Corrections misconduct process could easily withstand scrutiny of any State of Federal court:

Agree	1	12	37.5
Disagree	2	6	18.8

(31) Conformance to due process standards eliminates possibility of judicial intervention into the disciplinary process:

Agree	1	12	37.5
Disagree	2	9	28.1

(34) Officers writing misconduct reports are fully confident their position will be upheld by hearing officers:

Agree	1	3	9.4
Disagree	2	23	71.9

(40) Overall, the disciplinary process works well:

Agree	1	5	15.6
Disagree	2	20	62.5

4. Perception of Process:

(4) Who do you believe is primarily responsible for change in disciplinary process:

Courts	1	10	31.3
Prisoners	2	8	25.0
Legislature	3	4	12.5
Outside Groups	4	3	9.4

(9) Command staff reviewing misconduct reports seem more interested in way report reads than what occurred:

Agree	1	21	65.6
Disagree	2	8	25.0

(17) Indicate which option best describes your impression of disciplinary process:

Fair	1	3	9.4
Complex	2	3	9.4
Manipulative	3	9	28.1
Fails to consider realities	4	12	37.5

(20) Hearing officers receive full support and cooperation from the rest of the institutional staff:

Agree	1	9	28.1
Disagree	2	13	40.6

(21) What would you identify as primary factor responsible for high misconduct rate:

Hearing Officers	1	1	3.1
Hearing Process	2	1	3.1

(26) Elements of successful misconduct writing have been clearly communicated to all officers:

Agree	1	14	43.8
Disagree	2	12	37.5

(27) Hearing officers perform a difficult function well:

Agree	1	12	37.5
Disagree	2	13	40.6

(32) If you could change any aspect of disciplinary process, what area would it be in:

Review	1	1	3.1
Investigative	2	3	9.4
Hearing	3	12	37.5

5. Usage of Process:

(15) A good officer uses disciplinary process as last resort:

Agree	1	26	81.3
Disagree	2	2	6.3

(16) Officers sometimes ignore minor infractions by far in order to maintain control over majority of prisoners:

Agree	1	22	68.8
Disagree	2	4	12.5

(23) Usage of disciplinary process by officers has increased over last several years:

Agree	1	20	62.5
Disagree	2	5	15.6

(35) A good officer uses disciplinary process as last resort:

Agree	1	26	81.3
Disagree	2	2	6.3

(36) Officers make full use of disciplinary process by reporting <u>each</u> and <u>every</u> infraction they see:

Agree	1	2	6.3
Disagree	2	25	78.1

(37) Officers sometimes ignore minor infractions in interest of maintaining tacit cooperation of prisoners:

Agree	1	26	81.3
Disagree	2	3	9.4

GROUP III

AFTER 1979

1. Comparison with Old System

Not applicable to Group III.

2. Current Complaints:

	Value	Frequency	Percent
(3) Disciplinary process is too easily manipulated by prisoners:			
Agree	1	13	81.3
Disagree	2	1	6.3
(5) The number of causes in which prisoners "beat the ticket" is high:			
Agree	1	9	56.3
Disagree	2	3	18.8
(13) Hearing officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant:			
Agree	1	10	62.5
Disagree	2	3	18.8
(14) Hearing officers appear easily manipulated by prisoners:			
Agree	1	7	43.8
Disagree	2	5	31.3
(18) Large number of misconduct reports are dismissed because of technicalities:			
Agree	1	12	75.0
Disagree	2	2	12.5
(19) Prisoners are more aware of requirements of disciplinary process than officers:			
Agree	1	10	62.5
Disagree	2	5	31.3

(27) Prisoners seem to have more rights under due process in disciplinary process than officers:

Agree	1	13	81.3
Disagree	2	1	6.3

3. Confidence in Process:

(1) Michigan Dept. of Corrections has one of the best disciplinary processes in the country:

Disagree	2	7	43.8

(22) Disciplinary process remains a critical management tool for maintaining control of prisoners:

Agree	1	13	81.3
Disagree	2	1	6.3

(23) Establishing due process standards for disciplinary process has decreased prisoner hostility and misconduct:

Agree	1	1	6.3
Disagree	2	10	62.5

(24) Michigan Dept. of Corrections misconduct process could easily withstand scrutiny of any State of Federal court:

Agree	1	6	37.5
Disagree	2	4	25.0

(25) Conformance to due process standards eliminates the possibility of judicial intervention into disciplinary process:

Agree	1	7	43.8
Disagree	2	5	31.3

(28) Officers writing misconduct reports are fully confident their position will be upheld by hearing officers:

Agree	1	3	18.8
Disagree	2	12	75.0

(33) As a whole, the disciplinary process works well:

Agree	1	4	25.0
Disagree	2	7	43.8

4. Perception of Process:

(2) Disciplinary process has become so formalized its effectiveness as control mechanism has been drastically reduced:

Agree	1	11	68.8
Disagree	2	2	12.5

(4) Who do you believe is primarily responsible for structure of disciplinary process:

Courts	1	2	12.5
Prisoners	2	2	12.5
Legislature	3	3	18.8
Administration	5	1	6.3

(6) Due process requirements make it essential misconduct reports are well written, with correct violations and details noted:

Agree	1	14	87.5
Disagree	2	1	6.3

(7) The review stage of disciplinary process is critical in eliminating erroneous changes and/or incomplete reports:

Agree	1	13	81.3
Disagree	2	2	12.5

(9) Command staff who review misconduct reports seem more interested in the way report reads than what happened:

Agree	1	10	62.5

(10) Elements of successful misconduct report writing have been clearly communicated to all officers:

Agree	1	8	50.0
Disagree	2	8	50.0

(11) Hearing officers perform a difficult function well:

Agree	1	5	31.3
Disagree	2	6	37.5

(12) Hearing officers, as graduates of law school, are well versed in requirements of due process for the disciplinary procedure:

Agree	1	8	50.0
Disagree	2	2	12.5

(15) Increasing the familiarity of hearing officers with prison environment would reduce the number of "not guilty" dispositions:

Agree	1	14	87.5
Disagree	2	2	12.5

(16) Hearing officers receive full support and cooperation from rest of the institutional staff:

Agree	1	3	18.8
Disagree	2	4	25.0

(17) What would you identify as primary factor for high misconduct rate:

Due process	3	1	6.3
Untrained officers	5	1	6.3
Aggressive prisoners	6	5	31.3

(26) If you could change any aspect of disciplinary process, which area would it be in:

Review	1	2	12.5
Investigative	2	2	12.5
Hearings	3	7	43.8
Appeal	4	1	6.3

(32) Indicate which option describes your impression of disciplinary process:

Complex	2	2	12.5
Manipulative	3	4	25.0
Fails to consider reality	4	6	37.5

5. Usage of Process:

(8) Indicate the level of cooperation you extend to the hearings investigator when contacted for information:

Full	1	15	93.8
None	3	1	6.3

(20) Officers have no hesitation invoking the disciplinary process when situation demands it:

Agree	1	8	50.0
Disagree	2	4	25.0

(21) Usage of disciplinary process by officers has increased over last several years:

Agree	1	7	43.8

(29) A good officer uses the disciplinary process as last resort:

Agree	1	12	75.0
Disagree	2	2	12.5

(30) Officers make full use of disciplinary process by reporting each and every violation they see:

Agree	1	2	12.5
Disagree	2	13	81.3

(31) Officers sometimes ignore minor infractions in the interest of maintaining tacit cooperation of prisoners:

Agree	1	13	81.3

Sampling Procedure

In order to identify potential participants in the survey, I obtained a current list of officers at S.P.S.M. As a security precaution, I manually blanked out the social security numbers on the list prior to leaving the Personnel Office. The list was generated by computer, using the department's CMDS format. As the list was arranged alphabetically, I went through the list three times, color coding each group differently. At the completion of this process, I found 80 percent of the officers were hired between 1982 and 1985. There was significantly less than

100 potential respondents for the first two groups. Given the low response rate typically generated by a voluntary survey, I selected 100 respondents as an ideal number, hoping for at least 50 percent return rate. To supplement the listing for the first two groups, I went back to Personnel and requested listings of custody supervisors and housing managers on the assumption that these individuals had started their career initially as officers. With this addition, I was able to generate a list of 100 potential respondents for the first two groups. For the third group, due to the overwhelming number to choose from, random selection was used to select the 100 potential respondents for Group III.

A letter of introduction was attached to the survey and appropriate questionnaires were placed in the time slots (where staff punched time cards in/out). Selection of questionnaire had been pre-determined by seniority date. Those who hired into the system, regardless of current position, prior to 1974 were labeled Group I. Staff who hired in after 1974 but before 1979 became Group II. Post-1979 hirees became Group III. The questionnaires were divided into two sections; Section I, the demographics section and Section II contained the five scales previously discussed. Recipients of the survey were given two weeks to complete the questionnaire. The letter of introduction, in addition to the due date, explained the purpose of the survey and assured confidentiality of the respondent's

answers. The method of returning the questionnaire and the designated location were also noted in the letter. After three weeks, a follow-up letter, with due date, went out to those individuals who had failed to return the questionnaire.

The majority of questions utilized a Likert scale, with the respondent able to indicate whether he agreed or disagreed with the question. This generated the ordinal data for analysis. The questionnaires also contained a few multiple choice items in order to obtain representative opinion from each group on a few critical items.

The response rate from the officers (past/present) was low. Total response rate was 71 out of the approximately 300 questionnaire mailed. Interestingly enough, the lowest response rate came from the post-1979 officers. Prior to this survey, I would have anticipated that the newer officers, given their lack of contact with previous systems and insufficient time to become apathetic, would have the highest response rate. I also would have thought the pre-1974 group to be the least responsive. Although the pre-1974 group did not have the highest response rate, having a higher rate than new officers was surprising. The 1974-1979 group having the highest response rate was also unanticipated. I expected, given the level of apathy and morale of the prison environment, a low response rate to the survey. The breakdown of the group response rates, however, was converse to my expectations.

CHAPTER VI

ANALYSIS

Before preceding with any in-depth analysis of variance between the three groups, a basic profile of each group is essential. Group I, Pre-1974, is the group who experienced the old Deputy Committee, and felt the maximum impact of the due process changes. Based on the demographic information obtained, members of this group were typically:

1. above 40 years old - 69%
2. male - 91%
3. white - 70%
4. married - 70%
5. had previous military experience - 52%
6. resided in rural areas - 52%
7. high school as highest educational level obtained - 39%
8. blue collar as previous occupation - 39%
9. rated dissatisfaction with previous job as prime consideration for entering corrections - 87%
10. only moderately interested in advancement - 44%
11. primary motivation for entering corrections - financial - 65%

When Group I responses are examined within the context of the five scales, the information is as follows:

Old System Comparison

The group was almost unanimous (96%) in their stance that the current system is not easier to use or more effective than the old system. Eighty-seven (87%) percent thought disciplinary process had lost effectiveness as control mechanism. Authority/control over prisoners was dominant factor in old system (83%). Those officers also felt they received more respect from prisoners then (83%). Seventy-eight (78%) percent voted in favor of dumping the due process requirements and returning to the days of the Deputy's Committee. Surprisingly, only 30 percent thought due process requirements were responsible for the increase in misconduct rates; 35 percent did not.

Current System Complaints

Eighty-seven (87%) percent thought current process is too easily manipulated by prisoners. In direct contrast with their previous assertion that due process requirements were not responsible for use in misconduct rates, seventy-four (74%) percent stated dismissal rate had increased under hearing officers. Additionally, forty-eight (48%) percent stated due process requirements were responsible for increase. Fifty-two (52%) percent agreed large number of misconduct reports were dismissed because of procedural violations. In respect to the hearing officers, the majority felt the hearing officers were too easily

manipulated by prisoners (57%), and possessed inclination to grant prisoners the benefit of the doubt (74%). The officers credited the prisoners for being more aware of due process requirement than they were (61%) and felt prisoners had more rights under due process than they did (78%).

Confidence in Process

Although 74 percent stated they had less confidence in the system than before, 57 percent still thought disciplinary process remained a critical control mechanism. Seventy-four (74%) percent could not perceive any decrease in prisoner hostility/misconduct as a result of establishment of the process requirements. Conversely, 87 percent thought Michigan system could pass any judicial scrutiny and split (35%-35%) whether conformance to due process standards would eliminate possibility of judicial intervention. Overall appraisal indicates 61 percent did not think the process worked well.

Perception of Process

Forty (40%) percent believe courts were responsible for changes in process. Thirty-five (35%) state younger, more aggressive prisoners are primarily responsible for high misconduct rate. Sixty-five (54%) percent feel command staff who review misconduct reports are more interested in how report reads than what happened. Forty-nine (49%)

percent are dissatisfied with performance of hearing officers; and given the option to change any aspect of the process, choose hearings stage (52%). Increasing the familiarity of hearing officers with prison environment would reduce number of not guilty dispositions (87%). Sixty-five (65%) percent feel elements of successful report writing have been communicated, yet feel reports will not be upheld by hearings officers (70%). Finally, they feel process is not cognizant of prison realities.

Usage of Process

Forty-nine (49%) percent of the officers feel usage of system has not increased. Ninety-one (91%) still feel a good officer only uses misconduct report as last resort. They admit to not making full use of system sometimes, even ignoring minor infractions (87%). Additionally, despite their impression of system, 96 percent indicate they extend full cooperation to hearings investigators when contacted.

Group II, 1974-1979, is the group present during the transitional period from Deputy's Committee to Hearing Officer. At that time, Hearing Officers were part of the institutional staff and reported to the Warden.

Based on the demographic information obtained from Group II members, the profile is as follows:

1. above 40 years old - 53%
2. male - 72%

3. white - 69%
4. previous military experience - 50%
5. reside in rural area - 40%
6. highest educational level high school - 41%; associate degree - 38%
7. previous occupation - blue collar - 47%; professional - 38%
8. reason for selecting corrections - salary/benefits - 63%
9. interested in advancement - 66%
10. prime motivation for corrections - 66%

When Group II responses were evaluated within context of five theme categories, information obtained was as follows:

Old System Comparison

Sixty-nine (69%) percent feel they lost respect from prisoners, and institution lost control of process when Hearing Division was established (56%). They also feel current system is too easily manipulated by prisoners (81%) and that hearing officers grant prisoners more benefit of doubt than evidence warrants (63%). They believe the courts are primarily responsible for changes in the system. Fully 75 percent agreed with returning hearing officers to jurisdiction of Warden.

Current System Complaints

Eight-one (81%) percent of the officers feel disciplinary process dismissal rate has increased since creation of the Hearings Division. Seventy-eight (78%) percent expressed the view that not only do prisoners seem to have more rights under due process, they are more aware of the requirements of due process (75%). Hearing officers appeal easily manipulated by prisoners (69%). Sixty-three (63%) percent of officers state that hearings officers have a tendency to give prisoners benefit of doubt in their dispositions, resulting in large number of misconduct reports being dismissed on technicalities.

Confidence in Process

Eight-four (84%) percent of respondents indicated they extend full cooperation to hearing investigator when contacted. They also concur disciplinary process remains critical management tool for control. Yet, 75 percent are not confident their reports will be upheld by hearings officers. Only 41 percent disagree with the assertion that Michigan has one of the best disciplinary systems in the country. Statements electing stance of respondents on ability of department to withstand court scrutiny or utility of conformance to due process standards to diminish judicial intervention evoked low response; 38 percent respectively. They also doubt that establishment of due process standards

has resulted in decreased hostility or misconduct (59%). They possess little confidence that hearing officers will uphold their charges (72%) and reject the premise that disciplinary process works well (63%).

Perception of Process

When asked whom they believed was responsible for changes in process, 31 percent stated courts, while 25 percent thought prison administration was responsible. Sixty-six (66%) percent feel command staff is more interested in way report reads than what happened. While 44 percent feel elements of successfully report writing have been communicated successfully to officers, only 41 percent feel hearing officers perform a difficult function well. Forty (40%) percent feel that hearing officers do not receive full cooperation from institutional staff. Decreasing the familiarity of hearing officers with prison environment would reduce the number of not guilty dispositions, in the opinion of 72 percent of respondents. Given the option to revise any stage of disciplinary process, the majority (38%) chose the hearing stage. A similar majority (38%) were critical of the disciplinary process perceived failure to realistically consider prison realities.

Usage of Process

Despite criticisms of the process, or perhaps because of it, 81 percent of those surveyed believed the disciplinary process should only be invoked as a last resort. Like Group I, they also sometimes ignore minor infractions (69%). Yet, contrary to the above assertions, they feel use of the disciplinary process has increased over the last several years (63%). This rise has occurred despite the practice of ignoring infractions to maintain tacit cooperation of prisoners (81%), and that full use is not made of disciplinary process (78%).

Group III, post-1979, were acquainted with only the current disciplinary process. They were familiar with misconduct process under total control of the Hearing Division.

Based on the demographic information obtained from Group III members, the profile is as follows:

1. between 31-40 years - 50%
2. male - 81%
3. white - 81%
4. lack military experience - 81%
5. 50% married; 25% divorced
6. place of residence - rural - 44%; town - 25%
7. highest level of education obtained - high school - 44%; associate degree - 50%
8. previous occupation - blue collar - 50%; professional - 13%; student - 13%.

9. reason for entering corrections - salary - 86%; job security - 56%
10. interest in advancement - 63%
11. prime motivation for entering corrections - financial - 87%

When Group III responses were evaluated within the context of five theme categories, the information obtained was as follows:

Old System Comparison

As this group entered corrections after the Hearings Division was established, they had no experience with the previous due process model.

