HSS 303

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES

OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

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March 25, 1980

Mr. Orlan Prestegard
Revisor of Statutes
411 West, State Capitol
Madison, Wisconsin 53702

Dear Mr. Prestegard:

As provided in section 227.023, Wis. Stats., there is hereby submitted a certified copy of HSS 303 relating to discipline in adult institutions and HSS 306 relating to security in adult institutions.

These rules are being submitted to the Secretary of State as required by section 227.023, Wis. Stats.

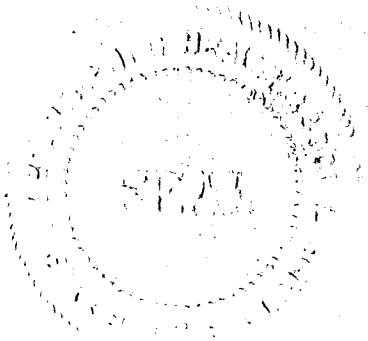
Sincerely,

Donald E. Percy
SECRETARY

Enclosure

The rules contained in this order shall take effect pursuant to authority granted by s. 227.026(1)(b), Stats.

Dated: March 25, 1980.



Department of Health and Social Services

Donald E. Percy, Secretary

032501A/ca

ORDER of the Department of Health and Social Services ADOPTING RULES.

Relating to rules concerning the conduct for which an inmate of a prison may be disciplined and the procedures for the imposition of discipline.

Analysis prepared by the Department of Health and Social Services.

Analysis

This rule governs and describes all the conduct for which an inmate may be disciplined in an adult correctional institution in Wisconsin. It contains the theory, definitions and need for discipline, the code of inmate ofenses for which an inmate may be charged and the procedures by which discipline is administered, as well as the schedule of penalties.

Pursuant to authority vested in the Department of Health and Social Services by s. 227.014(2) Wis. Stats., the Department adopts rules interpreting ss. 53.04, 53.07, 53.08, 53.10 and 53.11(2) Wis. Stats. as follows:

Sections 303.01 through 303.86 of the Wisconsin administrative code are adopted to read:

CHAPTER HSS 303

DISCIPLINE

Eighth Draft

February, 1980

Department of Health and Social Services
Division of Corrections

DISCIPLINE

CHAPTER HSS 303

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General provisions

HSS 303.01 Applicability and purposes.

(1) Pursuant to authority vested in the department of health and social services by s. 227.014(2), Stats., the department adopts this chapter which applies to the department, division of corrections and to all adult inmates in its legal custody. It implements ss. 53.07, 53.08, 53.11(2) and 53.04, Stats. The rules governing inmate conduct under this chapter describe all the conduct for which an inmate may be disciplined and the procedures for the imposition of discipline.

(2) "Discipline" includes only the sanctions described in HSS 303.08. It does not include reclassification, change of program assignment, loss or modification of a MAP contract, change of housing assignment, or transfer to another institution.

(3) The objectives of the disciplinary rules under this chapter are the following:

(a) The maintenance of order in correctional institutions;

(b) The maintenance of a safe setting in which inmates can participate in constructive programs;

(c) The rehabilitation of inmates through the development of their ability to live with others, within rules;

(d) Fairness in the treatment of inmates;

(e) The development and maintenance of respect for the correctional system and for our system of government through fair treatment of inmates;

(f) Punishment of inmates for misbehavior; and

(g) Deterrence of misbehavior.

NOTE: All the disciplinary rules for inmates are found under this chapter or authority is delegated for the making of additional specified policies and procedures in specified areas in these chapters. See HSS 303.08 and 303.63. Differences among institutions make some differences in specific policies and procedures relating to conduct necessary. Delegating authority to permit these differences, limited though they are, is provided for under this chapter. Chapter HSS 303 sets forth the procedure for inmate discipline. It structures the exercise of discretion at various decision making stages in the disciplinary process, including the decision to issue a conduct report, the decision to classify an alleged violation as major or minor, and sentencing. Codifying the rules of discipline in a clear, specific way serves important objectives by itself.

An important element of fairness is that people must know the rules which they are expected to follow. Rules which are unnecessarily ambiguous or overly broad are unfair, and so are rules which are unwritten and not known by all inmates. If inmates are aware of the rules and what they mean, they are more likely to obey than if they are uncertain about them. When rules are vague, overbroad, or unwritten, the interpretation

and enforcement of them may vary greatly from officer to officer. Thus, having specific rules increases fairness and equality of treatment.

Clarity also saves time and money. When there is unnecessary ambiguity, there is also unnecessary disagreement which takes staff time and, ultimately, the time of lawyers and courts. Clarity in the rules can prevent the expenditure of time and money in settling such disagreements.

The English language is not so precise that ambiguity can be done away with entirely. Nor is that necessarily desirable, since flexibility is an important tool in the effective administration of the correctional system. Without flexibility, there is undue reliance on formalism and rules are enforced in a mechanical way.

Discretion is thus very important in corrections. Formal discipline is not always the best way to induce future compliance with rules; special circumstances may dictate harshness or leniency; different individuals respond differently to the same types of discipline or other treatment. The disciplinary rules are not intended to eliminate discretion in handling disciplinary problems, nor to disparage the quality of decision-making under the past system of broader discretion. In fact, the rules take advantage of what has been learned by experience and use this experience to provide guidelines for the future exercise of discretion.