Current System Complaints

Like their more senior peers, this group also feels process is too easily manipulated by prisoners (81%), and dismissal rate is too high (56%). They also stated hearing officers appeared malleable to prisoners (44%) and appeared to extend beyond reasonable doubt necessary for conviction for prisoners (63%). Not only do prisoners seem to possess more rights under due process than officers (81%), they appear to be more knowledgeable of due process requirements than officers (63%). Finally, 75 percent of respondents feel technicalities are responsible for too many dismissals.

Confidence in Process

Forty-four (44%) percent of respondents feel process does not work well. Yet, they concede Michigan Dept. of Corrections process could easily withstand judiciary scrutiny (38%), and that conformance to due process standards minimizes the possibility of judicial intervention into prison authority in this area (44%). They also concur with their peers that disciplinary process remains a critical management tool for control (81%). However, the majority (75%) do not expect their reports to be upheld by hearing officers.

Perception of Process

This group was first to express the view that State Legislature was primarily responsible for structure of disciplinary process (19%), with only 13 percent blaming the courts. However, this group was also the first to list prisoner input as a factor in formulation of process (13%). Sixty-nine (69%) percent feel effectiveness of the process has been negatively impacted by its formalization. Eighty-one (81%) percent agree review stage is critical to eliminating errors or detecting incomplete reports, yet failed to respond to question emphasizing the importance of reports being well written and complete.

They disagree among themselves that elements of successful report writing has been communicated to all officers (50%-50%), yet concur that command staff is more

interested in the way the report reads than what happened (63%). The respondents expressed no opinion when asked how effectively hearing officers performed their role; yet disagree with statement that based on their law school experience, hearing officers are well versed in due process requirements (38%). On the other hand, the majority feels hearing officers do not receive full cooperation from other institutional staff (25%). Eighty-six (86%) percent feel increasing the hearing officer's familiarity with prison environment would reduce the number of not guilty dispositions. Given the option to change any aspect of hearing process, forty-four (44%) percent selected the hearing stage. Yet, the majority (31%) blamed the increased misconduct rate on younger, more aggressive prisoners, and not hearing officers, process, or due process requirements.

Usage of Process

Despite the previous assertion regarding lack of cooperation received by hearing officers, the respondents stated they extend full cooperation (94%). This group appears as contradictory when they respond as to how they use the process. They concur with Groups I and II that full use of process would be counter-productive (81%). They also agree sometimes infractions are ignored to maintain tacit cooperation of prisoners. Yet, they disagreed that the disciplinary process should only be used as last resort

(75%). The respondents feel an officer should have no hesitation in invoking the disciplinary process when occasion warrants it (50%). They also concede use of process by officers has increased over the last several years.

Intergroup Comparisons

Scale 1

Looking at Scale 1 (old system comparison) for Groups I and II, statistical analysis (t-test) indicated virtually no significant difference in the way they viewed their respective system and current system. Group III was excluded from this scale due to the fact their brief tenure did not expose them to any of the previous system. Table 1 indicates the results obtained:

TABLE 1

Variable	Number of Cases	Mean	Standard Deviation
Old Sys. Comp.			
Group I	23	1.1583	0.236
Group II	31	1.2171	0.293

Utilizing the t-test for significance difference requires $T \leq .05$, this scale detected no differences between groups.

TABLE 2

Poled Variance Estimate			Separate Variance Estimate		
T Value	D.F.	2-tail Prob.	T Value	D.F.	2-tail Prob.
-0.79	52	0.433	-0.82	51.59	0.418

This analysis falls in line with anticipated results. Given the limitations placed on discretion by due process mandates, you would expect Groups I and II to feel the loss keenly. Group I officers, with Deputy's Committee, felt 100 percent certain of their charges being upheld all the way down the line (from Deputy's Committee to Warden). Likewise, officers from Group II, with fellow staff acting as hearing officers, and appeal of unfavorable disposition to the Warden possible, still felt supported by the system. Due process requirements severely limited the discretion of the officers and ultimately resulted in creation of autonomous Hearings Division. Both Groups I and II would support a move to return to their respective systems. Table 3 shows percentage comparison of Groups I and II on those three specific items.

TABLE 3	Group I	Group II
Loss of Control	83%	56%
Loss of Respect	83%	67%
Return to Previous System	78%	78%

Scale 2

Looking at Scale 2 (current complaints) for all three groups, utilizing the F statistic for analysis of variance, there was a significant difference noted between Group III and the other two groups. Table 4 indicates the results obtained.

TABLE 4

Group	Number	Mean	Standard Deviation
I	23	1.2391	.2602
II	31	1.1445	1.2206
III	16	.1725	.0433
Total	70	.9534	.4777

F = 143.63 (2,67), p = .0000

Table 5 shows results obtained when Scheffe procedure was used to analyze the level of difference at 0.050 level in grid format.

TABLE 5

Mean	Group
.1725	III
1.1445	II
1.2391	I

	III	II	I
III			
II	*		
I	*		

These results are again in line with anticipated results. Groups I and II, with their feelings of loss of control

(respect accentuated by the new system), would tend to be more critical of what they view as inadequate replacement. Although all three groups were pretty much in accord with their perceived deficiencies in the process, Group III appeared less disenchanted with the process than the other two groups. Table 6 shows percentage comparison of specific items.

TABLE 6	Group I	Group II	Group III
Manipulation of process by prisoner	87%	81%	81%
Dismissed tickets	74%	75%	56%
Manipulation of H.O.	56%	69%	44%
More rights to prisoners than officers	78%	78%	81%
Over-extension of preponderance of evidence by H.O.	74%	63%	63%

Scale 3

Looking at Scale 3 (confidence in process) utilizing the F statistic for analysis of variance, there was a significant difference noted between Group I and the other two groups. Table 7 indicates the results obtained.

TABLE 7

Group	Number	Mean	Standard Deviation
I	23	2.1235	.3373
II	31	1.5029	.2205
III	16	1.5356	.2650
Total	70	1.7143	.3949

F = 38.3913 (2,67), p = .0000

Table 8 shows the results obtained when Scheffe procedure was used to determine the level of difference at 0.050 level in grid format.

TABLE 8

Mean	Group
1.5029	II
1.5356	III
2.1235	I

	II	III	I
	*	*	

These results again fall in line with expectations. Group I remains most critical of new process. Although all three groups concede disciplinary process remains a critical management tool, Group I is noticeably less enthusiastic. The groups also give credit to the new system for having the capability of withstanding any degree of judicial scrutiny. However, they are noticeably less impressed by process when they evaluate whether the due process requirements have decreased prisoner hostility to the staff. Overall, the new

process does not get a passing grade. Table 9 shows percentage comparison on specific items. ( ) indicates disagreement.

TABLE 9

	Group I	Group II	Group III
Process remains control tool	57% (39%)	81% (13%)	81% (6%)
Due process has decreased prisoner hostility	9% (74%)	13% (59%)	6% (62%)
Process overall works well	22% (61%)	16% (63%)	25% (44%)
Process has ability to withstand judicial scrutiny	57% (9%)	38% (18%)	38% (25%)

Scale 4

Looking at Scale 4 (perception of process) utilizing the F statistic for analysis of variance, there was a significant difference noted between Group III and the other two groups. Table 10 indicates the results obtained.

TABLE 10

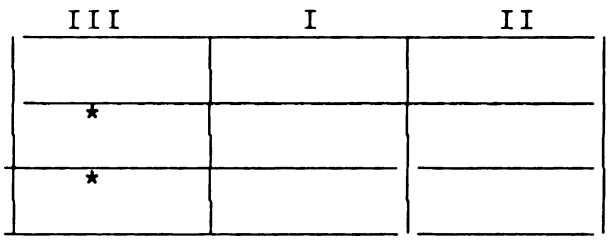
Group	Number	Mean	Standard Deviation
I	23	1.8922	.2939
II	31	1.9126	.3770
III	16	1.6294	.1992
TOTAL	70	1.8411	.3340

$F = 4.6367$ (2,67), $p = .0130$

Table 11 shows results obtained when Scheffe procedure was used to determine level of difference at 0.050 level in grid format.

TABLE 11

Mean	Group
1.6294	III
1.8922	I
1.9126	II



This, again, is in line with anticipated results. With the exception of shared perception of lack of support from command staff which was equally as strong as other two groups, Group III generally had more positive perspective of process. Again, extent of Groups I and II disillusionment can be attributed to loss of authority/respect they experienced during transition to autonomous Hearings Division. Table 12 shows percentage comparison of specific items.

TABLE 12	Group I	Group II	Group III
Process fails to consider prison realities	44%	38%	38%
Hearing stage of process needs changing	52%	38%	44%
Lack of support from command staff	63%	66%	63%
H.O. do not fulfill their role well	48%	41%	38%

Scale 5

Looking at Scale 5 (usage of process) utilizing the F statistic for analysis of variance, there was no significant difference noted between any of the groups. Table 13 indicates results obtained.

TABLE 13

Group	Number	Mean	Standard Deviation
I	23	1.3291	.1910
II	31	1.2255	.2520
III	16	1.2162	.4885
TOTAL	70	1.2574	.3060

Utilizing the Scheffe procedure to determine level of difference, no difference was detected.

This was a totally unanticipated finding. Given the previous pattern of responses, I expected Group I to exhibit passive aggressive behavior and make less use of the formal system, while Group III would have the highest usage. Group II should have fallen somewhere in between the two groups. However, all three groups appeared to have reached a consensus in how the process is best utilized. Table 14 shows the percentage comparison of specific items.

TABLE 14	Group I	Group II	Group III
Disciplinary process as last resort	91% (9%)	81% (6%)	75% (13%)
Make full use of process	4% (87%)	6% (81%)	13% (81%)
Minor infractions sometimes ignored	87% (9%)	69% (13%)	81% (0%)
Use of process has increased	30% (48%)	63% (16%)	43% (0%)

Summary

The most significant finding of this study was anticipated, i.e., data substantiates there is a difference in perspective in how line staff view disciplinary process, based on tenure/experience. Group I, being the most senior of the three, felt the loss of control/authority aspect more keenly than any other group. To them, the institution lost control when the Deputy Committee was eliminated. Their status/authority was based on the largely discretionary system of their day. Group II also felt similar loss, but their loss was predicated on the hearing officer being taken from the Warden and placed under auspices of Hearings Administrator in Lansing. To them, this totally eliminated any institutional input into misconduct dispositions. This loss was accentuated by bringing in attorneys as hearing officers. Lacking institutional experience, hearing officers were perceived as easily manipulated by prisoners and uncognizant of prison realities. Group III had more

confidence in the system than the other two groups. Although they mirrored some of the same complaints as the other two groups, they were notably more inclined to use the system. This group was more in tune with due process requirements, simply wanted modifications to make process more effective in prison environment.

The second finding was unanticipated. The data indicated no difference in usage among three groups. Therefore, contrary to administrative staff belief, the older guards are not operationally more resistant to the current system than newer officers. In fact, given the adaptation displayed by the older guards, they may be deemed more "teachable" than the new officers who lacked the need to adapt.

Finally, I noted a gradual change in demographics among the three groups. While the average age of the first two groups was above 40 years, 88 percent of Group III was below 40 years of age. While in Groups I and II the majority were married, in Group III a significant number (25% were divorced. In Groups I and II the majority had military experience; in Group III the majority did not. Group III had a significant number living in towns (25%), while the bulk of Groups I and II lived in rural areas. In terms of education, there was gradual shift from Group I where high school was highest, to Group III where 50 percent had at least an associate degree. Previous occupations shifted

from basically blue collar to a mixture of professional and students. Prime motivation for entering the corrections profession remains constant - financial (salary, benefits, job security). This data indicates that staff, like prisoner population, has and is continuing to undergo demographic changes.

CHAPTER VII

REVIEW AND CONCLUSION

Prior to commenting on the impact Wolff/P.A. 140 has had on the Michigan Department of Corrections, both structurally and staff, some final observations on the empirical research I conducted at SPSM is in order.

Methodology Review

First of all, as mentioned in Chapter V, response to the survey was low. Although response ratio to voluntary response surveys are typically low, I thought to compensate for a low response rate by expanding my sampling frame to insure over 100 potential respondents for each group. The number of staff who decided to participate was abysmally low. Given any other type of environment, serious questions of validity and reliability would be generated by such a low response rate. However, given the level of apathy in the prison, coupled with the lack of motivational incentives to participate in the survey, I can safely state that each response has ordinal value of three. To anyone familiar with the prison environment, my assertion is perfectly acceptable. It was on the basis of that assumption that I preceded with statistical analysis of the data collected.

Second, due to the low response rate, I technicaly cannot generalize my conclusions to all officers at SPSM. I would suspect my conclusions could be attributed to all

officers at SPSM and throughout the Michigan system, however, such a generalization is beyond the parameters of this study. Despite that acknowledgment, I am fully confident this study possesses the degree of intersubjectivity to be applied at least institution-wide.

Impact of Wolff/P.A. 140.

The structural changes generated by these two mandates have been documented in Chapter 3. The department moved from an informal, highly discretionary system to a formal, tightly controlled process. The Deputy's Committee was replaced by the autonomous Hearings Division. As Professor Branham's assessment indicates, Michigan is in substantial compliance with the dictates of Wolff. Her conclusions are as follows:

1. Prisoner is entitled to receive written notice of charge at least 24 hours in advance.

In the Michigan system, not only does the prisoner receive written disciplinary charge within the 24 hour requirement, there is concerted effort by the staff (reporting officers, reviewing officers, hearing officers) to see that the prisoner is totally aware of both the charge and the purported facts the charge is based on. This enables the prisoner to properly respond to the charge.

2. Hearing before an impartial examining body.

Once again, Michigan has exceeded the Wolff requirement by creating a wholly new autonomous division within the institution to handle misconduct hearings. The requirement that hearing officers be attorneys and not under the jurisdiction of institutional heads insures removal of bias from the disciplinary decision-making process.

3. Right to call witnesses and present evidence.

Michigan not only recognizes the right of a prisoner to present documentary evidence, but has developed a procedure to give the prisoner access to certain "specifically relevant" documents he would be unable to obtain on his own. It is with the qualified right to call witnesses that the department has digressed from Wolff. The department has adopted an alternative procedure of obtaining/presenting witnesses' statements as substitution for actual presence of witnesses.

4. Right to assistance from legal assistant or staff member.

Once again, Michigan is in full compliance by routinely providing a hearings investigator for all cases, whether the prisoner requests one or not.

5. Written statement as to evidence relied on for disposition.

While Wolff only speaks to evidence relied on to establish guilt, the department requires all evidence presented at the hearing to be indicated irrespective of

whether or not it supports a guilty finding. Additionally, the hearing reports are required to explain why certain evidence was accepted as credible, and subsequently relied upon by the hearing officer.

Thus, with one exception (right to call witnesses), Michigan is in substantial compliance with Wolff.

However, the structural changes have been recognized for a long time. One of the aims of this study was to modernize institutional staff attitudes to the misconduct process by invalidating a commonly held perception bout the misconduct process, i.e., inhibits control of prisoners. The assumption that all officers are hostile to the misconduct process, and subsequently engage in passive-aggressive or avoidance behavior in respect to it has been shown invalid. Certainly those officers on board prior to the changes invoked by Wolff/P.A. 140 had feelings of nostalgia for what they viewed as simpler, less complex era. The data supported the fact that those officers feel a keen sense of loss of authority and respect dealing with today's prisoners. On the other hand, neither they nor their contemporary peers blame the misconduct process for rising rate of misconduct. All three groups of officers surveyed were unanimous in their assertion that the younger, more aggressive prisoners were the culprits. Nor was there any evidence of passive-aggressive or avoidance behavior on the part of any of the officers. In fact, statistical analysis

indicates no difference in usage among the three groups. Therefore, both structurally and in terms of staff adaptation, the establishment of the process requirement within the department can be viewed largely as a success.

Future Trends

Given that the misconduct process is a success in the largest, most archaic institution in the State system, there is no reason for the Hearings Division to maintain a defensive, almost apologetic stance. The Hearings Division has taken a lot of lumps from the rest of the institutional staff, particularly after the disturbance at Northside of Jackson in 1982. However, the majority of that verbal abuse stemmed from natural resentment of staff people to change. All people resent change, however, institutionalized people resent it to even a greater degree. Institutional staff are institutionalized into routines and patterns of behavior as much as the prisoners are. Consequently, any requirement necessitating an attitude/behavior change would inevitably generate hostility and resentment. However, this phenomenon is merely an effect of the transition from Big House mentality to the professionalism of centralized bureaucracy. Therefore, the Hearings Division should come to the realization that they have been serving as a projection focus, and get about their task of leading the department to the next phase of process development. They now have a unique opportunity to do so.

Over the next four years, the department has 26 additional prisons on the drawing board. While the effort to build their way out of over-crowding is futile, the fact that these new prisons will be mostly small, multi-leveled institutions located in the proximity of urban areas, does augur well for the future. These new institutions pose an opportunity for innovation in the misconduct hearing process.

First, the singular criticism Professor Branham had of the Michigan system was their general interdiction of in-person witness testimony. Wolff states that prisoners have a right to call witnesses as long as their presence is not "unduly hazardous to institutional safety or correctional goals." Therefore, Michigan's procedure in this respect is in potential conflict with Wolff. Rather than continue any elaborate rationalization for the practice, the smaller institutions offer a suitable environment to allow actual witness testimony. While this would obviously be an impossibility at a mammoth institution like Jackson, it would and could work at the small, regional prisons.