Professor Kenneth Culp Davis, an expert on discretionary justice and administrative rulemaking, says that there are three ways a rule regulates discretion. These rules of discipline regulate discretion in all three ways. (1) A rule can <u>limit</u> discretion by providing an outer limit on acceptable decision-making. For example, this section states that

discipline cannot be imposed except for a violation under this chapter. Limits can be very broad or very narrow. This particular example still leaves a large area for discretion: whether or not to report an offense and how serious a punishment to impose are left open by this section. (2) A rule can structure discretion by providing guidelines, goals, or factors to be considered, without dictating a result. Commonly, structured discretion would be combined with a broad limit on discretion, instead of with a narrow limit or no limit. An example of a rule which structures discretion is HSS 303.65(1), Offenses which do not require a conduct report. That section lists factors to be considered in determining whether a violation should be reported without creating a formula which must be strictly followed. (3) A rule can check discretion by providing for review of a decision by a higher-ranking officer. Two examples are review of the conduct report by the security office to determine if it is appropriate, and appeal of an adjustment committee's decision to the superintendent. See HSS 303.67 and 303.78.

Having specific, written rules which deal with prison discipline thus has the advantages of stating clearly what conduct is prohibited, of eliminating unnecessary discretion, increasing equality of treatment, increasing fairness, and raising the probability that inmates will follow the rules. In addition, there are advantages to the formal rulemaking process: (1) Rules are made by top officers and administrators in consultation with line staff and others, rather than ad hoc by correctional officers. Thus, greater experience can be brought to bear on the decision-making. (2) Rules are consciously made and the advantages and disadvantages of various alternatives are consciously weighed. This is superior to following unquestioned tradition. (3) The rulemaking

process results in public input. The "sunshine" effect results in the elimination of abuses and can also provide new perspectives on more subtle questions. Also, corrections officers are public servants and rulemaking, by exposing their decision-making process to the public, is more democratic than a system of following unwritten or at least unpublished traditional policies.

For the reasons outlined above, among others, authorities on correctional standards agree that inmate disciplinary rules, including procedural rules, should be codified and made available to the inmates as a rulebook. See American Correctional Association's Manual of Standards for Adult Correctional Institutions (1977) (hereinafter "ACA"), standards 4296 and 4297; National Advisory Commission on Criminal Justice Standards and Goals, Corrections (1973) (hereinafter "National Advisory Commission"), standard 2.11; Krantz et al., Model Rules and Regulations on Prisoners' Rights and Responsibilities (1973) (hereinafter "Model Rules" or "Krantz, et. al."), rules IVA-1 and IVA-2; National Council on Crime and Delinquency, Model Act for the Protection of Rights of Prisoners (1972), section 4; Fourth United Nations Congress on Prevention of Crime and Treatment of Offenders, Standard Minimum Rules For the Treatment of Prisoners (1955), rule 29.

The above discussion addresses the question of why we have rules. As important, of course, is to identify the objectives of the disciplinary system itself. This is an issue which is rarely addressed and is widely misunderstood, both by inmates and staff. Subsection (3) addresses this question.

It is impossible for any community, including a prison community, to exist without order. No society or individual can exist without limits,

which are usually in the form of rules. These rules provide the necessary structure and expectations that permit the community to function. Without such norms and expectations, people could not interact constructively with each other.

A prison community is like all others in that it requires order. This is basic to functioning at all, as well as to accomplishing correctional objectives.

People cannot participate in programs or work at jobs unless they are safe. Thus, a safe setting is essential to rehabilitation programs, whether they be jobs or psychological treatment.

Rehabilitation also requires teaching inmates -- who have demonstrated their inability to live within rules -- to live with others, within rules. Rules of discipline are some of those rules that prepare people to function within rules set by the community. If people violate, counseling and punishment is usually helpful in causing them to think carefully about their future acts.

People will not live by norms, however, unless those norms are enforced fairly and in a way that develops and maintains respect for the system. The system should get respect if it deserves it. To deserve it, it must be fair.

It is quite possible that security staff has more influence on the development of inmates' attitudes toward themselves, society and its norms than anyone else in prison. This is because inmates have more contact with line officers than treatment staff. The security staff,

then, by the example it sets and by the way it enforces rules--fairly or unfairly--greatly influences the process of rehabilitation.

The importance of the disciplinary system is reflected by the significance of its objectives.

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HSS 303.02 Definitions.

In this chapter:

(1) "Authorized" means:

(a) According to departmental rules;

(b) According to posted policies and procedures;

(c) According to the latest order of a staff member;

(d) According to established institution custom; or

(e) With permission from the appropriate staff member.

(2) "Bodily injury" means injury or physical pain, illness or any impairment of physical condition.

(3) "Bureau director" means director of the bureau of institutions, division of corrections, department of health and social services, or designee.

(4) "Case record" means any file folder or other method of storing information which is accessible by the use of an individual inmate's name or other identifying symbol.

(5) "Communicate" means:

(a) To express verbally;

(b) To express in writing; or

(c) To express by means of gesture(s) or other action(s).

(6) "Consent" means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. A person under fifteen (15) years of age is incapable of consent as a matter of law. The following persons are presumed incapable of consent but the presumption may be rebutted by competent evidence:

(a) A person who is 15 to 17 years of age;

(b) A person suffering from a mental illness or defect which impairs capacity to appraise personal conduct; or

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(7) "Department" means the department of health and social services.

(8) "Division" means the department of health and social services, division of corrections.

(9) "Harass" means to annoy or irritate persistently.

(10) "Intoxicating substance" means anything which if taken into the body may alter or impair normal mental or physical functions, to include: LSD, heroin, cocaine, marijuana, alcoholic drinks, paint thinner or glue. Tobacco is <u>not</u> included.