The same would apply to cross-examination of adverse witnesses and presence of counsel. At the time ABA did its national survey 14 years ago, 31 states allowed counsel and cross-examination of adverse witnesses. At that time, none of the larger states (California, Texas, New York or

Michigan) had allowed these privileges. The term privilege is applicable because not even Wolff requires either. However, Wolff made a statement in regard to an expectation of progress, and Michigan has the opportunity to assume the mantle of correctional leadership. With the newer institution located close to urban areas and staffed to full A.C.A. staffing patterns, the purpose innovations are possible. To the cries of disparate treatment that would arise from those incarcerated in the older institutions, they would have to be appeased with the statement that the new institutions are being used as pilot study to determine the feasibility of mandating the changes system-wide. In fact, this could be the justification for mothballing such colossal and unmanageable institutions such as Jackson, Ionia, and Marquette. Not only is it doable, I believe it is essential for the department to do so on its own, with its own timetable, rather than mandated by a court. As corrections administrators well know, it only takes one case from anywhere in the country to come before the U.S. Supreme Court to result in changes. Even with today's somewhat conservative climate, it would be prudent and good management to adopt a productive rather than reactive stance in this area.

There are two other trends that make innovation in the misconduct process doable. The proximity of the regional institutions makes universities and/or law schools a

community resource that could be tapped for counsel-representatives. Another possibility is that attorneys would be credited for such appearances in the same manner as public defenders. To those who claim attorneys would not be interested in the corrections field, let them examine the Hearings Division which is composed of 100% attorneys.

The second trend is that correctional staff is becoming younger, better educated, and more minority-represented. With the resiliency displayed by the older officers at Jackson, these new officers should have even less difficulty in adjusting to the changes the proposed innovations would entail.

Future Research

This study hardly purports to be the culmination of research in this area. As the study at best is limited in its application to SPSM, a study should be done to replicate its conclusions on a statewide basis. To determine that Wolff/PA 140 have not diminished control of line staff at all facilities would involve expansion of research sites beyond Jackson. The procedure utilized would be somewhat similar to that used in this study. An investigation of personnel listings should indicate which facilities have a sufficient number of staff from the three significant time periods identified, thereby determining the potential respondents for the survey.

However, based on my experience at Jackson, I would suggest additional steps to possibly increase the potential return rate of the questionnaires. First, I would insist on strong encouragement from the Director/Deputy Director, Central Office, to participate in the survey. Second, I would increase involvement of the union and/or individual prison administrators, again to promote increased participation. Finally, I would spend time at each facility becoming familiar with line saff, hearing officers, administrators, and prisoners. Possibly the Training Division could also be tapped as facilitator of the questionnaire. The implications of my study and future studies in this area for training and staff are far too important to overlook.

Additionally, future studies should also closely examine the impact the demographic changes noted have on officer performance. This transformation has implications beyond simply the disciplinary process, but would affect the total spectrum of functions performed by officers. Another factor to consider would be how prisoners perceive the changes in the disciplinary process or demographic changes. Or, how the hearing officers feel about their institutional role.

This study focused exclusively on line staff perceptions, however, how the other participants in the process feel/interact would also be valid measurements of

the disciplinary process. Given the limited research done within the Michigan system, a myriad of possible topics exists. I have merely scratched the surface of possibilities.

Conclusion

The department has a misconduct process that works. It also has a unique opportunity to make significant progress in this area. Unfortunately, the department appears so caught up in daily operational matters, it has little time to spare for proactive management. Yet, the recent statement by the newest member of the Corrections Commission, Mr. Conrad Mallet, Jr., offers a glimmer of hope for the future. He stated that the goal of rehabilitation of prisoners is a task beyond the resources of this department. Instead, he said, emphasis should be on making prisons a clean and safe environment for prisoners. With such a concentration of effort on the prison environment, innovation becomes possible. At one time, Michigan was the leading proponent of change in the correctional area; hopefully, it will seize the opportunity to assume the mantle of leadership again.

TABLE OF CASES

TABLE OF CASES

Sostre v Rockefeller, 312 F Supp 863 (1970)

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APPENDIX A

WOLFF v. McDONNELL

418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

Mr. Justice WHITE delivered the opinion of the Court.

We granted the petition for writ of certiorari in this case, 414 U.S. 1156, 94 S.Ct. 913, 39 L.Ed.2d 108, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U.S.C.A. § 1983 challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; * * *

After an evidentiary hearing, the District Court granted partial relief. 342 F.Supp. 616 (Neb. 1972). Considering itself bound by prior circuit authority, it rejected the procedural due-process claim; * * *

The Court of Appeals reversed, 483 F.2d 1059 (1973), with respect to the due process claim, holding that the procedural requirements outlined by this Court in Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), decided after the District Court opinion in this case, should be generally followed in prison disciplinary hearings but left the specific requirements, including the circumstances in which counsel might be required, to be determined by the District Court on remand. With respect to a remedy, the Court further held that Preiser v. Rodriguez, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), forbade the actual restoration of good-time credits in this § 1983 suit but ordered expunged from prison records any determinations of misconduct arrived at in proceedings that failed to comport with due process as defined by the court. * * *

I

We begin with the due process claim. An understanding of the issues involved requires a detailing of the prison disciplinary regime set down by Nebraska statutes and prison regulations.

Section 16 of the Nebraska Treatment and Corrections Act, Neb.Rev. Stat. § 83–185 (1972 Supp.),[5] provides that the chief executive officer of

each penal facility is responsible for the discipline of inmates in a particular institution. The statute provides for a range of possible disciplinary action. "Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83–1,107 [good time credit] [6] be forfeited or withheld and also that the person be confined in a disciplinary cell." Each breach of discipline is to be entered in the person's file together with the disposition or punishment therefor.

As the statute makes clear, there are basically two kinds of punishment for flagrant or serious misconduct. The first is the forfeiture or withholding of good-time credits, which affects the term of confinement, while the second, confinement in a disciplinary cell, involves alteration of

the conditions of confinement. If the misconduct is less than flagrant or serious, only deprivation of privileges results.[7]

The only statutory provision establishing procedures for the imposition of disciplinary sanctions which pertains to good time, section 38 of the Nebraska Treatment and Corrections Act, Neb.Rev.Stat. § 83–1,107 (Supp. 1972), merely requires that an inmate be "consulted regarding the charges of misconduct" in connection with the forfeiture, withholding or restoration of credit. But prison authorities have framed written regulations dealing with procedures and policies for controlling inmate misconduct.[8] By regulation misconduct is classified into two categories: major

misconduct is a "serious violation" and must be formally reported to an Adjustment Committee, composed of the Associate Warden Custody, the Correctional Industries Superintendent, and the Reception Center Di-

rector. This Committee is directed to "review and evaluate all misconduct reports" and, among other things, to "conduct investigations, make findings, [and] impose disciplinary actions." If only minor misconduct, "a less serious violation," is involved, the problem may either be resolved informally by the inmate's supervisor or it can be formally reported for action to the Adjustment Committee. Repeated minor misconduct must be reported. The Adjustment Committee has available a wide range of sanctions. "Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center [the disciplinary cell), withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein.[9]

Additional procedures have been devised by the Complex governing the actions of the Adjustment Committee. Based on the testimony, the District Court found, 342 F.Supp., at 625–626, that the following procedures were in effect when an inmate is written up or charged with a prison violation:[10]

> "(a) The chief correction supervisor reviews the 'write-ups' on the inmate by the officers of the Complex daily;
>
> "(b) the convict is called to a conference with the chief correction supervisor and the charging party;
>
> "(c) following the conference, a conduct report is sent to the Adjustment Committee;
>
> "(d) there follows a hearing before the Adjustment Committee and the report is read to the inmate and discussed;
>
> "(e) if the inmate denies the charge he may ask questions of the party writing him up;
>
> "(f) the Adjustment Committee can conduct additional investigations if it desires;
>
> "(g) punishment is imposed."

II

This class action brought by McDonnell alleged that the rules, practices and procedures at the Complex which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amend-

ment. McDonnell sought three types of relief: (1) the restoration of good time; (2) that a plan be submitted by the prison authorities for a hearing procedure in connection with withholding and forfeiture of good time which complied with the requirements of due process; and (3) damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures.[11]

At the threshold is the issue whether under Preiser v. Rodriguez, supra, the validity of the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C.A. § 1983. In *Preiser,* state prisoners brought a § 1983 suit seeking an injunction to compel restoration of good-time credits. The Court held that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U.S., at 500, 93 S.Ct., at 1841, with the concomitant requirement of exhausting state remedies. But the Court was careful to point out that habeas corpus is not an appropriate or available remedy for damage claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody. 411 U.S., at 494, 498–499, 93 S.Ct., at 1838, 1840–1841.

The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser.* But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. 411 U.S., at 499, n. 14, 93 S.Ct., at 1841.[12] Respondent's damage claim was therefore properly before the District Court and required determination of the validity of the procedures employed for imposing sanctions, including loss of good time, for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damage award would not be barred by *Preiser;* and because under that case, only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

We therefore conclude that it was proper for the Court of Appeals and the District Court to determine the validity of the procedures for revoking good-time credits and to fashion appropriate remedies for any

constitutional violations ascertained, short of ordering the actual restoration of good time already cancelled.[13]

III

The State of Nebraska asserts that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1059–60, 92 L.Ed. 1356 (1948). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. Prisoners have been held to enjoy substantial religious freedom under the First and Fourteenth Amendments. Cruz v. Beto, 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); Cooper v. Pate, 378 U.S. 546, 84 S.Ct. 1733, 12 L.Ed.2d 1030 (1964). He retains his right of access to the courts. Younger v. Gilmore, 404 U.S. 15, 92 S.Ct. 250, 30 L.Ed.2d 142 (1971), aff'd Gilmore v. Lynch, 319 F.Supp. 105 (N.D.Cal. 1970); Johnson v. Avery, supra, Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034 (1941). Prisoners are protected under the Equal Protection Clause of the Fourteenth Amendment from invidious discrimination based on race. Lee v. Washington, 390 U.S. 333, 88 S.Ct. 994, 19 L.Ed.2d 1212 (1968). The prisoner may also claim the protections of the Due Process Clause. He may not be deprived of his life, liberty or property without due process of law. Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); Wilwording v. Swenson, 404 U.S. 249, 92 S.Ct. 407, 30 L.Ed.2d 418 (1971); Screws v. United States, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945).

Of course, as we have indicated, that a prisoner retains rights under the Due Process Clause in no way implies that this right is not subject to restrictions imposed by the nature of the regime to which he has been lawfully committed. Cf. United States Civil Service Commission v. Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973); Parker v. Levy, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974). Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply. Cf. Morrissey v. Brewer, 408 U.S., at 488, 92 S.Ct., at 2603–2604. In sum, there must be mutual accommodation between institutional needs and

objectives and the provisions of the Constitution that are of general application.

We also reject the assertion of the State that whatever may be true of the Due Process Clause in general or of other rights protected by that clause against state infringement, the interest of prisoners in disciplinary procedures is not included in that "liberty" protected by the Fourteenth Amendment. It is true that the Constitution itself does not guarantee good-time credit for satisfactory behavior while in prison. But here the State itself has not only provided a statutory right to good-time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing "in every conceivable case of government impairment of private interest." Cafeteria Workers v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). But the State having created the right to good-time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated. This is the thrust of recent cases in the prison disciplinary context. In Haines v. Kerner, supra, the state prisoner asserted a "denial of due process in the steps leading to [disciplinary] confinement." 404 U.S., at 520, 92 S.Ct., at 595–596. We reversed the dismissal of the § 1983 complaint for failure to state a claim. In Preiser v. Rodriguez, supra, the prisoner complained that he had been deprived of good-time credits without notice or hearing and without due process of law. We considered the claim a proper subject for a federal habeas corpus proceeding.

This analysis as to liberty parallels the accepted due-process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests. Anti-Fascist Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The requirement for some kind of a hearing applies to the taking of private property, Grannis v. Ordean, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363 (1914), the revocation of licenses, In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), the operation of state dispute settlement mechanisms, when one person seeks to take property from another, or to government-created jobs held absent "cause" for termination, Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Arnett v. Kennedy, 416 U.S. 134, 171, 206, 94 S.Ct. 1633, 1652, 1669–70, 40 L.Ed.2d 15 (1974) (Powell, J., concurring; White, J., concurring in part and dissenting in part; Marshall, J., dissenting). Cf. Stanley v. Illinois, 405 U.S. 645, 652–654, 92 S.Ct. 1208, 1213–14, 31 L.Ed.2d 551 (1972); Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of govern-

ment, Dent v. West Virginia, 129 U.S. 114, 123, 9 S.Ct. 231, 233, 234, 32 L.Ed. 623 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed.

IV

As found by the District Court, the procedures employed are (1) a preliminary conference with the chief corrections supervisor and the charging party, where the prisoner is informed of the misconduct charge and engages in preliminary discussion on its merits; (2) a conduct report is then prepared and a hearing held before the Adjustment Committee, the disciplinary body of the prison, where the report is read to the inmate; and (3) the opportunity at the hearing to ask questions of the charging party. The State contends that the procedures already provided are adequate. The Court of Appeals held them insufficient and ordered the due-process requirements outlined in *Morrissey* and *Scarpelli* be satisfied in serious disciplinary cases at the prison.

Morrissey held that due process imposed certain minimum procedural requirements which must be satisfied before parole could finally be revoked. These procedures were:

> "(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." 408 U.S., at 489, 92 S.Ct., at 2604.

The Court did not reach the question as to whether the parolee is entitled to the assistance of retained counsel or to appointed counsel, if he is indigent. Following the decision in *Morrissey,* in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), the Court held the requirements of due process established for parole revocation were applicable to probation revocation proceedings. The Court added to the required minimum procedures of *Morrissey* the right to counsel, where a probationer makes a request, "based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present." Id., at 790, 93 S.Ct., at 1764. In doubtful cases, the agency was to consider whether the probationer appeared to be capable of speaking effectively for himself, id., at 790–791, 93 S.Ct. at 1763–1764, and a record was to be made of the grounds for refusing to appoint counsel.

We agree with neither the State nor the Court of Appeals: the Nebraska procedures are in some respects constitutionally deficient but the *Morrissey-Scarpelli* procedures need not in all respects be followed in disciplinary cases in state prisons.

We have often repeated that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginative situation." Cafeteria Workers v. McElroy, 367 U.S., at 895, 81 S.Ct., at 1748. "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." Id., at 895, 81 S.Ct., at 1748; *Morrissey*, 408 U.S., at 471, 92 S.Ct., at 2595. Viewed in this light it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.

Revocation of parole may deprive the parolee of only conditional liberty, but it nevertheless "inflicts a grievous loss on the parolee and often on others." *Morrissey*, 408 U.S., at 481, 92 S.Ct., at 2600. Simply put, revocation proceedings determine whether the parolee will be free or in prison, a matter of obvious great moment to him. For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee. The deprivation, very likely, does not then and there work any change in the conditions of his liberty. It can postpone the date of eligibility for parole and extend the maximum term to be served, but it is not certain to do so, for good time may be restored. Even if not restored, it cannot be said with certainty that the actual date of parole will be affected; and if parole occurs, the extension of the maximum term resulting from loss of good time may affect only the termination of parole, and it may not even do that. The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance. But it is qualitatively and quantitatively different from the revocation of parole or probation.

In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing. That the revocation of parole be justified and based on an accurate assessment of the facts is a critical matter to the State as well as the parolee; but the procedures by which it is determined whether the conditions of parole have been breached do not themselves threaten other important state interests, parole officers, the police or witnesses, at least no more so than in the case of the ordinary criminal trial. Prison disciplinary proceedings, on the other hand, take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so. Some are first offenders, but many are

recidivists who have repeatedly employed illegal and often very violent means to attain their ends. They may have little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life. Although there are very many varieties of prisons with different degrees of security, we must realize that in many of them the inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates are varied and complex and perhaps subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonisms on the important aims of the correctional process.

Indeed, it is pressed upon us that the proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released. Inevitably there is a great range of personality and character among those who have transgressed the criminal law. Some are more amenable to suggestion and persuasion than others. Some may be incorrigible and would merely disrupt and exploit the disciplinary process for their own ends. With some, rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure. In any event, it is argued, there would be great unwisdom in encasing the disciplinary procedures in an inflexible constitutional straitjacket that would necessarily call for adversary proceedings typical of the criminal trial, very likely raise the level of confrontation between staff and inmate and make more difficult the utilization of the disciplinary process as a tool to advance the rehabilitative goals of the institution. This consideration, along with the necessity to maintain an acceptable level of personal security in the institution, must be taken into account as we now examine in more detail the Nebraska procedures that the Court of Appeals found wanting.

V

Two of the procedures that the Court held should be extended to parolees facing revocation proceedings are not, but must be, provided to prisoners in the Nebraska Complex if the minimum requirements of procedural due process are to be satisfied. These are advance written

notice of the claimed violation and a written statement of the factfindings as to the evidence relied upon and the reasons for the disciplinary action taken. As described by the Warden in his oral testimony, on the basis of which the District Court made its findings, the inmate is now given oral notice of the charges against him at least as soon as the conference with the chief correction officer and charging party. A written record is there compiled and the report read to the inmate at the hearing before the Adjustment Committee where the charges are discussed and pursued. There is no indication that the inmate is ever given a written statement by the Committee as to the evidence or informed in writing or otherwise as to the reasons for the disciplinary action taken.

Part of the function of notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the charges are, in fact. See In re Gault, 387 U.S. 1, 33–34 & n. 54, 87 S.Ct. 1428, 1446–1447, (1967). Neither of these functions was performed by the notice described by the Warden. Although the charges are discussed orally with the inmate somewhat in advance of the hearing, the inmate is sometimes brought before the Adjustment Committee shortly after he is orally informed of the charges. Other times, after this initial discussion, further investigation takes place which may reshape the nature of the charges or the evidence relied upon. In those instances, under procedures in effect at the time of trial, it would appear that the inmate first receives notice of the actual charges at the time of the hearing before the Adjustment Committee. We hold that written notice of the charges must be given to the disciplinary action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." *Morrissey*, 408 U.S., at 489, 92 S.Ct., at 2604. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb.Rev.Stat. § 83–185(4) (Supp. 1972), and are certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety are so implicated, that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise,

we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.[16]

We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other inmates to collect statements or to compile other documentary evidence.. Although we do not prescribe it, it would be useful for the Committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity or the hazards presented in individual cases. Any less flexible rule appears untenable as a constitutional matter, at least on the record made in this case. The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments. There is this much play in the joints of the Due Process Clause, and we stop short of imposing a more demanding rule with respect to witnesses and documents.