(11) "Negotiable instrument" is a writing, signed by the maker or drawer, which contains an unconditional promise to pay which is payable on demand or at a specified time, and which is payable to the order of the bearer.

(12) "Overt behavior" means behavior which is open and observable.

(13) "Possession" means on one's person, in one's quarters, in one's locker or under one's immediate physical control.

(14) "Security director" means the security director at an institution, or designee.

(15) "Superintendent" means the superintendent at an institution, or designee.

(16) "Without consent" means no consent in fact or that consent is given for any of the following reasons:

(a) Because the actor put the victim in fear by the use or threat of imminent use of physical violence on him or her, or on a person in his or her presence, or on a member of his or her immediate family; or

(b) Because the actor purported to be acting under legal authority; or

(c) Because the victim did not understand the nature of the thing to which he or she consented, either by reason of ignorance, or mistake of fact or of law other than criminal law, or by reason of youth, or by reason of defective mental condition - whether permanent or temporary.

HSS 303.03 Lesser included offenses.

(1) If one offense is a lesser included offense of another, then if an inmate is charged with the greater offense, the inmate is deemed to be charged with the lesser included offense as well.

(2) An inmate may be found guilty of a lesser included offense of the offense charged, even if he or she was not expressly charged with the lesser included offense.

(3) An inmate may not be found guilty of two offenses or punished for two offenses based on a single incident if one offense is a lesser included offense of the other.

(4) No offense shall be considered a lesser included offense of another unless it is so listed in the following table.

Greater offense	Lesser included offense
303.07 Aiding and abetting	303.06 Attempt 303.21 Conspiracy
303.12 Battery	303.17 Fighting
303.13 Sexual assault - intercourse	303.14 Sexual assault - contact 303.15 Sexual conduct
303.14 Sexual assault - contact	303.15 Sexual conduct

Greater offense		Lesser included offense	
303.18	Inciting a riot	303.19	Participating in a riot
		303.20	Group resistance and petitions
		303.28	Disruptive conduct
303.19	Participating in a riot	303.20	Group resistance and petitions
		303.28	Disruptive conduct
303.22	Escape	303.51	Leaving assigned area
303.28	Disruptive conduct	303.29	Talking
303.34	Theft	303.40	Unauthorized transfer of property
303.37	Arson	303.38	Causing an explosion or fire
		303.39	Creating a hazard
303.38	Causing an explosion or fire	303.39	Creating a hazard
303.42	Possession of money	303.47	Possession of contraband - miscellaneous
303.43	Possession of intoxicants	303.47	Possession of contraband - miscellaneous
303.44	Possession of drug paraphernalia	303.47	Possession of contraband - miscellaneous

Greater offense		Lesser included offense	
303.45	Possession, manufacture, and alteration of weapons	303.47	Possession of contraband - miscellaneous
303.46	Possession of excess smoking materials	303.47	Possession of contraband - miscellaneous
	Any substantive offense	303.06	Attempt
		303.07	Aiding and abetting
		303.21	Conspiracy

(5) After each note to a substantive offense under this chapter, all offenses which are lesser included offenses of the offense are listed, except that aiding and abetting, attempt, and conspiracy are not listed. They are always lesser included offenses of the completed offense.

NOTE: The concept of a lesser included offense is derived from the theory of the same name in the criminal law. In these rules, it serves two distinct functions. First, it serves to put the inmate on notice that he or she, while charged in writing with one offense, is also charged and may be convicted of either the offense charged or a lesser included offense.

The second function is to insure that an inmate is not punished twice for a single act which satisfies the elements of more than one offense, where conviction for more than one offense is unfair.

At the risk of oversimplifying, it is accurate to say that the technical definition requires that every element of the lesser offense is also an element of the greater offense. Rather than use this definition--and require analysis of the elements of each offense in individual cases, with inconsistency and confusion a likely result--the sections have been specifically labeled.

In some cases an offense would not be a lesser included offense of another if the criminal law definition were used, yet it has been labeled as such. This is because the basic test in labeling certain offenses as "lesser included" is fairness: is it fair to say that an inmate has notice that he is accused of the "lesser" offense, if he has been told only that he is accused of the "greater" offense? Is it fair to convict and punish for two closely related offenses, when the inmate committed one act?

Under the old rules, the problem of lesser included offenses was not specifically mentioned. Apparently, what was done was that even if an inmate was found guilty of greater and lesser offenses, the penalty was approximately the same as for just one of the offenses. In other words, unfairness was avoided by the use of sentencing discretion. However, this was not entirely satisfactory since all of the offenses were listed on the inmate's permanent record. Thus, the inmate's record may appear worse than it really is. Under this section, by contrast, an inmate cannot be found guilty of both a greater and a lesser offense based on the same incident. Subsection (3).

There are other implications which necessarily follow when lesser included offenses exist which are implicit in the section. If an inmate is charged with a lesser included offense and the case is considered by

the committee, the inmate cannot be later charged with the greater offense. Similarly, if an inmate is charged and found guilty of a higher offense, he or she cannot later be charged with a lesser included offense.

If an act violates more than one section, the offense which best describes the conduct should be charged. This would not prevent separate convictions for a series of related but distinct acts.

HSS 303.04 Definitions relating to state of mind.

In this chapter, these words have the following meanings:

(1) "Intentionally" means that the inmate had a purpose to do the thing or cause the result specified, or believed that his or her act, if successful, would cause the result specified.

(2) "Knowingly" means only that the inmate believes that the specified fact exists.

(3) "Recklessly" means that the inmate did an act or failed to do an act and thereby created a situation of unreasonable risk that another might be injured. The act or failure to act must demonstrate both a conscious disregard for the safety of another and a willingness to take known chances of perpetrating an injury.

(4) "Negligently" means that the inmate did an act or failed to do an act and thereby failed to exercise that degree of care appropriate for the circumstances.

NOTE: It is basic in criminal law that all serious or "malum in se" crimes require proof of culpable state of mind. Morisette v. U.S., 342 U.S. 246 (1952); Remington and Helstad, The Mental Element in Crime - A Legislative Problem, 1952 Wis. L. Rev. 644.

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It

> is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil . . . . Morisette, at 250.

It is important to carry over this basic concept from the criminal law into the disciplinary rules used in prisons.

Strict liability rules are often perceived as being unfair, for the very reason discussed in Morisette, above: the concepts of free will and of culpability are deeply ingrained in our culture. Any child who pleads, "But I didn't do it on purpose!" has already learned this lesson. Inmates will lack respect for the disciplinary system if they see it as unfair, and this lack of respect will retard their adjustment and rehabilitation.

Many disciplinary offenses may result in a serious loss if the inmate is found guilty. They are also crimes, yet the decision in nearly all cases is to handle the situation internally rather than turning to the local prosecutor. It seems only fair to supply as many as possible of the safeguards available in a criminal prosecution in these cases. Procedural safeguards are already required: Wolff v. McDonnell, 418 U.S. 539 (1974). The substantive safeguard of proof of culpability should also be required.

"Culpability" as used in the above discussion means one of four things: that a person did an act intentionally, that a person failed to act despite knowledge of a situation and the opportunity to act, that a person acted with great carelessness, or that the person acted without appropriate care.

These four concepts are represented by the words "intentionally," "knowingly," "recklessly," and "negligently," which are defined under this section. The definitions are derived from s. 939.23, Stats., and the common law. Every substantive offense under this chapter contains one of these four words, or the phrase "with intent to," which describes the same culpability as "intentionally."

Under HSS 303.39, Creating a hazard, liability is based only on negligence, which is also defined in this section. In the prison setting, with many people living in very close proximity, high standards of care for the safety of all must be enforced. This is the only substantive rule for which negligence is the basis for liability.

Under the division's old policies and procedures, there was no explicit state of mind requirement. Nevertheless, both inmates and staff assumed that an inmate who did something accidentally was not guilty. This unstated policy has now been made explicit, by including one of the words from this section in every other section.

An alternative viewpoint to the one discussed above and reflected in this section is that the state of mind requirement should not be expressly included in the rules. The main reason for this view is that state of mind is difficult to prove and accused inmates will probably very frequently claim that their actions were accidental or excused for another reason. In the cases where the hearing officer or adjustment committee feels that the accused inmate was not culpable, it should dismiss the charge. In the majority of cases the need to prove the inmate's state of mind is satisfied because the hearing officer or adjustment committee can infer it from the act and surrounding

circumstances. For example, if two inmates have a heated argument and one of them takes a knife and stabs the other, a permissible inference is that the first inmate intended to cause bodily injury to the second. In such a situation, there is little doubt that a finding of guilt on a charge of battery is proper.

Krantz, et al., Model Rules and Regulations (1973), rule IV A-6 contains the following requirement for establishing liability under its disciplinary code: "A person commits an offense only when he engages in conduct which fulfills all the necessary elements of the offense and (1) the conduct was voluntary and was intentionally, recklessly, or negligently done. . ." This principle is applied in these sections.

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HSS 303.05 Defenses.

The following, if established by clear and convincing evidence, to the satisfaction of the committee, by the inmate, are complete defenses to alleged violations of the sections under this chapter.

(1) Mental incapacity. At the time of the conduct, the inmate, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his or her conduct to the sections.

(2) Involuntary intoxication. At the time of the conduct, the inmate, as a result of involuntary intoxication, lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his or her conduct to the rules. This section does not afford a defense if the intoxicant was taken voluntarily.

(3) Mistake. The inmate honestly erred (except an error regarding the contents of this chapter), and such error negates the existence of a state of mind essential to the offense.

(4) Self-defense. An inmate may use the minimum amount of force necessary to prevent death or bodily injury to himself or herself. An inmate may never use force which may cause death to another in exercising the privilege of self-defense. An inmate may never use a weapon in exercising the privilege of self-defense.

An inmate may not continue to exercise the privilege of self-defense after an order to stop. In determining whether the minimum force was used in exercising the privilege of self-defense, staff should consider:

(a) Whether a weapon was used by the aggressor;

(b) The size of the inmates;

(c) The opportunity of the inmate who claims self-defense to flee or get assistance from a staff member; and

(d) Whether staff members were nearby.

(5) Orders. An inmate may disobey a rule if he or she is expressly authorized to disobey it by a staff member.

NOTE: Sections 939.42-939.49, Stats., list the "defenses" which may be used in a criminal case. These are intoxication, mistake, privilege, coercion, necessity, self-defense and defense of others, and defense of property and protection against shoplifting. In addition, s. 971,15, Stats., states the defense of mental disease or defect. These statutory provisions formed the basis for the defenses listed under this section, but alteration was necessary to meet the special needs of the prison situation.

Subsection (1) is similar to the insanity defense in criminal law in Wisconsin. Section 971.15, Stats. The section is in simplified language.

Subsection (2) differs from the Wisconsin criminal code section on involuntary intoxication in several respects. Section 939.42(1), Stats. It makes the involuntary intoxication defense parallel to the insanity defense, discussed above.