Confrontation and cross-examination present greater hazards to institutional interests.[17] If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused if found guilty, may be subjected to the most

serious deprivations, Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965), or where a person may lose his job in the society, Greene v. McElroy, 360 U.S. 474, 496–497, 79 S.Ct. 1400, 1413, 1414, 3 L.Ed.2d 1377 (1959). But they are not rights universally applicable to all hearings. See Arnett v. Kennedy, supra. Rules of procedure may be shaped by consideration of the risks of error. In re Winship, supra, 397 U.S. 358, 368, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring); Arnett v. Kennedy, supra (White, J., concurring), and should also be shaped by the consequences which will follow their adoption. Although some States do seem to allow cross-examination in disciplinary hearings,[18] we are not apprised of the conditions under which the procedure may be curtailed; and it does not appear that confrontation and cross-examination are generally required in this context. We think that the Constitution should not be read to impose the procedure at the present time and that adequate bases for decision in prison disciplinary cases can be arrived at without cross-examination.

Perhaps as the problems of penal institutions change and correctional goals are reshaped, the balance of interests involved will require otherwise. But in the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many States, including Nebraska and the Federal Government, to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least, the Constitution, as we interpret it today, does not require the contrary assumption. Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.

We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem. There may be a class of cases where the facts are closely disputed, and the character of the parties minimizes the dangers involved. However, any constitutional rule tailored to meet these situations would undoubtedly produce great litiga-

tion and attendant costs in a much wider range of cases. Further, in the last analysis, even within the narrow range of cases where interest balancing may well dictate cross-examination, courts will be faced with the assessment of prison officials as to the dangers involved, and there would be a limited basis for upsetting such judgments. The better course at this time, in a period where prisons practices are diverse and somewhat experimental, is to leave these matters to the sound discretion of the officials of state prisons.

As to the right to counsel, the problem as outlined in *Scarpelli* with respect to parole and probation revocation proceedings is even more pertinent here:

> "The introduction of counsel into a revocation proceeding will alter significantly the nature of the proceeding. If counsel is provided for the probationer or parolee, the State in turn will normally provide its own counsel; lawyers, by training and disposition, are advocates and bound by professional duty to present all available evidence and arguments in support of their clients' positions and to contest with vigor all adverse evidence and views. The role of the hearing body itself, aptly described in *Morrissey* as being 'predictive and discretionary' as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee. In the greater self-consciousness of its quasi-judicial role, the hearing body may be less tolerant of marginal deviant behavior and feel more pressure to reincarcerate other than to continue nonpunitive rehabilitation. Certainly, the decisionmaking process will be prolonged, and the financial cost to the State—for appointed counsel, counsel for the State, a longer record and the possibility of judicial review—will not be insubstantial." [Footnote omitted]. 411 U.S., at 787–788, 93 S.Ct., at 1762.

The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals. There would also be delay and very practical problems in providing counsel in sufficient numbers at the time and place where hearings are to be held. At this stage of the development of these procedures we are not prepared to hold that inmates have a right to either retained or appointed counsel in disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. We need not pursue the matter further here, however, for there is no claim that the named plaintiff McDonnell is within the class of inmates entitled to advice or help from others in the course of a prison disciplinary hearing.

Finally, we decline to rule that the Adjustment Committee which conducts the required hearings at the Nebraska Prison Complex and determines whether to revoke good time is not sufficiently impartial to satisfy the Due Process Clause. The Committee is made up of the Associate Warden for Custody as chairman, the Correctional Industries Superintendent and the Reception Director. The Chief Corrections Officer refers cases to the Committee after investigation and an initial interview with the inmate involved. The Committee is not left at large with unlimited discretion. It is directed to meet daily and to operate within the principles stated in the controlling regulations among which is the command that "full consideration must be given to the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals," as well as the direction that "disciplinary measures will be taken only at such times and to such degrees as are necessary to regulate and control a man's behavior within acceptable limits and will never be rendered capriciously or in the nature of retaliation or revenge." We find no warrant in the record presented here for concluding that the Adjustment Committee presents such a hazard of arbitrary decisionmaking that it should be held violative of due process of law.

Our conclusion that some, but not all, of the procedures specified in *Morrissey* and *Scarpelli* must accompany the deprivation of good time by state prison authorities [19] is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court. It is our view, however, that the procedures we have now required in prison disciplinary proceedings represent a reasonable accommodation between the interests of the inmates and the needs of the institution.[20]

VI

The Court of Appeals held that the due process requirements in prison disciplinary proceedings were to apply retroactively so as to require that prison records containing determinations of misconduct, not in accord with required procedures, be expunged. We disagree and reverse on this point.

The question of retroactivity of new procedural rules affecting inquiries into infractions of prison discipline is effectively foreclosed by this Court's ruling in *Morrissey* that the due process requirements there announced were to be "applicable to *future* revocations of parole," 408 U.S., at 490, 92 S.Ct., at 2604 (emphasis supplied). Despite the fact that procedures are related to the integrity of the fact-finding process, in the context of disciplinary proceedings, where less is generally at stake for an individual than at a criminal trial, great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures. During 1973, the Federal Government alone conducted 19,000 misconduct hearings, as compared with 1,173 parole revocation hearings, and 2,023 probation revocation hearings. If *Morrissey-Scarpelli* rules are not retroactive out of consideration for burden on federal and state officials, this case is *a fortiori*. We also note that a contrary holding would be very troublesome for the parole system since performance in prison is often a relevant criteria for parole. On the whole, we do not think that error was so pervasive in the system under the old procedures to warrant this cost or result.

* * *

Mr. Justice DOUGLAS, dissenting.

The majority concedes that prisoners are persons within the meaning of the Fourteenth Amendment, requiring the application of certain due process safeguards to prison disciplinary proceedings, if those proceedings have the potential of resulting in the prisoner's loss of good time or placement in solitary confinement, supra, at p. 29 n. 19. But the majority finds that prisoners can be denied the right to cross-examine adverse witnesses against them, and sustains the disciplinary board's right to rely on secret evidence provided by secret accusers in researching its decision, on the ground that only the prison administration can decide whether in a particular case the danger of retribution requires shielding a particular witness' identity. And in further deference to prison officials, the majority, while holding that the prisoner must usually be accorded the right to present witnesses on his own behalf, appears to leave the prisoner no remedy against a prison board which unduly restricts that right in the name of "institutional safety." Respondents thus receive the benefit of some of the constitutional rights of due process that the Fourteenth extends to all "persons." In my view, however, the threat of any substantial deprivation of liberty within the prison confines, such as solitary confinement, is a loss which can be imposed upon respondent prisoners only after a full hearing with all due process safeguards.

I

I agree that solitary confinement is a deprivation requiring a due process hearing for its imposition. Due process rights are required whenever an individual risks condemnation to a "grievous loss," Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484; Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 1018, 25 L.Ed.2d 287; Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (Frankfurter, J., concurring). Thus due process is required before the termination of welfare benefits, *Goldberg*, supra; revocation of parole or probation, *Morrissey*, supra, and Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656; revocation of a driver's license, Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; attachment of wages, Sniadach v. Family Finance Crop., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349. Every prisoner's liberty is of course circumscribed by the very fact of his confinement, but his interest in the limited liberty left to him is then only the more substantial. Conviction of a crime does not render one a nonperson whose rights are subject to the whim of the prison administration, and therefore the imposition of any serious punishment within the prison system requires procedural safeguards. Of course a hearing need not be held before a prisoner is subjected to some minor deprivation, such as an evening's loss of television privileges. Placement in solitary confinement, however, is not in that category. Prisoners are sometimes placed in solitary or punitive segregation for months or even years; Bryant v. Harris, 465 F.2d 365 (C.A.7, 1972); Sostre v. McGinnis, 442 F.2d 178 (C.A.2, 1971); Adams v. Carlson, 368 F.Supp. 1050 (E.D.Ill. 1973); Landman v. Royster, 333 F.Supp. 621 (E.D.Va. 1971), and such confinement inevitably results in depriving the prisoner of other privileges as well which are ordinarily available to the general prison population, La Reau v. MacDonald, 473

F.2d 974 (C.A.2 1972); Wright v. McMann, 387 F.2d 519 (C.A.2, 1967). Moreover the notation in a prisoner's file that he has been placed in such punitive confinement may have a seriously adverse effect on his eligibility for parole, a risk which emphasizes the need for prior due process safeguards, Procunier v. Clutchette, No. 71–2357 (C.A.9, April 25, 1972).

II

I would start with the presumption that cross-examination of adverse witnesses and confrontation of one's accusers are essential rights which ought always to be available absent any special overriding considerations. In Morrissey v. Brewer, supra, we held that the right to confront and cross-examine adverse witnesses is a minimum requirement of due process which must be accorded parolees facing revocation of their parole "unless the hearing officer specifically finds good cause for not allowing confrontation." Id., at 489, 92 S.Ct., at 2604. "Because most disciplinary cases will turn on issues of fact * * * the right to confront and cross-examine witnesses is essential." Landman v. Royster, supra, 333 F.Supp., at 653.

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirement of confrontation and cross-examination. * * * This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases * * but also in all types of cases where administrative and regulatory actions were under scrutiny." Greene v. McElroy, 360 U.S. 474, 496–497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377.

The decision as to whether an inmate should be allowed to confront his accusers should not be left to the unchecked and unreviewable discretion of the prison disciplinary board. The argument offered for that result is that the danger of violent response by the inmate against his accusers is great, and that only the prison administrators are in a position to weigh the necessity of secrecy in each case. But it is precisely this unchecked power of prison administrators which is the problem that due process safeguards are required to cure. "Not only the principle of judicial review, but the whole scheme of American government, reflects an institutionalized distrust of any such unchecked and unbalanced power over essential liberties. That mistrust does not depend on an assumption of inveterate venality or incompetence on the part of men in power * * *." Covington v. Harris, 136 U.S.App.D.C. 35, 419 F.2d 617, 621 (1969). Likewise the prisoner should have the right to cross-examine adverse witnesses who testify at the hearing. Opposed is the view that the right may

somehow undermine the proper administration of the prison, especially if accused inmates are allowed to put questions to their guards. That, however, is a view of prison administration which is outmoded and indeed antirehabilitation, for it supports the prevailing pattern of hostility between inmate and personnel which generates an "inmate's code" of noncooperation, thereby preventing the rapport necessary for a successful rehabilitative program. The goal is to reintegrate inmates into a society where men are supposed to be treated fairly by the government, not arbitrarily. The opposed procedure will be counterproductive. A report prepared for the Joint Commission on Correctional Manpower and Training has pointed out that the "basic hurdle [to reintegration] is the concept of a prisoner as a non-person and the jailer as an absolute monarch. The legal strategy to surmount this hurdle is to adopt rules * * * maximizing the prisoner's freedom, dignity and responsibility. More particularly, the law must respond to the substantive and procedural claims that prisoners may have * * *." F. Cohen, The Legal Challenge to Corrections, at 65 (1969). We recognized this truth in *Morrissey*, where we noted that society has an interest in treating the parolee fairly in part because "fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." 408 U.S., at 484, 92 S.Ct., at 2602. The same principle applies to inmates as well.

The majority also holds that "the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Supra, at 2979. Yet while conceding that "the right to present evidence is basic to a fair hearing," ibid., the Court again chooses to leave the matter in the discretion of prison officials, who are not even required to state their reasons for refusing a prisoner his right to call a witness, although the Court finds that such a statement of reasons would be "desirable." Supra, at 2980. Thus although the Court acknowledges the prisoner's right it appears to leave him with no means of enforcing it.

As the Court itself agrees in holding that the disciplinary board must provide a statement of reasons for its ultimate determination on the merits, supra, at 2979, such a written statement is crucial not only to provide a basis for review, but to ensure that the Board "will act fairly." Ibid. Of course even in a criminal trial the right to present one's own witnesses may be limited by the trial judge's finding that the evidence offered is irrelevant, incompetent, or needlessly repetitious, and certainly the same restrictions may apply in the prison setting. But when the judge makes such a ruling it is a matter in the record which may be challenged on appeal. Nebraska may not provide any channel for administrative appeal of the Board's ruling, but because "the fundamental requisite of due process of law is the opportunity to be heard," Goldberg v. Kelly, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287, some possibility must remain open for judicial oversight. Here as with the rights of confrontation and cross-examination, I must dissent from the Court's holding that the prisoner's exercise of a fundamental constitutional right should be left within the unreviewable discretion of prison authorities.

Our prisons are just now beginning to work their way out of their punitive heritage. The first American penitentiary was established in Philadelphia in 1790; it contained 24 individual cells for the solitary confinement of hardened offenders. P. Tappan, Crime, Justice and Correction, at 605–606 (1960). Under this "Pennsylvania System" the prisoner was continuously confined to solitary and all communication was forbidden with the exception of religious advisors and official visitors. Wilson, The Crime of Punishment, at 219–220. New York experimented with this approach but found it too severe, and adopted instead a compromise solution known as the "Auburn" or "silent" system, in which inmates were allowed to work in shops with others during the day, although under a strict rule of silence, and then returned to solitary confinement at night. Prisoners were marched around in military lock-step with their eyes cast on the ground, and the violations of any rules resulted in the immediate infliction of corporal punishment by the guards. Tappan, supra, at 609–610. Although the harsh treatment produced an orderly prison, it came under criticism because of its inhumanity, with particular emphasis on the unfettered discretion of the guards to impose punishment on the basis of vague charges that were never subjected to detached or impartial evaluation. Livingston, System of Penal Law, Introductory Report to the Code of Reform and Prison Discipline, at 8 (1828).

We have made progress since then but the old tradition still lingers. Just recently an entire prison system of one State was held so inhumane as to be a violation of the Eighth Amendment bar on cruel and unusual punishment. Holt v. Sarver, 309 F.Supp. 362 (E.D.Ark. 1970), aff'd, 442 F.2d 304 (C.A.8 1971). The lesson to be learned is that courts cannot blithely defer to the supposed expertise of prison officials when it comes to the constitutional rights of inmates.

> "Prisoners often have their privileges revoked, are denied the right of access to counsel, sit in solitary, or maximum security or lose 'goodtime' on the basis of a single unreviewed report of a guard. When courts defer to administrative expertise, it is this guard to whom they delegated the final word on reasonable prison practices. This is the central evil in prison * * * the unreviewed administrative discretion granted to the poorly trained personnel who deal directly with prisoners." Hirschop and Millemen, The Unconstitutionality of Prison Life, 55 Va.L.Rev. 795, 811–812 (1969).

The prisoner's constitutional right of confrontation should not yield to the so-called expertise of prison officials more than is necessary. The concerns of prison officials in maintaining the security of the prison and of protecting the safety of those offering evidence in prison proceedings are real and important. But the solution cannot be a wholesome abrogation of the fundamental constitutional right to confront one's accusers. The danger of retribution against the informer is not peculiar to the prison system; it exists in every adversary proceeding, and the criminal defendant out on bail during his trial might present a greater threat to the witness hostile to his interests than the prison inmate who is subject to constant surveillance. See Preiser v. Rodriguez, 411 U.S. 475, 492, 93

S.Ct. 1827, 1837, 36 L.Ed.2d 439. If there is an "inmates code" of the prison, based upon hostility to the authorities, which proscribes inmate cooperation with prison officials in disciplinary proceedings, it is probably based upon the perceived arbitrariness of those proceedings. That ethic, which is clearly antirehabilitative, must be ferretted out, but I do not see how the petitioners can rely on their current failure to correct this evil for the perpetration of an additional one—the denial of the right to confrontation. In some circumstances it may be that an informer's identity should be shielded. Yet in criminal trials the rule has been that if the informer's information is crucial to the defense, then the government must choose between revealing his identity and allowing confrontation, or dismissing the charges. Roviaro v. United States, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639. And it is the court, not the prosecutor, who determines the defendant's need for the information. We should no more place the inmate's constitutional rights in the hands of the prison administration's discretion than we should place the defendant's right in the hands of the prosecutor.

Insofar as the Court affirms the judgment of the Court of Appeals I concur in the result. But the command of the Due Process Clause of the Fourteenth Amendment compels me to dissent from that part of the judgment allowing prisoners to continue to be deprived of the right to confront and cross-examine their accusers, and leaving the right to present witnesses in their own behalf in the unreviewable discretion of prison officials.

* * *

Mr. Justice MARSHALL, with whom Mr. Justice BRENNAN joins, dissenting in part.

* * *

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause in prison disciplinary proceedings. I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I fully support the Court's holding that the interest of inmates in freedom from imposition of serious discipline is a "liberty" entitled to due process protection.[1] But, in my view, the content which the Court gives to this due process protection leaves these noble holdings as little more than empty promises. To be sure, the Court holds that inmates are constitutionally entitled to advance written notice of the charges against them and a statement of the evidence relied on, the facts found, and the reasons supporting the

disciplinary board's decision. Apparently, an inmate is also constitutionally entitled to a hearing and an opportunity to speak in his own defense. These are valuable procedural safeguards, and I do not mean for a moment to denigrate their importance.