Section 939.42(2), Stats., provides that voluntary intoxication which "negatives the existence of a state of mind essential to the crime" prevents a person from being convicted of the crime.

No defense parallel to s. 939.42(2), Stats., for voluntary intoxication has been included in these sections. The reason is that in the prison situation (where all intoxication is forbidden), no defense based on voluntary intoxication is appropriate. Voluntary intoxication is so serious that public policy requires that it not be used to excuse an offense. If intoxication does in fact negate a state of mind, culpability sufficient for a finding of guilt lies in the fact of intoxication as a policy matter. See the discussion of this principle in the Model Penal Code Proposed Official Draft, Section 2.08.

Subsection (3) is the same as s. 939.43(1), Stats. Just as, under that statute, a mistake of criminal law is no defense, so under this section a mistake concerning the disciplinary rules is no defense. A mistake of fact may be a defense. An example of such a situation is taking property of another but thinking it is one's own property.

Drafting an appropriate self-defense section is difficult for a prison because of the importance of preventing fighting. Fights can lead to serious disruptions. On the other hand, it seems only fair to permit people to prevent others from harming them.

Subsection (4) permits an inmate to use minimum force in self-defense, to prevent injury to himself or herself. It does not permit use of force which could cause death to another, or the use of a weapon in self-defense. Under this section, any privilege is lost if fighting continues after an order to stop. Finally, the definition provides guidance to staff in determining whether minimum force was used.

There is no privilege to defend others in prison. It would reduce control and encourage gang activity.

Subsection (5) has no counterpart in the criminal law. However, the pervasiveness of state authority in the inmate's life and the necessity of requiring prompt and complete obedience make an analogy to military law rather than civilian criminal law appropriate. According to the Manual for Courts Martial (1969 Rev. Ed.) p. 29-35, "obedience to apparently lawful orders" is a defense to prosecution under the Uniform Code of Military Justice (UCMJ).

> An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner in the discharge of a lawful duty, is not excusable.

Thus, the defense here is even broader than under the UCMJ.

There is no privilege to defend one's property under this chapter. Return of the property can be accomplished in most cases by the staff after a complaint by the victim. Similarly, coercion and necessity do not excuse violations. It is thought that it is better to rely on the authority not to issue a conduct report in situations where these

privileges might otherwise be applicable. Also, the availability of correctional staff makes the need to rely on such defenses rare.

183C/06

HSS 303.06 Attempt.

(1) An inmate is guilty of attempt to violate a rule if the following are all true:

(a) The inmate intended to do something which would have been a rule violation; and

(b) The inmate did acts which showed that he or she intended to violate the rule at that time.

(2) The number used for attempts in recordkeeping and conduct reports shall be the offense's number plus the suffix A. Example: Battery is HSS 303.12. Attempted battery is HSS 303.12-A.

(3) The penalty for an attempt may be the same as for the completed offense. See HSS Table 303.84.

(4) An inmate may be charged with both a substantive offense and attempt to commit that offense, based on the same incident, but may be found guilty of only one.

NOTE: The definition of attempt under subsection (1) is identical in content to the definition of intent, but in simpler language.

Under the Wisconsin criminal code, s. 939.32(1), Stats., the penalty for an attempt is one-half the penalty for a completed offense. Similarly,

Krantz et al., Model Rules and Regulations (1973) provide that maximum punishment for an attempt is two-thirds the maximum penalty for the completed offense. Under subsection (3) of this section, however, the maximum penalty for an attempt may be the same as for a completed offense. This is based on the belief that an event over which the actor had no control should not reduce liability so greatly, and on the knowledge that the perpetrator of an attempt is just as dangerous and just as much in need of a deterrent (punishment) as the perpetrator of a completed offense. Of course, the circumstances of an attempt may lead to mitigation in punishment.

Under the division's former policies and procedures, attempt was not defined, but they did provide for equal punishment of attempts and completed offenses.

Subsection (2) has been added in order to allow keeping records of attempts and completed offenses separately. With a computer, the use of a suffix (instead of a special section number for attempt) means records can easily be retrieved of all attempts, or attempts for specific sections, or both attempts and completed offenses for specific sections.

HSS 303.07 Aiding and abetting.

(1) If an inmate intentionally does any of the following things, he or she is guilty of aiding and abetting a rule violation:

(a) Tells or hires another inmate to commit a rule violation;

(b) Assists another inmate, prior to a rule violation, in planning or preparing for it, with intent that the offense be committed;

(c) Assists another inmate during commission of an offense, whether or not this was planned in advance; or

(d) Destroys evidence of an offense committed by another person or otherwise helps to prevent discovery of a violation or of who committed it.

(2) The number used for aiding and abetting in record keeping and conduct reports shall be the offense's number plus the suffix B. Example: Battery is HSS 303.12. Aiding and abetting a battery is HSS 303.12-B.

(3) An inmate may be charged with both a substantive offense and aiding and abetting that offense, based on the same incident, but he or she may be found guilty of only one.

(4) An inmate may be charged and found guilty of aiding and abetting even if no one is charged or found guilty of committing the offense. The principal should, if possible, be identified when the inmate is charged.

(5) The penalty for aiding and abetting may be the same as for the substantive offense. See Table, HSS 303.84.

(6) The penalty given to an inmate who aids and abets need not be based in any way on the penalty, if any, given to the inmate who actually committed the offense.

NOTE: The definition of aiding and abetting used in this section is a combination of the crime of solicitation (subsection (1)(a), compare s. 939.30, Stats.) and aiding and abetting (subsection (1)(b) - (d), compare s. 939.05(2)(b), Stats.). In the past, fine distinctions, often without real differences, have been made between accessories before and after the fact, principals, etc. Nowadays, Wisconsin and most other states combine all of these together as "aiding and abetting." S. 939.05(2)(b), Stats. Wisconsin goes a step further and combines aiding and abetting together with actual commission and with vicarious liability of coconspirators. S. 939.05, Stats. However, no coconspirator liability has been included in this section because in those few cases where a coconspirator is liable as such but <u>not</u> for aiding and abetting, his or her relationship to the offense committed is such that the conspiracy section should be relied on. Separating conspiracy and aiding and abetting is also designed to avoid unnecessary confusion. See HSS 303.21.

Under the former policies and procedures, aiding and abetting was not defined, but the policy provided that "aiding and abetting another to engage in prohibited conduct, shall be considered an infraction of the rules involved."

As explained in the note to HSS 303.07, the use of a suffix to designate offenses involving attempt or aiding and abetting will simplify and improve record keeping.

Subsection (3) states a principle which is followed in modern criminal law. In Wisconsin a person cannot be found guilty of aiding and abetting and the offense itself based on the same incident. In factually ambiguous situations, however, subsection (3) of this section leaves open the option of charging a person with both and letting the hearing officer or adjustment committee decide which is most appropriate.

Subsections (4) and (6) are necessary because of the history of aiding and abetting. Traditionally, a person could not be tried as an accessory unless the principal had already been found guilty, and the accessory's sentence could not exceed the sentence of the principal. Neither of these is true under modern criminal law, and neither of these is true under the disciplinary rules. This is so because it is in the nature of some offenses that it is possible to identify two or more people as accessories, though it is impossible to know who did the completed act. Subsection (4) points out that, when possible, the principal should be identified. This gives the accused accessory a more fair opportunity to defend himself or herself.

Subsection (5) provides that the maximum sentence for aiding and abetting is the same as that provided for the offense itself in HSS 303.84. Obviously, however, in many cases the aider or abetter will not be as culpable as the actual perpetrator of the offense. In such cases, the committee or hearing officer should use its discretion to select an appropriate lower sentence.

This section is essentially the same as Krantz, et al., Model Rules and Regulations, (1973), rule IV A-8.

183C/08

HSS 303.08 Institutional policies and procedures.

(1) As provided under this chapter, institutions may make specific policies and procedures and provide that if inmates violate them, they may be disciplined. Wherever a specific policy or procedure provides for discipline if an inmate violates it, discipline may only be imposed if the policy or procedure was in fact posted on an official bulletin board at the time of the violation, or if the inmate had actual knowledge of the contents of the bulletin and that it was still in force, or if the inmate had received a copy of the bulletin.

(2) Each institution shall maintain at least one bulletin board for bulletins of general applicability. Bulletin boards shall be so located that every inmate has an opportunity to read all bulletins which apply to him or her. Additional bulletin boards should be maintained in workshops, classrooms, recreation areas, housing units, or other places for the posting of notices which apply only to inmates who use the particular facility involved. Each inmate at a maximum security institution shall be given a copy of all bulletins which are applicable to him or her.

(3) Bulletins which are no longer in force shall be removed.

(4) A notebook of all current bulletins shall be maintained and be available for inmates in the library.

NOTE: It is necessary to permit institutions to discipline inmates for violations of specific policies and procedures of the institution. For

example, violation of posted work place policies or procedures regarding recreation may result in a penalty. Likewise, housing units may have policies and procedures necessary for the maintenance of order. These policies will vary from institution to institution and place to place within institutions.

In the past, inmates were sometimes punished for "disobeying orders" where the order was a written memorandum distributed to staff or posted at an earlier time but not currently posted on any inmate bulletin board because someone had taken it down. The inmate is not really culpable unless he or she is aware of the order, or should have been aware of it because it was posted at the time of the offense and he or she had had an opportunity to read it.

This section assures that inmates have notice of the conduct expected of them; this is essential to fairness and due process. See the note to HSS 303.01.

Of course, some inmates are unable to read. Staff should attempt to identify such inmates and communicate the rules orally to them.

HSS 303.09 Manual of disciplinary rules.

(1) All of the sections under this chapter, along with their notes, shall be printed in pamphlet or other appropriate form.

(2) A copy of this pamphlet shall be given to every inmate. Any time major changes are made, written notice to inmates shall be provided. The pamphlet shall be entitled Disciplinary Rules.

NOTE: This section requires that the rules and notes pertaining to inmate discipline be published and distributed to the inmates at all institutions. This continues the existing practice.

Due process and fundamental fairness require that inmates be given notice of the rules they are expected to follow. In addition, awareness and understanding of the rules and of the sanctions for breaking them should increase compliance with them. Authorities on correctional standards agree that disciplinary rules should be made available to inmates in the form of a rule book. See the note to HSS 303.01.

HSS 303.10 Seizure and disposition of contraband.

(1) "Contraband" means any of the following:

(a) Any item which inmates may not knowingly possess under HSS 303.42-303.47 (for example, money, intoxicants, drug paraphernalia and weapons);

(b) Any item which is not state property and is on the institution grounds but not in the possession of any person;

(c) Any item which is in the possession of an inmate, if knowing possession of it would violate HSS 303.47;

(d) Any item which an inmate may possess but which comes into his or her possession through unauthorized channels or which is not on the inmate's property list and is required to be; or

(e) Stolen property.