But the purpose of notice is to give the accused the opportunity to prepare a defense, and the purpose of a hearing is to afford him the chance to present that defense. Today's decision deprives an accused inmate of any enforceable constitutional right to the procedural tools essential to the presentation of any meaningful defense, and makes the required notice and hearing formalities of little utility. Without the enforceable right to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any defense beyond his own word. Without any right to confront and cross-examine adverse witnesses the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest, with each side telling its version of the facts—and, indeed, with only the prisoner's story subject to being tested by cross-examination. In such a contest, it seems obvious to me that even the wrongfully charged inmate will invariably be the loser. I see no justification for the Court's refusal to extend to prisoners these procedural safeguards which in every other context we have found to be among the "*minimum* requirements of due process." Morrissey v. Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484 (1972) (emphasis added).

The Court states that it is "of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." Ante, at 2979. Since the Court is not ordinarily in the business of giving neighborly advice to state correctional authorities, I think it fair to assume that this statement represents the considered judgment of the Court that the Constitution requires that an accused inmate be permitted to call defense witnesses and present documentary evidence. Still, the Court hardly makes this clear, and ends up deferring to the discretion of prison officials to the extent that the right recognized is, as my Brother Douglas demonstrates, post, at 2994–2995, practically unenforceable.

I would make clear that an accused inmate's right to present witnesses and submit other evidence in his defense is constitutionally protected and, if unnecessarily abridged, judicially enforceable. As we said only last Term, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).

> "The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the [hearing body] so it may decide where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 1923, 18 L.Ed.2d 1019 (1967).

See also Morrissey v. Brewer, supra, 408 U.S., at 489, 92 S.Ct., at 2604. In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507–508, 92 L.Ed. 682 (1948). The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard. See Clutchette v. Procunier, 497 F.2d 809, 818 (C.A.9, April 25, 1974); ABA Commission on Correctional Facilities and Services, Survey of Prison Disciplinary Practices and Procedures 19 (1974).

I see no persuasive reason to justify the Court's refusal to afford this basic right to an accused inmate. The majority cites the possible interference with "swift punishment." But how often do we have to reiterate that the Due Process Clause "recognizes higher values than speed and efficiency." Fuentes v. Shevin, 407 U.S. 67, 90–91 n. 22, 92 S.Ct. 1983, 1999, 32 L.Ed.2d 556 (1972). Surely the brief prolongation of disciplinary hearings required to hear the testimony of a few witnesses before reaching what would otherwise seem to be a pre-ordained decision provides no support whatever for refusal to give accused inmates this right. Nor do I see the "obvious potential for disruption" that the majority relies upon in the context of an inmate's right to call *defense* witnesses.

But even if the majority's fear in this regard is justified, the point that must be made clear is that the accused prisoner's right to present witnesses is the constitutional rule and that the needs of prison security must be accommodated within a narrowly limited exception to that rule. The inmate's right to call witnesses should of course be subject to reasonable limitation by the disciplinary board to prevent undue delay caused by an inmate's calling numerous cumulative witnesses or witnesses whose contributions would be of marginal relevance. The right to call a particular witness could also justifiably be limited if necessary to protect a confidential informant against a substantial risk of reprisal. I agree with the Court that there is this much flexibility in the due process requirement. But in my view the exceptions made to the constitutional rule must be kept to an absolute minimum, and each refusal to permit witnesses justified in writing in the disciplinary file, a rule the majority finds "useful" but inexplicably refuses to prescribe. Ante, at 2980. And if prison authorities persist in a niggardly interpretation of the inmates' right to call witnesses, it must ultimately be up to the courts to exercise their great responsibility under our constitutional plan and enforce this fundamental constitutional right.

With respect to the rights of confrontation and cross-examination, the gulf between the majority opinion and my views is much wider. In part, this disagreement appears to stem from the majority's view that these rights are just not all that important. Thus, the Court states—not surprisingly, without citation of authority, other than Mr. Justice White's separate opinion in Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974)—that confrontation and cross-examination "are not rights universally applicable to all hearings." Ante, at 2980. And the Court suggests that while these procedures may be essential in situations where "serious deprivations" like loss of employment are at stake, they are not so essential here. I suppose the majority considers loss of a job to

be a more serious penalty than the imposition of an additional prison sentence—on this record, ranging up to 18 months—which is the effective result of withdrawal of accumulated good time.

I could not disagree more, both with respect to the seriousness of the deprivation involved here and the importance of these rights. Our decisions flatly reject the Court's view of the dispensibility of confrontation and cross-examination. We have held that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." Goldberg v. Kelly, 397 U.S. 254, 269, 90 S.Ct. 1011, 1021, 25 L.Ed.2d 287 (1970). And in Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), we found that the view that cross-examination and confrontation must be permitted whenever "governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings" was one of the "immutable" principles of our jurisprudence —immutable, that is, until today. See also Arnett v. Kennedy, supra, 416 U.S., at 206, 94 S.Ct., at 1669–1670, (dissenting opinion); Chambers v. Mississippi, supra, 410 U.S., at 294–295, 93 S.Ct., at 1045–1046; Morrissey v. Brewer, supra, 408 U.S., at 489, 92 S.Ct., at 2604; In re Gault, 387 U.S. 1, 56–57, 87 S.Ct. 1428, 1458–1459, 18 L.Ed.2d 527 (1967). Surely confrontation and cross-examination are as crucial in the prison disciplinary context as in any other, if not more so. Prison disciplinary proceedings will invariably turn on disputed questions of fact, see Landman v. Royster, 333 F.Supp. 621, 653 (E.D.Va. 1971), and, in addition to the usual need for cross-examination to reveal mistakes of identity, faulty perceptions, or cloudy memories, there is a significant potential for abuse of the disciplinary process by "persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy," Greene v. McElroy, supra, 360 U.S., at 496, 79 S.Ct., at 1413, whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control. See also Davis v. Alaska, 415 U.S. 308, 317, 94 S.Ct. 1105, 1110–1111, 39 L.Ed.2d 347 (1974). I can see no rational means for resolving these disputed questions of fact without providing confrontation and cross-examination.

The majority, however, denies accused prisoners these basic constitutional rights, and leaves these matters for now to the "sound discretion" of prison officials. Since we already know how Nebraska authorities, at least, have chosen to exercise this discretion, the Court necessarily puts its stamp of approval on the State's failure to provide confrontation and cross-examination. I see no persuasive justification for this result. The Court again cites concern for administrative efficiency in support of its holding: "Proceedings would inevitably be longer and tend to unmanageability." Ante, at 2980. I can only assume that these are makeweights, for I refuse to believe that the Court would deny fundamental rights in reliance on such trivial and easily handled concerns.

A more substantial problem with permitting the accused inmate to demand confrontation with adverse witnesses is the need to preserve the secrecy of the identity of inmate informers and protect them from the danger of reprisal. I am well aware of the seriousness of this problem, and I agree that in some circumstances this confidentiality must prevail

over the accused's right of confrontation. "But this concern for the safety of inmates does not justify a wholesale denial of the right to confront and cross-examine adverse witnesses." Clutchette v. Procunier, supra, 497 F.2d, at 819. The need to keep the identity of informants confidential will exist in only a small percentage of disciplinary cases. Whether because of the "inmates' code" or otherwise, the disciplinary process is rarely initiated by a fellow inmate and almost invariably by a correctional officer. I see no legitimate need to keep confidential the identity of a prison guard who files charges against an inmate; indeed, Nebraska, like most States, routinely informs accused prisoners of the identity of the correctional officer who is the charging party, if he does not already know. In the relatively few instances where inmates press disciplinary charges, the accused inmate often knows the identity of his accuser, as, for example, where the accuser was the victim of a physical assault.

Thus, the Court refuses to enforce prisoners' fundamental procedural rights because of a legitimate concern for secrecy which must affect only a tiny fraction of disciplinary cases. This is surely permitting the tail to wag the constitutional dog. When faced with a similar problem in Morrissey v. Brewer, supra, we nonetheless held that the parolee had the constitutional right to confront and cross-examine adverse witnesses, and permitted an exception to be made "if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed." 408 U.S., at 487, 92 S.Ct., at 2603. In my view, the same approach would be appropriate here.

Aside from the problem of preserving the confidentiality of inmate informers, the Court does not require confrontation and cross-examination of known accusers, whether inmates or guards, and indeed does not even require cross-examination of adverse witnesses who actually testify at the hearing. Yet, as The Chief Justice recently observed, "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested," and "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." Davis v. Alaska, supra, 415 U.S., at 316, 94 S.Ct., at 1110. I see little basis for the Court's refusal to recognize the accused inmate's rights in these circumstances. The Court apparently accepts the State's arguments that there is a danger that such cross-examination will produce hostility between inmate and guard, or inmate and inmate, which will eventually lead to prison disruption; or that cross-examination of a guard by an inmate would threaten the guard's traditional role of absolute authority; or that cross-examination would somehow weaken the disciplinary process as a vehicle for rehabilitation.

I do not believe that these generalized, speculative, and unsupported theories provide anything close to an adequate basis for denying the accused inmate the right to cross-examine his accusers. The State's arguments immediately lose most of their potential force when it is observed that Nebraska already permits inmates to question the correctional officer who is the charging party with respect to the charges. See, ante, at 2980 n. 17. Moreover, by far the greater weight of correctional authority is that greater procedural fairness in disciplinary proceedings,

including permitting confrontation and cross-examination, would enhance rather than impair the disciplinary process as a rehabilitative tool. President's Commission on Law Enforcement and The Administration of Justice, Task Force Report: Corrections 13, 82–83 (1967); ABA Survey, supra, at 20–22; see Landman v. Royster, supra, 333 F.Supp., at 653.

> "Time has proved * * * that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling among those whom it contains that they are being treated unfairly." Palmigiano v. Baxter, supra, 487 F.2d, at 1283.

As The Chief Justice noted in Morrissey v. Brewer, supra, 408 U.S., at 484, 92 S.Ct., at 2601, 2602, "fair treatment * * * will enhance the chance of rehabilitation by avoiding reactions to arbitrariness."

Significantly, a substantial majority of the States do permit confrontation and cross-examination in prison disciplinary proceedings, and their experience simply does not bear out the speculative fears of Nebraska authorities. See ABA Survey, supra, at 21–22. The vast majority of these States have observed "no noticeable effect on prison security or safety. Furthermore, there was general agreement that the quality of the hearings had been 'upgraded' and that some of the inmate feelings of powerlessness and frustration had been relieved." Id., at 21. The only reported complaints have been, not the theoretical problems suggested by petitioners, but that these procedures are time-consuming and have slowed down the disciplinary process to some extent. These are small costs to bear to achieve significant gains in procedural fairness.

Thus, in my view, we should recognize that the accused prisoner has a constitutional right to confront and cross-examine adverse witnesses, subject to a limited exception when necessary to protect the identity of a confidential inmate informant. This does not mean that I would not permit the disciplinary board to rely on written reports concerning the charges against a prisoner. Rather, I would think this constitutional right sufficiently protected if the accused had the power to compel the attendance of an adverse witness so that his story can be tested by cross-examination. See Clutchette v. Procunier, supra, 497 F.2d, 818; Palmigiano v. Baxter, supra, 487 F.2d, at 1290. Again, whenever the right to confront an adverse witness is denied an accused, I would require that this denial and the reasons for it be noted in writing in the record of the proceeding. I would also hold that where it is found necessary to restrict the inmate's right of confrontation, the disciplinary board has the constitutional obligation to call the witness before it in camera and itself probe his credibility, rather than accepting the unchallenged and otherwise unchallengeable word of the informer. See Palmigiano v. Baxter, supra, 487 F.2d, at 1290; cf. Birzon v. King, 469 F.2d 1241 (C.A.2 1972). And, again, I would make it clear that the unwarranted denial of the right to confront adverse witnesses, after giving due deference to the

judgment of prison officials and their reasonable concerns with inmate safety and institutional order, would be cause for judicial intervention.

The Court next turns to the question of an accused inmate's right to counsel, and quotes a long passage from our decision last Term in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), in support of its conclusion that appointed counsel need not be provided and retained counsel need not be permitted in prison disciplinary proceedings at this time. The Court seemingly forgets that the holding of *Scarpelli* was that fundamental fairness requires the appointment of counsel in some probation revocation or parole revocation proceedings and overlooks its conclusion that

> "the effectiveness of the rights guaranteed by *Morrissey* may in some circumstances depend on the use of skills which the probationer or parolee is unlikely to possess. Despite the informal nature of the proceedings and the absence of technical rules of procedure or evidence, the unskilled or uneducated probationer or parolee may well have difficulty in presenting his version of a disputed set of facts where the presentation requires the examining or cross-examining of witnesses or the offering or dissecting of complex documentary evidence." Id., at 786–787, 93 S.Ct., at 1761–1762.

Plainly, these observations are at least as appropriate in the context of prison disciplinary proceedings. We noted in Johnson v. Avery, 393 U.S. 483, 487, 89 S.Ct. 747, 749–750, 21 L.Ed.2d 718 (1969), that "penitentiaries include among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited"; the same considerations provide the motivating force for the holding today in Part VIII of the Court's opinion.

In view of these considerations, I think it is clear that, at least in those serious disciplinary cases meeting the *Scarpelli* requirements, see 411 U.S., at 790, 93 S.Ct., at 1763, 1764, any inmate who seeks assistance in the preparation of his defense must be constitutionally entitled to have it. But, although for me the question is fraught with great difficulty, I agree with the Court that it would be inappropriate at this time to hold that this assistance must be provided by an appointed member of the bar.[2] There is considerable force to the argument that counsel on either side would be out of place in these disciplinary proceedings, and the practical problems of providing appointed counsel in these proceedings may well be insurmountable. But the controlling consideration for me is my belief that, in light of the types of questions likely to arise in prison discipline cases, counsel-substitutes should be able to provide sufficiently effective assistance to satisfy due process. At least 41 States already provide such counsel-substitutes, ABA Survey, supra, at 22, reflecting the nearly

universal recognition that for most inmates, this assistance with the preparation of a defense, particularly as disciplinary hearings become more complex, is absolutely essential. Thus, I would hold that any prisoner is constitutionally entitled to the assistance of a competent fellow inmate or correctional staff member—or, if the institution chooses, such other alternatives as the assistance of law students—to aid in the preparation of his defense.

Finally, the Court addresses the question of the need for an impartial tribunal to hear these prison disciplinary cases. We have recognized that an impartial decision-maker is a fundamental requirement of due process in a variety of relevant situations, see, e.g., Morrissey v. Brewer, supra, 408 U.S., at 485–486, 92 S.Ct., at 2602–2603; Goldberg v. Kelly, supra, 397 U.S., at 271, 90 S.Ct., at 1022, and I would hold this requirement fully applicable here. But in my view there is no constitutional impediment to a disciplinary board comprised of responsible prison officials like those on the Adjustment Committee here. While it might well be desirable to have persons from outside the prison system sitting on disciplinary panels, so as to eliminate any possibility that subtle institutional pressures may affect the outcome of disciplinary cases and to avoid any appearance of unfairness, in my view due process is satisfied as long as no member of the disciplinary board has been involved in the investigation or prosecution of the particular case, or has had any other form of personal involvement in the case. See Clutchette v. Procunier, supra, 497 F.2d, at 820; United States ex rel. Miller v. Twomey, 479 F.2d 701, 716, 718 (C.A.7 1973); Landman v. Royster, supra, 333 F.Supp., at 653. I find it impossible to determine on the present record whether this standard of impartiality has been met, and I would leave this question open for the District Court's consideration on remand.

Thus, it is my conclusion that the Court of Appeals was substantially correct in its holding that the minimum due process procedural requirements of Morrissey v. Brewer are applicable in the context of prison disciplinary proceedings. To the extent that the Court is willing to tolerate reduced procedural safeguards for accused inmates facing serious punishment which do not meet the standards set out in this opinion, I respectfully dissent.

APPENDIX B

APPENDIX B

REPLICA

Act No. 140
Public Acts of 1979
Approved by Governor
November 7, 1979

STATE OF MICHIGAN
80TH LEGISLATURE
REGULAR SESSION OF 1979

Introduced by Reps. Virgil C. Smith, Henry, Dressel, Ballantine, Padden, Hollister and Vaughn.

ENROLLED HOUSE BILL No. 4480

AN ACT to amend Act No. 232 of the Public Acts of 1953, entitled "An act to revise, consolidate and codify the laws relating to probationers and probation officers as herein defined, to pardons, reprieves, commutations and paroles, to the administration of penal institutions, and the supervision and inspection of local jails and houses of correction; to create a state department of corrections, and to prescribe its powers and duties; to provide for the transfer to and vesting in said department of powers and duties vested by law in certain other state boards, commissions and officers, and to abolish certain boards, commissions and offices the powers and duties of which are hereby transferred; to prescribe penalties for the violation of the provisions of this act; and to repeal all acts and parts of acts inconsistent with the provisions of this act," as amended, being sections 791.201 to 791.283 of the Compiled Laws of 1970, by adding chapter IIIA.

The People of the State of Michigan enact:

Section 1. Act No. 232 of the Public Acts of 1953, as amended, being sections 791.201 to 791.283 of the Compiled Laws of 1970, is amended by adding chapter IIIA to read as follows:

CHAPTER IIIA

Sec. 51. (1) There is created within the department a hearings division. The division shall be under the direction and supervision of the hearings administrator who is appointed by the director of the department.

(2) The hearings division shall be responsible for each prisoner hearing which the department conducts which may result in the loss by a prisoner of either a right or significant privilege, including but not limited to any 1 or more of the following matters:

(a) An infraction of a prison rule which may result in punitive detention or the loss of good time.

(b) A security classification which may result in the placement of a prisoner in administrative segregation.

(c) A special designation for the community placement of a person under the jurisdiction of the department.

(3) Each hearings officer of the department shall be under the direction and supervision of the hearings division. Each hearings officer hired by the department after October 1, 1979, shall be an attorney.

Sec. 52. The following procedures shall apply to each prisoner hearing conducted pursuant to section 51(2):

(a) The parties shall be given an opportunity for an evidentiary hearing without undue delay.

(b) The parties shall be given reasonable notice of the hearing.

(c) If a party fails to appear at a hearing after proper service of notice, the hearings officer, if an adjournment is not granted, may proceed with the hearing and make a decision in the absence of the party.

(d) Each party shall be given an opportunity to present evidence and oral and written arguments on issues of fact.

(e) A prisoner may not cross-examine a witness, but may submit rebuttal evidence. A prisoner may also submit written questions to the hearings officer to be asked of a witness or witnesses. The hearings officer may present these questions to and receive answers from the witness or witnesses. The questions presented and the evidence received in response to these questions shall become a part of the record. A hearings officer may refuse to present the prisoner's questions to the witness or witnesses. If the hearings officer does not present the questions to the witness or witnesses, the reason for the decision not to present the questions shall be entered into the record.

(f) The hearings officer may administer an oath or affirmation to a witness in a matter before the officer, certify to the official acts, and take depositions.

(g) The hearings officer may admit and give probative effect to evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs. Irrelevant, immaterial, or unduly repetitions evidence may be excluded. The reason for the exclusion of the evidence shall be entered into the record. An objection to an offer of evidence may be made and shall be noted in the record. The hearings officer, for the purpose of expediting a hearing and if the interest of the parties are not substantially prejudiced by the actions, may provide for the submission of all or part of the evidence in written form.

(h) Evidence, including records and documents in possession of the department of which the hearings officer wishes to avail himself or herself, shall be offered and made a part of the record. A hearings officer may deny access to the evidence to a party if the hearings officer determines that access may be dangerous to a witness or disruptive of normal prison operations. The reason for the denial shall be entered into the record.

(i) The hearings conducted under this chapter shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a hearings officer, the department shall determine the matter as a part of the record of the hearing, and the determination shall be subject to judicial review at the conclusion of the hearing. If a hearings officer is disqualified or it is impracticable for the hearings officer to continue the hearing, another hearings officer may be assigned to continue the hearing unless it is shown that substantial prejudice to a party will result from the continuation.

(j) Except as otherwise authorized by subdivision (e), a hearings officer, after the notice of the hearing is given, shall not communicate, directly or indirectly, in connection with an issue of fact, with a person or party, except on notice and opportunity for all parties to participate. A hearings officer may communicate with other members of the department and may have the aid and advice of the department employees other than employees which have been or are engaged in investigating or prosecuting functions in connection with the hearing or a factually related matter which may be the subject of a hearing.

(k) A final decision or order of a hearings officer in a hearing shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact, and shall state any sanction to be imposed against a prisoner as a direct result of a hearing conducted under this chapter. The final decision shall be made on the basis of a preponderance of the evidence presented. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by a party to the proceeding and as supported by and pursuant to competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to the prisoner. The final disposition shall be posted for the information of the reporting officer.

Sec. 53. (1) The department shall prepare an official record of a hearing which shall include:

(a) Questions and offers of proof, objections, and rulings on the objections.

(b) Matters officially noticed, except a matter so obvious that a record would not serve a useful purpose.

(c) A decision or order by the hearings officer.

(2) The official record shall not include evidence, access to which a hearings officer has determined would be disruptive of normal prison operations. However, on an appeal from a final decision made to a court of this state, that evidence shall be included in the official record.

Sec. 54. (1) The department may order a rehearing of a matter which was the subject of a hearing. The order may be made on the department's own motion or on request of a party.

(2) If, for justifiable reasons, the record of testimony made at the hearing is found by the department to be inadequate for purposes of judicial review, the department on its on motion or on request of a party shall order a rehearing.

(3) A request for a rehearing shall be filed within 30 days after the final decision or order is issued after the initial hearing. A rehearing shall be conducted in the same

manner as an original hearing. The evidence received at the rehearing shall be included in the record for department reconsideration and for judicial review. A decision or order may be amended or vacated after the rehearing.

(4) The department shall promulgate the rules necessary to implement this chapter within 180 days after the effective date of this chapter.

Sec. 55. A prisoner aggrieved by a final decision or order of a hearings officer or of the department may file a petition for judicial review of the decision or order pursuant to chapter 6 of Act No. 306 of the Public Acts of 1969, as amended, being sections 24.301 to 24.306 of the Michigan Compiled Laws.

Section 2. The procedures provided for in sections 52, 53, 54, and 55 shall take effect on February 1, 1980.

Section 3. This amendatory act shall not take effect unless House Bill No. 4105 of the 1979 regular session of the legislature is enacted into law.

This act is ordered to take immediate effect.

/s/
Clerk of the House of Representatives.

/s/
Secretary of the Senate.

Approved _____

_____
Governor.

PS-24

MICHIGAN DEPARTMENT OF CORRECTIONS

POLICY DIRECTIVE

CSO-216 Rev. 3/82

EFFECTIVE DATE	NUMBER
8-31-87	PD-DWA-60.01

ACA STANDARDS

2-4345 through 2-4367

SUBJECT

PRISONER DISCIPLINARY POLICY

PAGE 1 OF 11

SUPERSEDES: PD-DWA-60.01 (2-18-85)

OBJECTIVE: To provide a means of maintaining discipline and enforcing necessary rules within correctional facilities; to ensure that prisoners are provided fair, timely, and impartial disposition of charges alleging violations of rules, based on proceedings that conform to state statutes, administrative rules, and due process requirements for disciplinary matters; and to set forth certain other possible consequences of misconduct.

APPLICATION: All prisoners and staff.

POLICY: DEFINITIONS

For purposes of this policy directive, the following definitions shall apply:

1. Area of Control: The area over which a prisoner has control and for which s/he will be held responsible, including: (a) assigned room or cell, including door track; (b) if assigned to a multiple occupancy room or area, that part of the room assigned to the prisoner, including bed, locker, and surrounding wall, floor and ceiling space; (c) any personal property belonging to the prisoner, unless it has been reported as stolen; (d) area of work or school assignment for which prisoner is responsible. A prisoner will be presumed to have possession of items found in his or her area of control and has the burden of proof in rebutting this presumption.

2. Mental Illness: A substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality or the ability to cope with the ordinary demands of life.

3. Not Responsible Due To Mental Illness: Due to mental illness: (1) Lacks substantial capacity to know right from wrong; or (2) Unable to conform conduct to departmental rules.

4. Toplock: Restriction of a prisoner to his/her own cell, room, or bunk and bunk area. "Bunk area" is that floor area next to the prisoner's bunk which extends to the adjacent bunks on all sides. If a prisoner is housed in a multiple occupancy cell or room, toplock may consist of

placement in a cell/room which is designated as a toplock cell/room. If placed in such a cell/room, the prisoner shall be given the same access to his/her property which would be provided if housed in his/her own cell/room and shall be treated in all other respects as described in this definition. A prisoner on toplock status shall not leave his/her cell, room or bunk area for any reason without specific authorization from the appropriate staff person. The prisoner may be deprived of use of his/her television, radio and tape player while on toplock status as provided in the institution's operating procedure. Staff may authorize a prisoner on toplock status to go to the dining room, and to attend college, school or work assignments, or other specified activities. Staff shall authorize release from toplock for showers (at least three times weekly), visits, medical care, and law library, unless law books are brought to the prisoner. Also, a prisoner on toplock shall have a minimum of one-hour per day of out-of-cell activity, which may include visits, meals, and other required activities.

General Information

Alleged violations of written rules are classified as "major misconduct" or "minor misconduct" and are further defined on the list attached to this policy. Misconduct reports may be written only for the violations which are on the list.

The structure of the disciplinary process is one of progressive sanctions. The least drastic method to ensure compliance with the rules should be used. Counseling and summary action should be attempted to correct minor violations. However, when rule infractions require more formal resolution, a misconduct report may be written. A major misconduct report shall be written if the behavior constitutes a non-bondable major misconduct charge. If a misconduct report is written, it must be prepared as soon as possible after the violation is observed or reported. Since the possible sanctions are more severe for major misconduct, greater procedural safeguards are provided for those charged with such violations.

Summary Punishment

The reporting employee may impose summary punishment which does not exceed 24 hours toplock, 8 hours extra duty, or one week loss of privileges for minor misconduct if the prisoner signs a waiver of her/his right to a minor misconduct hearing. Any non-dangerous contraband must be confiscated in conjunction with a summary punishment and turned over to appropriate institutional staff for proper disposition. A record of this action must be on file with the deputy, assistant deputy or other supervisory level person. If the prisoner does not sign an offered summary action, the resultant misconduct report shall be processed and heard as a "minor" regardless of the charge or the prisoner's disciplinary record.

Minor Misconduct

A prisoner charged with minor misconduct shall have a right to the following:

1. Advance written notice of the charge unless s/he waives this in favor of an informal summary action.

2. A hearing conducted in compliance with the procedures set forth in R 791.3310 by an employee designated by the facility head or area manager. The employee designated as the hearing officer shall have had no prior direct involvement in the matter at issue.

3. To be present at the hearing if s/he chooses to attend. If the prisoner chooses not to attend, it shall be verified on the hearing report that the prisoner was notified of the hearing and chose not to attend. In all cases, the prisoner shall receive a copy of the hearing officer's written decision.

4. An appeal of the hearing officer's decision to supervisory staff at the level of assistant deputy, camp supervisor or community program supervisor. The appeal must be filed within 24 hours of receipt of the hearing officer's written decision.

The hearing officer in a minor misconduct case shall ensure that all relevant evidence has been presented and that the prisoner has had adequate time and opportunity to prepare his or her defense. A hearing investigator is not available for minor misconduct but the hearing officer shall make a reasonable investigation of the charges and assist those prisoners who have limited intelligence or education in presenting a defense. The decision of the hearing officer shall be based on a preponderance of the evidence. A waiver of a minor misconduct hearing may be accepted by either the hearing officer or reviewing officer. A minor misconduct hearing officer may impose sanctions, upon a finding of guilt, as set forth in R 791.5505(4).

Property determined to be nondangerous contraband at a minor misconduct hearing shall be confiscated and turned over to appropriate staff for disposition. (See PD-BCF-53.01 - Prisoner Personal Property Control.)

Unless a minor charge is part of a major misconduct hearing, minor misconduct hearing reports will not be filed in the prisoner's files. However, a list of minor charges of which the prisoner has been found guilty shall be kept in the field file (for community residential programs) or the counselor's file for control and monitoring purposes and to provide the basis for establishing a pattern of minor reports if other action becomes necessary. The minor misconduct report and hearing report shall not be retained.

Major Misconduct

Major misconduct which is also a felony shall be referred to the appropriate law enforcement agency as well as being pursued through the departmental disciplinary process. The initiation of the departmental disciplinary process may be delayed if it would interfere with the criminal investigation or prosecution. In all cases of assault, forfeiture of good time or disciplinary credits shall be ordered, in accordance with appropriate statutes and administrative rules, if the prisoner is found guilty of the misconduct.

Prisoners charged with major misconduct are entitled to a formal hearing, as set forth in R 791.3315, which shall include the following:

1. Review

A reviewing officer shall conduct a preliminary review with the prisoner of every major misconduct report. A reviewing officer shall be a supervisory level employee in institutions of the Bureau of Correctional Facilities (BCF) and an employee specifically designated by procedure in the Bureau of Field Services (BFS). In all BCF institutions, this review shall be conducted within 24 hours after the report is written, unless there is good cause for delay, as determined by the hearing officer. If the report is not reviewed within that time period, and there is no good cause for delay, it shall be dismissed by the hearing officer. This review is the beginning of the formal processing and investigation of the misconduct report, and shall include: (a) examination of the report to determine that it is appropriate and correct; (b) reading of the report to the prisoner; (c) advising the prisoner of his/her right to witnesses, relevant documents, and a hearing investigator; and, (d) ensuring that the prisoner receives a copy of the misconduct report.

After this review, the reviewing officer shall order the prisoner to be confined in segregation or on toplock pending a formal hearing if the charge is nonbondable (as designated on the attached list) or if there is a reasonable showing that failure to do so would constitute a threat to the security or good order of the facility. The reason given for confining a prisoner for a bondable offense must relate to the specific circumstances of the incident. In other words, it must state why this case differs from other instances of this charge and thus presents a threat to security. Conclusory phrases such as "necessary for the good order of the facility" are not acceptable as reasons. The reason must state the facts underlying the charge which make it necessary to lock up the accused prisoner for an offense which policy has already determined can normally be safely handled as a bondable matter.

Whenever a prisoner is placed in segregation or on toplock for a charge or charges which are by policy bondable, and an adequate reason is not given on the misconduct report for this action, the hearing officer shall report the matter to the facility head and to the Hearings Administrator. The facility head (BCF) and area manager (BFS) shall ensure that all employees comply with this policy on bondable charges.

If a prisoner is placed in segregation or on toplock, the exact time and date of placement shall be noted on the misconduct report by the reviewing officer who shall also immediately notify the prisoner's housing unit of this placement. The person notified in the housing unit shall be indicated on the misconduct report. In BFS, where a prisoner may be confined to a local jail pending a hearing, the date and time of placement in the jail or of notification of such placement to the Department shall be noted on the misconduct report.

2. Adherence to Time Limits

The formal hearing must be held within the time limits set forth in R 791.5501. (NOTE: The day on which a prisoner is locked up or on which the report is reviewed with him/her is not counted in the time limit; however, the day on which the hearing occurs is counted.)

3. Investigation

The prisoner may submit written questions to be asked of a witness. These questions shall be submitted to the hearing investigator, who shall obtain answers to all questions which are relevant, not repetitious, and not a threat to the security of the facility. The hearing investigator may initially determine if a question should be asked or a witness contacted. However, the hearing officer has the final authority and may require the hearing investigator to obtain an answer to a question if s/he determines that an answer is needed. The hearing officer also may interview a witness at the hearing if s/he determines this is necessary and not unduly hazardous to the safety of the facility, staff, or prisoners. All hearing investigator reports and written witness statements must be either typewritten or done in black ink to facilitate copying of records on appeal.

The hearing officer shall ensure that all relevant evidence and testimony have been presented, and must return the matter to the hearing investigator for further investigation if needed. The hearing officer shall also ensure that

the prisoner has had adequate time and opportunity to prepare a defense and that a reasonable and impartial investigation has been conducted. All staff members shall cooperate fully with the hearing officer and hearing investigator and shall comply with all requests for information or assistance necessary to conduct a proper hearing, as determined by the hearing officer.

If a prisoner, the hearing investigator or the hearing officer raises the issue that the prisoner may not be responsible for the misconduct due to mental illness, a request for information on that issue shall be directed to the following:

(A) If the prisoner is in a Chronic Care Unit (CCU) or a protective environment, questions shall be directed to the treatment team;

(B) For all other prisoners, questions shall be directed to psychological services.

It shall be the responsibility of the facility head to ensure that all hearing investigator reports are kept in designated hearing investigator files at the facility where the hearing is held. They should be kept in chronological order by date of hearing, and in order by prisoner number, so the record can be retrieved if necessary for an appeal. A copy of any confidential information (as determined by the hearing officer) must be kept with the hearing investigator's report but should be clearly marked. These confidential statements are exempt from disclosure under the Freedom of Information Act. All photographs should be attached to the hearing investigator reports. The reports shall be retained for at least two years after the date of the hearing. If a lawsuit is filed, the hearing investigator's report shall be retained until the litigation is completed. A facility will ordinarily be alerted that a lawsuit has been filed when a request is made by the Hearings Division for a copy of the investigator's report. Physical evidence, other than photographs, may be kept in a separate place, but it must be retained for at least 90 days after the hearing, or until litigation is completed if a lawsuit is filed, by the person holding that evidence.

4. Formal Hearing and Sanctions

The hearing shall be conducted by a hearing officer under the direction of the Hearings Division. In making a decision as to whether a prisoner is guilty of a charge, the hearing officer shall consider only that evidence which

relates to the specific charge or charges or their lesser included violations. Decisions shall be based upon a preponderance of evidence. The formal hearing is not an adversary proceeding but is rather a fact-finding process in which all parties involved have a responsibility to reveal all relevant evidence whether supportive or damaging to the person charged. Fairness is to be the paramount consideration of this hearing process.

Upon a finding of guilt, the hearing officer shall impose one or more of the sanctions for major misconduct, as set forth in R 791.5505. Hearing officers may consider all relevant information in determining a sanction, including the prisoner's prior record of misconducts. It is also proper to consider evidence of mitigating or compounding circumstances in determining the sanction. A hearing officer may give credit for time spent in segregation or on toplock pending a hearing, but is not required to do so. The time given by the hearing officer during which the sanction is to be served shall not be changed by the institution.

Prior to a major misconduct hearing, in all facilities where detention may be served, each prisoner to be heard shall have been reviewed under R 791.5510 pursuant to a procedure established by the Bureau of Health Care Services. As stated in that rule, a prisoner who has a history of significant psychiatric or medical problems shall not be placed in punitive detention without prior review by the medical director or the psychiatric staff. The hearing officer shall be notified whether the prisoner has a history of significant psychiatric or medical problems and, if so, whether the prisoner's medical and psychiatric care needs can be met in detention. If it is determined by the medical director (or designated physician) or psychiatric staff that those needs cannot be met in detention, the hearing officer shall not give the sanction of detention. If detention may be served as long as specific health or psychiatric services are provided, this shall be noted by the medical director (or designated physician) or psychiatric staff. It shall be the responsibility of the segregation unit staff to ensure that any prescribed health care or psychiatric needs are met. They shall be entered into the detention log book, which shall also reflect, by signature of staff, that the special conditions have been carried out.