(2) Seizure. Any staff member who reasonably believes that an item is contraband may seize the item, whether or not the staff member believes a violation of HSS 303.42-303.47 has occurred. Items seized shall be sent to the security director, accompanied by the conduct report if there is one. If there is not, the item shall be

accompanied by a written report. Property which is not contraband shall be returned to the owner or disposed of in accordance with this section.

(3) Disposition. If a conduct report is written, the disposal of the item shall be decided by the hearing officer or committee at the disciplinary hearing. If there is no conduct report, the security director may dispose of seized items. Disposal should be as follows:

(a) Currency (money). All confiscated currency shall be placed in the state's general fund.

(b) Checks. Checks and other negotiable instruments shall be returned to the maker. If it is not possible to determine an address for the maker of the check, the check shall be destroyed.

(c) U.S. bonds and other securities. Upon proof of ownership and the source of a U.S. bond or other security, the item shall be held in the institution business office until it can be returned to the owner. If the owner is an inmate, it shall be held until his or her release from the institution, at which time it shall be transferred with the inmate's general account funds to the division cashier. It shall be returned to the inmate upon discharge or at any earlier time when the supervising agent determines that continued control over it is no longer necessary.

(d) Property. If the owner is known, property may be returned to the true owner, placed in storage, or sent at the inmate's expense to another, in accordance with the nature of the property, unless the owner transferred the property in an unauthorized manner. Otherwise, items of inherent value shall be sold through the department's purchasing officer and money received shall be placed in the state's general fund. Items of inconsequential value (having a value of $5 or less) shall be destroyed.

Property items authorized but in excess of the amount allowed inmates may be sent at the inmate's expense to anyone designated by the inmate or stored.

(e) Intoxicating substances. Intoxicating substances shall be disposed of by the institution or given to the sheriff's department for use as evidence or for disposal.

(f) Weapons. Weapons not required for use as evidence may be retained for training purposes or disposed of by institution authorities or law enforcement agencies.

(g) Institution property. Any article originally assigned as property of the institution shall be returned to service at the institution.

(4) If an inmate believes that property should be returned, placed in storage or sent out at his or her direction, and a decision to

dispose of it in a different manner has been made, the inmate may file a grievance. The property shall not be disposed of until the grievance is resolved.

NOTE: In a prison it is necessary to regulate very carefully the property which may be kept by the inmates. See "Contraband offenses," HSS 303.42-303.48. However, these offenses only punish knowing possession of certain items, or in the case of weapons and drug paraphernalia, possession with intent to use the items. Even where it is not possible to show that any inmate was in possession of a forbidden item, or where the inmate in possession did not have the required mental state, the item nevertheless should be taken out of circulation. This section provides the authority to deal with contraband in situations where no one is charged with an offense, as well as when someone is charged and found guilty.

HSS 303.11 Temporary lockup: use.

(1) An inmate may be placed in temporary lockup (TLU) by a security supervisor, security director, or superintendent.

(2) If the inmate is placed in temporary lockup by a security supervisor, the security director shall review this action on the next working day. Before this review and the review provided for in subsection (3), the inmate shall be provided with the reason for confinement in TLU and with an opportunity to respond, either orally or in writing. Review of the decision must include consideration of the inmate's response to the confinement. If, upon review, it is determined that TLU is not appropriate, the inmate shall be released from TLU immediately.

(3) No inmate may remain in TLU for longer than 20 days, except that the superintendent, with notice to the bureau director, may extend this period for no longer than 20 additional days for cause. The security director shall review each inmate in TLU every seven days to determine whether TLU continues to be appropriate. If upon review it is determined that TLU is not appropriate, the inmate shall be released from TLU immediately.

(4) An inmate may be placed in TLU and kept there only if the decision maker is satisfied that it is more likely than not that one or more of the following is true:

(a) If the inmate remains in the general population, the inmate will seek to intimidate a witness in a pending investigation or disciplinary action;

(b) If the inmate remains in the general population, he or she will encourage other inmates by example, expressly, or by their presence, to defy staff authority and thereby erode staff's ability to control a particular situation;

(c) If the inmate remains in the general population, it will create a substantial danger to the physical safety of the inmate or another;

(d) If the inmate remains in the general population, it will create a substantial danger that the inmate will try to escape from the institution; or

(e) If the inmate remains in the general population, a disciplinary investigation will thereby be inhibited.

(5) When an inmate is placed in TLU, the person who does so shall state the reasons on the appropriate form and shall include the facts upon which the decision is based. The inmate shall be given a copy of the form. Upon review, the security director shall approve or disapprove the TLU on the form.

(6) Conditions in TLU should, insofar as feasible, be the same as those in the status the inmate was formerly in. If the inmate was earning compensation and extra good time credit, this shall continue.

NOTE: The main purpose of the section authorizing temporary lockup is to allow temporary detention of an inmate until it is possible to complete an investigation, cool down a volatile situation or hold a disciplinary hearing. The effort is to avoid punitive segregation without a prior hearing, while insuring that inmates can be separated from the general population when there is good reason to do so. The policy is to keep an inmate in TLU only as long as necessary and then either to release the inmate or put the inmate in segregation based on a disciplinary hearing which conforms to the provisions of this chapter. The frequent reviews by high-ranking administrators and the 20-day limit, both provided by subsection (3), are designed to implement this policy, as well as to give the inmate an opportunity to be heard on the issue of whether TLU is appropriate.