If a prisoner is given the sanction of loss of privileges, the hearing officer shall complete the Loss of Privileges form (CAJ-113) and shall indicate which privileges shall be withheld. Only those privileges listed on the form may be

affected by this sanction. Loss of visiting privileges shall be included only if the misconduct relates to the visitor(s) named on the form or occurred in connection with a visit. In no case may a prisoner be deprived of both indoor and outside exercise (yard) for more than 30 consecutive days without a break of 7 days.

All major misconduct hearings which result in a finding of guilt on one or more of the charges at issue at the hearing shall be entered into CMIS by the institution where the hearing is conducted. This entry should ordinarily be done by the end of the next business day following the hearing.

5. Not Guilty Findings

A finding of not guilty or dismissal shall result in no sanction being imposed and no report filed in the prisoner's record files. However, a copy of the misconduct report and misconduct hearing report shall be retained with the hearing investigator report files to assist in responding to requests for rehearing and litigation. It shall be the responsibility of the facility head to ensure that these reports are properly retained and are not used against a prisoner. These reports shall be kept for two years. In addition, a copy of the misconduct report and misconduct hearing report for each case where all charges are not guilty or dismissed shall be sent to the Hearings Administrator by the facility's hearings coordinator or other staff of the facility who are responsible for processing misconduct hearing reports. The information from these reports will be entered into CMIS for research and reporting purposes but will not be accessible by users of CMIS.

The hearing records for not guilty or dismissed charges must be reviewed by designated staff to monitor for any errors which have been made. Complaints as to hearing officer performance shall be brought to the attention of the Hearings Administrator or the Hearing Officer Supervisor.

Special Provisions for Psychiatric Patients and Prisoners in a CCU

A prisoner who is admitted as a patient in the Riverside Psychiatric Center, the psychiatric unit of the Duane Waters Hospital and the Department of Mental Health's Center for Forensic Psychiatry shall not be subject to the disciplinary process. However, the patient's behavior and the immediate therapeutic response must be thoroughly documented in the priso-

ner's medical file to ensure that the safety of the prisoner and others is not jeopardized by lack of knowledge of a serious incident. Such incidents shall be discussed in the patient's discharge summary and other appropriate reports to ensure that they are brought to the attention of institutional staff when the prisoner is no longer an inpatient and shall be included in the parole eligibility report.

An employee who observes a major misconduct violation by a prisoner housed in a CCU shall take necessary emergency action to prevent the prisoner from engaging in behavior which is dangerous to self, others or property, and shall confiscate any dangerous or contraband items. However, the prisoner shall not be placed in segregation or on toplock pending a hearing. If necessary, the prisoner shall be placed in medical seclusion or restraints pursuant to applicable policies governing restraints for psychiatric patients. Immediately thereafter, the employee, without informing the prisoner, shall prepare a misconduct report and submit it to the treating psychiatrist or treatment team to determine if the prisoner is responsible for the behavior. The misconduct report, however, must be reviewed within 24 hours, as set forth elsewhere in this policy. If the prisoner is determined to be not responsible, the misconduct report will be destroyed and the behavior will be addressed therapeutically. If this occurs, the procedures described above for prisoners in a psychiatric hospital shall be followed to ensure that the behavior is documented.

If the prisoner is found to be responsible for his/her behavior, the treating psychiatrist shall notify the hearing officer of the responsibility determination and whether the patient's medical and psychiatric care needs can be met in detention. If those needs can be met, the hearing officer may give a sanction of detention.

Prisoners in a CCU who are given loss of privileges as a sanction shall not be subject to the list described elsewhere in this policy (CAJ-113). Rather, only the following privileges may be withheld:

(1) Regular exercise yard;

(2) Visits in the institution's visiting area;

(3) Use of the weight pit;

(4) Hobbycraft;

(5) Library (General Library only, not Law Library);

(6) Gym activities.

The hearing officer shall indicate on the misconduct hearing report which privileges are lost. If all of the above privileges are to be withheld, then the hearing officer need only fill in the number of days the sanction will run.

Major Misconduct Appeals

If either the prisoner or the institution head disagrees with the results of a hearing, they may submit a request for rehearing. That request must be submitted within 30 days after a copy of the hearing report is received. The request for rehearing must be submitted to the Hearings Administrator on the Request for Rehearing form (CSH-418), and shall be accompanied by a copy of the misconduct report and misconduct hearing report. A departmental request for rehearing must be approved and signed by the warden of the institution or by the Assistant Deputy Director for Community Programs.

A rehearing shall be ordered if any of the following occurs:

1. The record of testimony made at the hearing is inadequate for judicial review.

2. The hearing was not conducted pursuant to applicable statutes or policies and rules of the Department and the departure from the statute, rule, or policy resulted in material prejudice to either party.

3. The prisoner's due process rights were violated.

4. The decision of the hearing officer is not supported by competent, material, and substantial evidence on the record as a whole.

5. The hearing officer was personally biased in favor of either party.

A rehearing also may be ordered by the Hearings Administrator on her/his own motion.

If the request for rehearing is denied, or the prisoner is not satisfied with the results of a rehearing, the prisoner may appeal to State Circuit Court, as set forth in MCLA 791.255.

Other Actions Resulting From Misconduct

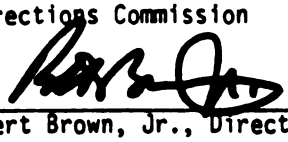
In addition to the sanctions imposed by the hearing officer, a prisoner who is found guilty of a major misconduct violation may be referred to the institution head for forfeiture of earned good time or disciplinary credits pursuant to R 791.5513, or a

notice of intent to the prisoner to not grant special good time or special disciplinary credits. This referral shall be made by a staff member designated by the institution head. A prisoner shall automatically not earn the disciplinary credits or good time which would have been earned during any month in which s/he commits a major misconduct violation which subsequently results in a finding of guilt.

The prisoner who is found guilty of misconduct may also be referred to other appropriate staff or services, such as a psychological or psychiatric evaluation, counseling, program classification committee, or security classification. All prisoners who are found guilty of a nonbondable major misconduct shall be reviewed by the Security Classification Committee to determine if a higher level of security is required, and shall be rescreened for appropriate risk classification pursuant to policy.

Reclassification to administrative segregation based solely upon major misconduct guilty findings may be done using the Security Reclassification Notice (CSO-423); an additional hearing is not required.

AUTHORITY: MCLA 24.207(k); 791.203; 791.206; 791.251 et seq.; and 800.33. Administrative Rules 791.3301-.3320; 791.5501-.5513. Corrections Commission

APPROVED:  8/7/87

Robert Brown, Jr., Director — Date

RB:MV:gs
7-20-87

PREPARED BY: Marjorie Van Ochten, Hearings Administrator

MAJOR AND MINOR MISCONDUCT

Following are descriptions of prisoner behavior which is prohibited and subject to disciplinary sanctions. The left-hand column lists and defines the violations; any behavior that fits the definition is misconduct. In the right-hand column are specific examples of behavior fitting under the rule violation. These are just examples; other actions that fit the violation definition are also misconduct even though they are not mentioned in the right-hand column. The violations are divided into major and minor misconduct.

In addition to the violations which follow, three other kinds of charges are possible: accomplice, attempt, or conspiracy to commit a specific violation.

1) ACCOMPLICE - A prisoner who assists another to commit a specific misconduct or, after it is committed, conceals the violation from the authorities. The charge should be written as "Accomplice to Assault," for example, and the report must describe what the prisoner allegedly did. Examples of being an accomplice include: "jiggering," holding down a victim, allowing use of cell/room for commission of a violation.

2) ATTEMPT - A prisoner intends to commit a specific rule violation and does something towards committing it, even though s/he may not have succeeded. (Note, however, that attempted assault and battery should always be charged as threatening behavior.)

3) CONSPIRACY - A prisoner intends to commit a specific violation and agrees with at least one other person to commit the violation. No action is necessary.

Many rule violations necessarily include other less serious violations. A lesser included violation would contain some, but not all, elements of the greater charge. For example, the "lesser included" violations of escape are: attempted escape, out of place, and temporary out of place. Being insolent to an officer is a lesser included violation of threatening behavior; creating a disturbance is a lesser included violation of inciting to riot. If a prisoner is charged with misconduct, and the evidence does not support the particular violation charged, but does establish a lesser included violation, the hearing officer has the authority to find the prisoner guilty of the lesser included violation.

Violations marked with an asterisk (*) are mandatory "nonbondable" charges, except that the reviewing officer may at his/her discretion place a prisoner who is charged with escape on bond if the escape charge was incurred at an institution of a lower security level than the one where the prisoner is now incarcerated, e.g., a prisoner who escapes from CRP or a camp, and is returned to a medium or higher level of security, may be placed on bond status pending his/her hearing if the reviewing officer determines that s/he is not a threat to security at the present custody level if placed on bond. All charges not marked with an asterisk are normally bondable offenses.

CMIS CODE (See Note Below)	MAJOR RULE VIOLATIONS	COMMON EXAMPLES
001 * (Escape from minimum or community custody) 050 (escape from secure facility)	Escape Leaving or failing to return to lawful custody without authorization and with the intent to remain away. Failure to return from furlough or pass within two hours after the designated time, or within 24 hours if assigned to community residential programs.	Leaving from hospital trip or while housed at hospital; hiding from authorities, even if still on prison property, would be attempted escape Unauthorized change of approved furlough destination.
002	Felony Any act that would be a felony under state law is also a major misconduct violation. Reference shall be made to the specific statutory citation in all cases where this charge is alleged.	Breaking and entering - MCLA 750.110. (NOTE: Use this charge only if there is no other specific violation which is applicable.)
010 *	Homicide Causing the death of another person by any means.	
011 * (prisoner victim) 015 (staff victim) 016 (other victim)	Assault and Battery Physical attack on, or intentional, non-consensual touching of, another person done either in anger or with the purpose of abusing or injuring another; physical resistance of or physical interference with an employee. Injury is not necessary, but contact is.	Attack by one or more persons; striking with feces or other objects; spitting on another person. (Note that the victim of an assault and battery should not be charged with a violation of this rule.)
012 *	Threatening Behavior Words, actions, or other behavior which expresses an intent to injure or physically abuse and which intends to place another in fear of being physically harmed, assaulted or physically abused. Such misconduct includes attempted assault and battery.	Threats of sexual assault made by one prisoner to another prisoner; writing threatening letters to another person; threats made to a third person which are intended to place the person threatened in fear of harm.
013 *	Sexual Assault Sexual penetration of, or sexual contact with, another person without that person's consent; non-consensual physical contact for sexual purposes.	Rape; intentional touching of sexual area (e.g., buttocks, breasts, genitals) without consent; kissing or embrace without consent of one who is kissed or embraced.

NOTE: The first number of the code for Accomplice to any rule violation should be 1, for Attempt 2, and for Conspiracy 3 (e.g., Attempted Escape would be coded 201).

*Non-bondable.

014	*	Fighting Physical confrontation between two or more persons, including a swing and miss, done in anger or with intent to injure.	Fight between prisoners, whether with fists, broom handles or other weapons.
017	*	Failure to Disperse Failure or refusal of a prisoner to leave an area in which a disturbance is occurring when the prisoner is physically able to leave; includes obstruction of staff at the scene of the disturbance. Disturbance is defined as a fight between prisoners, subduing or taking into custody of a prisoner or prisoners by staff, destruction of property, or any similar action or occurrence.	Preventing a staff member from coming to the aid of other staff; remaining at the scene of a fight to observe or offer encouragement to combatants; blocking staff who are removing a prisoner from an area.
020		Disobeying a Direct Order Refusal or failure to follow a valid and reasonable order.	Refusal to submit to a shakedown; fleeing from an officer after being directed to stop.
021		Possession of Forged Documents; Forgery Knowingly possessing a falsified or altered document; altering or falsifying a document with the intent to deceive or defraud; unauthorized possession of the identification card, pass, or detail of another prisoner.	A fake pass, application, furlough papers, etc. which is represented to be true.
022	*	Incite to Riot or Strike; Rioting or Striking Advocating or instigating actions which are intended to seriously endanger the physical safety of the facility, persons, or property or to disrupt the operation of the facility by group cessation of normal activity; participation in such action.	Encouraging other prisoners to take group action to injure staff, destroy property, or disrupt normal operations; refusal of prisoners as a group to leave the yard when instructed by staff to do so; joining others in unauthorized work stoppage.
023		Interference with the Administration of Rules Acts intending to impede, disrupt, or mislead the disciplinary process for staff or prisoners.	Intimidating or tampering with an informant or witness; tampering with or destroying evidence; interfering with an employee writing a misconduct report; making false accusations of misconduct against another prisoner or staff which would ordinarily result in disciplinary action being initiated against that person. (NOTE - should not be charged as retaliation for the writing of a grievance.)

024		Bribery of an Employee Offering to give or withhold anything to persuade an employee to neglect duties or perform favors.	
026		Insolence Words, actions, or other behavior which is intended to harass or cause alarm in an employee.	Abusive language, writing or gesture directed at an employee.
027		Destruction or Misuse of Property with Value of $10 or More Any destruction, removal, alteration, tampering, or other misuse of property which has a value of $10 or more.	Tampering with locking device; use of door plug; destruction of property belonging to another prisoner.
028		Failure to Maintain Employment Failure of a prisoner in community residential or work pass programs to immediately report to appropriate department staff any absence from employment or training for illness, layoff, termination, or any other reason; failure to obtain prior staff approval for planned absences from, or voluntary termination of, employment or training.	
030	*	Possession of Dangerous Contraband Unauthorized possession of weapons, explosives, acids, caustics, materials for incendiary devices, or escape materials; possession of critical tools and materials or dangerous tools and materials as defined by policy; includes failure to return any item covered by this definition which is signed out for a work or school assignment or any other purpose.	Possession of gasoline, butane lighter, sulphuric acid, lye, prison-made knives, pipe bomb, rope and grappling hook, or anything which could be used as a weapon; possession of a screwdriver, hammer, hobbycraft knive, etc. if outside authorized area.
031		Possession of Money Possession of unauthorized amounts of money from unauthorized sources. Money is defined as either cash or a negotiable instrument.	In institutions, any money other than 50 pennies is unauthorized.
032		Creating a Disturbance Actions or words of a prisoner which result in disruption or disturbance among others, but which does not endanger persons or property.	Excessive noise which causes other prisoners to react; loud arguing in the visiting room which disturbs others.

033	Sexual Misconduct Consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party, except that an embrace of a visitor at the beginning and end of a visit, or holding hands with a visitor during a visit, is not sexual misconduct; intentional exposure of the sexual organs to another person in a location or manner where such exposure has no legitimate purpose; imitating the appearance of the opposite sex; words or actions of a sexual nature directed at another person in order to harass or degrade that person.	Kissing, hugging, intercourse, sodomy. Intentional exposure of sexual organs when prisoner knows officer will be making rounds. Wearing clothing of the opposite sex. Wearing of makeup by male prisoners. Whistling at and making sexual remarks to another person; making propositions of a sexual nature. (NOTE: Threats of sexual assault should be charged as Threatening Behavior.)
034 (alcohol) 039 (marijuana) 040 (heroin/morphine) 041 (cocaine) 042 (other substance) 043 (drug test refusal) 044 (narcotics paraphernalia)	Substance Abuse Possession, use, selling, or providing to others, or being under the influence of, any intoxicant, inhalant, controlled substance (as defined by Michigan statutes), alcoholic beverage, marijuana or any other substance which is used to cause a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system; unauthorized possession of prescribed or restricted medication; possession of narcotics paraphernalia; failure or refusal to voluntarily submit to substance abuse testing which is requested by the Department for the purpose of determining the presence in the prisoner of any substance included in this charge.	Narcotics paraphernalia includes such items as needles, syringes, etc. (that is, items used to administer narcotics), but does not include such items as "roach clips," pipes and cigarette papers.
035	Unauthorized Occupation of Cell or Room Being in another prisoner or prisoners' cell or room without specific authorization from staff; being present in any cell, room, or other walled area with another prisoner or prisoners or a member or members of the public without staff authorization.	Two prisoners in a "one-person" cell; being in a room, cell, bay or other area to which the prisoner is not assigned; two prisoners in a restroom stall; prisoner and member of public in prisoner's room, or visiting area restroom.

036	Out of Place or Bounds/AWOL Being anywhere without the proper authorization; being absent from where one is required to be; breaking toplock without authorization; being outside assigned housing unit without prisoner identification card; being absent from required location during count.	"Skating" in another block; no pass; no I.D. card; failure to return c time from furlough, but returne within two hours of deadline. ("Skating" in own housing unit during the day is a minor unless on top lock status.) Failure to be where required by detail.
037	Theft; Possession of Stolen Property Any unauthorized taking of property which belongs to another; possession of property which the prisoner knows, or should have known, has been stolen.	
038	Gambling; Possession of Gambling Paraphernalia Playing games or making bets for money or anything of value; possession of gambling equipment, or other materials commonly associated with wagering.	Possession of dice or betting slips.

MINOR RULE VIOLATIONS	COMMON EXAMPLES
(All are coded 049)	
Misdemeanor Any act that would be a misdemeanor if prosecuted under Michigan law is also a minor misconduct violation, unless specified elsewhere as a major. Reference must be made to the specific statutory citation in all cases where this charge is alleged.	Larceny under $100 - MCLA 750.356.
Abuse of Privileges Intentional violation of any departmental or institutional regulation dealing with prisoner privileges unless it is specified elsewhere as a major.	
Contraband Possession or use of non-dangerous property which a prisoner has no authorization to have, where there is no suspicion of theft or fraud.	Possession of unauthorized items or anything with someone else's name or number on it; having excessive store items.
Health, Safety or Fire Hazard Creating a health, safety or fire hazard by act or omission.	Dirty cell; smoking in unauthorized areas; lack of personal hygiene.
Temporary Out of Place/Bounds In own housing unit, during the day. Out of place for a brief time or adjacent to where supposed to be.	Tardy for count or assignment; on gallery outside own cell. ("Skating" in own housing unit if on toplock status is a major.)
Unauthorized Communications Any contact, by letter, gesture or verbally, with an unauthorized person or in an unauthorized manner.	Love letters to another prisoner; passing property on a visit either directly or through a third person.
Violation of Posted Rules Violation of rules of community residential programs, housing units, dining room, furlough, work or school assignment which is not covered elsewhere.	Violation of kitchen sanitary regulations; wasting food; excessive noise in housing unit, playing TV or radio without earphone; unauthorized driving of motor vehicle; failure to report income in CRP.
Horseplay Any physical contact, or attempted physical contact, between two or more persons, done in a prankish or playful manner without anger or intent to injure or intimidate.	Towel snapping at others in showers; playful body punching; playing "grab-ass."

Lying to an Employee Knowingly providing false information to an employee.	Giving a false name, number or room/cell assignment. (Note: making false accusations of misconduct is included under the major violation of interference with administration of rules.)
Destruction or Misuse of Property with Value of Less Than $10 Any destruction, removal, alteration, tampering, or other misuse of property which has a replacement value of less than $10.	
Excessive Noise Creation of sound, whether by use of human voice, a radio, TV, or any other means, at a level which could disturb others.	Playing TV or radio above allowable level; banging objects against cell bars.

APPENDIX C

APPENDIX D

APPENDIX D

QUESTIONNAIRE

SECTION I

Please respond to the questions below:

1. Indicate age category:

   ( ) 21 yrs - 30 yrs
   ( ) 31 yrs - 40 yrs
   ( ) above 40 yrs

2. Indicate your gender and race:

   ( ) Male
   ( ) Female
   ( ) Afro-American
   ( ) White

3. Indicate your marital status:

   ( ) Married
   ( ) Divorced
   ( ) Single
   ( ) Widowed

4. Indicate if you have military experience:

   ( ) Yes
   ( ) No

5. Indicate the appropriate geographic area you live:

   ( ) Rural
   ( ) Town
   ( ) City
   ( ) Metropolitan area

6. Indicate highest educational level completed:

   ( ) High School
   ( ) Associate
   ( ) Bachelor's
   ( ) Master's
   ( ) Doctorate

7. Indicate your previous occupation:

( ) Student
( ) Blue Collar
( ) Professional
( ) None

8. Indicate reason(s) why you selected corrections:

( ) Salary/Benefits
( ) Job Security
( ) Previous security or military experience
( ) Dissatisfaction with previous job
( ) Proximity to correctional facility
( ) Acquaintance with correctional employee

9. Are you interested in advancing as far as you can go in corrections?

( ) Yes
( ) No

10. Indicate which best describes your motivation for entering corrections:

( ) Assist prisoners
( ) Achieve status (power/authority)
( ) Financial

SECTION II

If working as correctional officer prior to 1974, respond to questions below:

1. Current disciplinary system is easier to use and more effective than the old system.

   SA_____ A_____ U_____ SD_____ D_____

2. Disciplinary process has become so formalized, its effectiveness as control mechanism has been drastically reduced.

   SA_____ A_____ U_____ SD_____ D_____

3. Correctional officers had more authority and better able to control prisoners when Deputy's Committee handled disciplinary hearings.

   SA_____ A_____ U_____ SD_____ D_____

4. Correctional officers commanded more respect from prisoners prior to establishment of Hearing Officers.

   SA_____ A_____ U_____ SD_____ D_____

5. Current disciplinary process is too easily manipulated by prisoners.

   SA_____ A_____ U_____ SD_____ D_____

6. Who do you believe is primarily responsible for change in disciplinary process:

   ( ) Courts
   ( ) Prisoners
   ( ) Legislature
   ( ) Outside groups
   ( ) Administrator

SA - STRONGLY AGREE
A - AGREE
U - UNDECIDED
SD - STRONGLY DISAGREE
D - DISAGREE

7. As a result of changes in disciplinary system, which category affects your level of confidence since establishment of Hearing Officers.

( ) Greater than before
( ) Same
( ) Less than before

8. Number of cases in which prisoners "beat the ticket" has increased since Hearing Officer's has been handling misconduct hearings.

SA_____ A_____ U_____ SD_____ D_____

9. Number of misconducts incurred by prisoners has increased since due process requirements were imposed by disciplinary hearings.

SA_____ A_____ U_____ SD_____ D_____

10. Indicate the level of cooperation you extend to hearings investigator when contacted for information.

( ) Full
( ) Little as possible
( ) None

11. Command staff who review misconduct reports seem more interested in the way report reads than what occurred.

SA_____ A_____ U_____ SD_____ D_____

12. Hearings officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant.

SA_____ A_____ U_____ SD_____ D_____

13. What would you identify as the primary factor responsible for high misconduct rate.

( ) Hearing Officer
( ) Hearing Process
( ) Due Process Requirements
( ) Over-Crowding
( ) Untrained Officers
( ) Younger, more aggressive prisoners

14. Large number of misconduct are dismissed because of procedural violations.

SA_____ A_____ U_____ SD_____ D_____

15. If you could change any aspect of disciplinary process, which area would it be in.

( ) Review stage
( ) Investigative stage
( ) Hearings stage
( ) Appeal stage

16. Would you support a move to dump due process requirements and return to old Deputy Committee.

( ) Yes
( ) No

17. Michigan Dept of Corrections has one of the best disciplinary processes in the country.

SA_____ A_____ U_____ SD_____ D_____

18. Misconduct rates have increased dramatically due to due process requirements imposed on disciplinary process.

SA_____ A_____ U_____ SD_____ D_____

19. Elements of successful report writing have been clearly communicated to officers.

SA_____ A_____ U_____ SD_____ D_____

20. Hearing officers perform a difficult function well.

SA_____ A_____ U_____ SD_____ D_____

21. Hearing officers appear easily manipulated by prisoners.

SA_____ A_____ U_____ SD_____ D_____

22. Increasing the familiarity of hearing officers with prison environment would reduce number of "not guilty" dispositions.

SA_____ A_____ U_____ SD_____ D_____

23. Hearing officers receive full support and cooperation from rest of institutional staff.

SA_____ A_____ U_____ SD_____ D_____

24. Prisoners are more aware of requirements of disciplinary process than officers.

SA_____ A_____ U_____ SD_____ D_____

25. Usage of disciplinary process by officers has increased.

SA_____ A_____ U_____ SD_____ D_____

26. Disciplinary process remains critical tool for maintaining control of prisoners.

SA_____ A_____ U_____ SD_____ D_____

27. Establishing due process standards has decreased prisoner hostility and misconduct.

SA_____ A_____ U_____ SD_____ D_____

28. Michigan Dept of Corrections misconduct process could easily withstand scrutiny of any State or Federal court.

SA_____ A_____ U_____ SD_____ D_____

29. Conformance to due process standards eliminates the possibility of judicial intervention into the disciplinary process.

SA_____ A_____ U_____ SD_____ D_____

30. As a whole disciplinary process works well.

SA_____ A_____ U_____ SD_____ D_____

31. Prisoners seem to have more rights under due process than officers.

SA_____ A_____ U_____ SD_____ D_____

32. Officers writing misconduct reports are fully confident their position will be upheld by hearing officers.

SA_____ A_____ U_____ SD_____ D_____

33. A good officer uses disciplinary process as last resort.

SA_____ A_____ U_____ SD_____ D_____

34. Officers make full use of disciplinary process by reporting each violation they see.

SA_____ A_____ U_____ SD_____ D_____

35. Officers sometimes ignore minor infractions in interest of maintaining tacit cooperation of prisoners.

SA_____ A_____ U_____ SD_____ D_____

SECTION III

If you started working as a correctional officer between 1974 and 1979, respond to questions listed below:

1. Institution lost control of disciplinary process when Hearing Officers stopped reporting to the Warden.

   SA_____ A_____ U_____ SD_____ D_____

2. Officers commanded more respect from prisoners prior to establishment of Hearings Division.

   SA_____ A_____ U_____ SD_____ D_____

3. Current disciplinary process is too easily manipulated by prisoners.

   SA_____ A_____ U_____ SD_____ D_____

4. Who do you believe is primarily responsible for change in disciplinary process.

   ( ) Courts
   ( ) Administration
   ( ) Legislature
   ( ) Outside groups

5. Number of cases in which the prisoners "beat the ticket" has increased since creation of Hearings Division.

   SA_____ A_____ U_____ SD_____ D_____

6. Indicate your level of confidence in disciplinary process since the establishment of Hearings Division.

   ( ) Greater than before
   ( ) Same
   ( ) Less than before

SA - STRONGLY AGREE
A - AGREE
U - UNDECIDED
SD - STRONGLY DISAGREE
D - DISAGREE

7. Rate of misconducts has increased since Hearings Division established.

SA_____ A_____ U_____ SD_____ D_____

8. Indicate level of cooperation you extend to hearings investigator when contacted for information.

( ) Full
( ) Little as possible
( ) None

9. Command staff reviewing misconduct reports seem more interested in way report reads than what occurred.

SA_____ A_____ U_____ SD_____ D_____

10. Hearing Officers appear easily manipulated by prisoners.

SA_____ A_____ U_____ SD_____ D_____

11. Disciplinary process remains a critical management tool for maintaining control in our prisons.

SA_____ A_____ U_____ SD_____ D_____

12. Prisoners are more aware of requirements of disciplinary hearings than officers.

SA_____ A_____ U_____ SD_____ D_____

13. Prisoners seem to have more rights under due process in disciplinary hearings than officers.

SA_____ A_____ U_____ SD_____ D_____

14. Officers writing misconduct reports are fully confident that position will be upheld by hearing officers.

SA_____ A_____ U_____ SD_____ D_____

15. A good officer uses disciplinary process as last resort.

SA_____ A_____ U_____ SD_____ D_____

16. Officers sometimes ignore minor infractions by far in order to maintain control over majority of prisoners.

SA_____ A_____ U_____ SD_____ D_____

17. Indicate which option best describes your impression of disciplinary process.

( ) Fair and effective
( ) Over-complicated
( ) Easily manipulated by prisoners
( ) Fails to consider prison realities

18. Hearing officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant.

SA_____ A_____ U_____ SD_____ D_____

19. Increasing the familiarity of hearing officers with prison environment would reduce the number of "not guilty" dispositions.

SA_____ A_____ U_____ SD_____ D_____

20. Hearing officers receive full support and cooperation from the rest of the institutional staff.

SA_____ A_____ U_____ SD_____ D_____

21. What would you identify as primary factor responsible for high misconduct rate.

( ) Hearing Officers
( ) Hearing process
( ) Due process requirements
( ) Over-crowding
( ) Inexperienced officers
( ) Younger, more aggressive prisoners

22. Large number of misconduct reports are dismissed on technicalities.

SA_____ A_____ U_____ SD_____ D_____

23. Usage of disciplinary process by officers has increased over last several years.

SA_____ A_____ U_____ SD_____ D_____

24. Michigan Dept of Corrections has one of the best disciplinary processes in the country.

SA_____ A_____ U_____ SD_____ D_____

25. Misconduct rates have increased due to due process requirements imposed on disciplinary process.

SA_____ A_____ U_____ SD_____ D_____

26. Elements of successful misconduct writing have been clearly communicated to all officers.

SA_____ A_____ U_____ SD_____ D_____

27. Hearing officers perform a difficult function well.

SA_____ A_____ U_____ SD_____ D_____

28. Disciplinary process remains a critical management tool for maintaining control of prisoners.

SA_____ A_____ U_____ SD_____ D_____

29. Establishing due process standards for disciplinary process has decreased prisoner hostility and misconduct.

SA_____ A_____ U_____ SD_____ D_____

30. Michigan Dept of Corrections misconduct process could easily withstand scrutiny of any State of Federal court.

SA_____ A_____ U_____ SD_____ D_____

31. Conformance to due process standards eliminates possibility of judicial intervention into the disciplinary process.

SA_____ A_____ U_____ SD_____ D_____

32. If you could change any aspect of disciplinary process, what area would it be in.

( ) Review stage
( ) Investigative stage
( ) Hearing stage
( ) Appeal stage
( ) None of the above

33. Prisoners seem to have more rights under due process than officers.

SA_____ A_____ U_____ SD_____ D_____

34. Officers writing misconduct reports are fully confident their position will be upheld by hearing officers.

SA_____ A_____ U_____ SD_____ D_____

35. A good officer uses disciplinary process as last resort.

SA_____ A_____ U_____ SD_____ D_____

36. Officers make full use of disciplinary process by reporting <u>each</u> and <u>every</u> infraction they see.

SA_____ A_____ U_____ SD_____ D_____

37. Officers sometimes ignore minor infractions in interest of maintaining tacit cooperation of prisoners.

SA_____ A_____ U_____ SD_____ D_____

38. Would you support a move to return to experienced institutional personnel as hearing officers?

( ) Yes
( ) No

39. Would you support a move to return hearing officers to the jurisdiction of the Warden?

( ) Yes
( ) No

40. Overall, the disciplinary process works well.

SA_____ A_____ U_____ SD_____ D_____

SECTION IV

If you started working as correctional officer after 1979, respond to questions below:

1. Michigan Dept of Corrections has one of the best disciplinary processes in the country.

   SA_____ A_____ U_____ SD_____ D_____

2. Disciplinary process has become so formalized its effectiveness as control mechanism has been drastically reduced.

   SA_____ A_____ U_____ SD_____ D_____

3. Disciplinary process is too easily manipulated by prisoners.

   SA_____ A_____ U_____ SD_____ D_____

4. Who do you believe is primarily responsible for structure of disciplinary process.

   ( ) Courts
   ( ) Legislature
   ( ) Administration
   ( ) Outside groups
   ( ) Prisoners

5. The number of causes in which prisoners "beat the ticket" is high.

   SA_____ A_____ U_____ SD_____ D_____

6. Due process requirements make it essential misconduct reports are well written, with correct violations and details noted.

   SA_____ A_____ U_____ SD_____ D_____

SA - STRONGLY AGREE
A - AGREE
U - UNDECIDED
SD - STRONGLY DISAGREE
D - DISAGREE

7. The review stage of disciplinary process is critical in eliminating erroneous changes and/or incomplete reports.

SA_____ A_____ U_____ SD_____ D_____

8. Indicate the level of cooperation you extend to the hearings investigator when contacted for information.

( ) Full
( ) Little as possible
( ) None

9. Command staff who review misconduct reports seem more interested in the way report reads than what happened.

SA_____ A_____ U_____ SD_____ D_____

10. Elements of successful misconduct report writing have been clearly communicated to all officers.

SA_____ A_____ U_____ SD_____ D_____

11. Hearing officers perform a difficult function well.

SA_____ A_____ U_____ SD_____ D_____

12. Hearing officers, as graduates of Law School, are well versed in requirements of due process for the disciplinary procedure.

SA_____ A_____ U_____ SD_____ D_____

13. Hearing officers seem more inclined to grant prisoners the benefit of doubt than preponderance of evidence would warrant.

SA_____ A_____ U_____ SD_____ D_____

14. Hearing officers appear easily manipulated by prisoners.

SA_____ A_____ U_____ SD_____ D_____

15. Increasing the familiarity of hearing officers with prison environment would reduce the number of "not guilty" dispositions.

SA_____ A_____ U_____ SD_____ D_____

16. Hearing officers receive full support and cooperation from rest of the institutional staff.

SA_____ A_____ U_____ SD_____ D_____

17. What would you identify as primary factor for high misconduct rate.

( ) Hearing Officers
( ) Hearing process
( ) Due process requirements
( ) Over-crowding
( ) Inexperienced officers
( ) Younger, more aggressive prisoners

18. Large number of misconduct reports are dismissed because of technicalities.

SA_____ A_____ U_____ SD_____ D_____

19. Prisoners are more aware of requirements of disciplinary process than officers.

SA_____ A_____ U_____ SD_____ D_____

20. Officers have no hesitation invoking the disciplinary process when situation demands it.

SA_____ A_____ U_____ SD_____ D_____

21. Usage of disciplinary process by officers has increased over last several years.

SA_____ A_____ U_____ SD_____ D_____

22. Disciplinary process remains a critical management tool for maintaining control of prisoners.

SA_____ A_____ U_____ SD_____ D_____

23. Establishing due process standards for disciplinary process has decreased prisoner hostility and misconduct.

SA_____ A_____ U_____ SD_____ D_____

24. Michigan Dept of Corrections misconduct process could easily withstand scrutiny of any State of Federal court.

SA_____ A_____ U_____ SD_____ D_____

25. Conformance to due process standards eliminates the possibility of judicial intervention into disciplinary process.

SA_____ A_____ U_____ SD_____ D_____

26. If you could change any aspect of disciplinary process, which area would it be in.

( ) Review stage
( ) Investigative stage
( ) Hearing stage
( ) Appeal stage
( ) None

27. Prisoners seem to have more rights under due process in disciplinary process than officers.

SA_____ A_____ U_____ SD_____ D_____

28. Officers writing misconduct reports are fully confident their position will be upheld by hearing officers.

SA_____ A_____ U_____ SD_____ D_____

29. A good officer uses the disciplinary process as last resort.

SA_____ A_____ U_____ SD_____ D_____

30. Officers make full use of disciplinary process by reporting <u>each</u> and <u>every</u> violation they see.

SA_____ A_____ U_____ SD_____ D_____

31. Officers sometimes ignore minor infractions in the interest of maintaining tacit cooperation of prisoners.

SA_____ A_____ U_____ SD_____ D_____

32. Indicate which option describes your impression of disciplinary process.

( ) Fair and effective
( ) Overly complicated
( ) Easily manipulated by prisoners
( ) Fails to consider prison realities

33. As a whole, the disciplinary process works well.

SA_____ A_____ U_____ SD_____ D_____

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