Where court decisions have dealt with temporary lockup, they have uniformly approved lockup without a prior hearing if the prison officials believe in good faith that there is an emergency or that the accused is likely to commit another offense if not locked up. See, for example, Hayes v. Walker, 555 F. 2d 625 (7th Cir. 1977). However, some courts have placed a time limit on temporary lockup: U.S. ex. rel. Miller v. Twomey, 479 F. 2d 701 (7th Cir. 1973), cert. den. 414 U.S. 1146 (reasonable time): Enomoto v. Wright, 46 L.W. 3325 (N.D. Cal. 1976), aff'd 46 L.W. 3525 (U.S. 1978) (72 hours).

In Barnes v. Govt. of Virgin Islands, 415 F. Supp. 1218 (D.C. V.I. 1976), the court required a hearing prior to lockup in all cases.

The policy is to use TLU only for an appropriate reason. Where TLU is no longer appropriate, it should be discontinued. There are situations, however, when its use for periods up to 20 days is justified. This period may be extended. It is anticipated that such extensions shall be relatively rare. The need arises most commonly if the sheriff's department requests it, to permit the completion of an investigation. Periodic review is to insure that abuses do not occur.

Subsection (4) identifies the situations in which TLU may be appropriate.

It must be emphasized that there are dangers in correctional institutions that may not exist outside them. For example, an inmate who encourages others to defy authority may create an immediate and real danger. If TLU cannot be relied on to isolate such an individual, it is likely that measures have to be taken against the group, though the group is not culpable.

Likewise, an inmate who is intimidating a witness should be restricted, rather than the victim of the intimidation. This may be the only choice available to correctional officers. Subsection (4)(a).

During evening recreation, the staff is small, yet large numbers of inmates may be outside their cells. Unless the authority exists to temporarily isolate one who is trying to create a disturbance, it will be necessary to cut short recreation for everyone to prevent trouble. This seems unfair, yet would result if an inmate who was encouraging defiance were not isolated in such a situation. Subsection (4)(b).

Some inmates need to be temporarily isolated for their own protection. For example, an inmate may be endangered by virtue of having cooperated in an investigation. The threat may be such that the only effective way to protect him or her is through TLU. Subsection (4)(c).

Sometimes TLU is necessary to prevent escape. For example, an inmate in a camp who has committed an infraction that is ultimately going to affect an expected parole may panic and try to escape. Subsection (4)(d).

Finally, an inmate's presence in the general population may greatly inhibit an investigation because the inmate may destroy evidence not yet discovered by authorities. Temporary isolation until the evidence is found is required. Subsection (4)(e).

Code of inmate offenses.

Introductory note

The purposes of the disciplinary system, including the substantive rules, are addressed in HSS 303.01 and note. However, it is helpful to stress and develop further several points which have particular relevance to the substantive offenses.

In identifying what conduct should be the subject of the disciplinary code, principal reliance was placed on experience. Experience teaches that the offenses which follow are those committed in institutions and that the disciplinary system is appropriate for dealing with them.

There is considerable overlap between the disciplinary rules and the criminal code, principally in the area of crimes of violence. "White-collar" crimes are generally not duplicated in the rules because they have not been a disciplinary problem. However, crimes against persons and property are an important disciplinary problem, and the correctional authorities need to have the power to deal with them without always resorting to the cumbersome machinery of the judicial system.

The experience in Wisconsin has been that disciplinary proceedings are a more effective way of dealing with most crimes committed in prison than prosecution is. In extreme cases, of course, cases are referred for prosecution. However, in these cases as well as in less serious cases, prison officials need to have the authority to isolate or punish individuals in order to prevent a recurrence of violence. The U.S. Supreme Court has approved the practice of bringing both disciplinary and criminal proceedings against an individual

based on a single incident, implying that no double jeopardy problems are raised by this practice. Baxter v. Palmigiano, 425 U.S. 308 (1976).

In addition to reevaluating the purpose and effectiveness of each rule, an attempt has been made to make sections as specific as possible even where the substance of the rule remained unchanged. For example, former policy and procedure 2.02 stated, "Residents shall not sexually assault another person." New HSS 303.13 and 303.14 define two types of sexual assault in very specific terms. This example also points up another change in some rules: rules covering both serious and less serious offenses have been split, so that now someone looking at an inmate's record will have a clearer idea of exactly how serious his or her disciplinary offenses have been. This is especially important at parole hearings and program review committee meetings.

183C/13

Offenses against bodily security

HSS 303.12 Battery.

Any inmate who intentionally causes bodily injury to another is guilty of an offense.

NOTE: This section is based on the old division policy and procedure 2.01 (Assault). The title of this section has been changed from "assault" to "battery" in order to conform to the title of the corresponding section in the criminal code, s. 940.19, Stats. The purpose of this section is to protect the personal security of all inmates, staff, and members of the public.

Virtually every instance where a person strikes another results in injury or pain under this section. Everything prohibited by the old policy is still prohibited, because aggressive behavior which does not result in injury could be punished as attempted battery (HSS 303.12-A), or as threats (HSS 303.16). See HSS 303.06 for the definition of attempt.

This section and HSS 303.17, Fighting, have considerable overlap. An inmate should not be found guilty of violating both sections based on a single incident. If it is possible to determine the aggressor in a fight, this section rather than HSS 303.17 should be used.

Lesser included offense: HSS 303.17, Fighting.

HSS 303.13 Sexual assault-intercourse.

Any inmate who has sexual intercourse with another person without that person's consent and knowing that it is without that person's consent is guilty of an offense. "Sexual intercourse" means any penetration, however slight, by the penis into the mouth, vagina, or anus of another person, or any penetration by any part of the body or an object into the anus or vagina of another person.

NOTE: The division's former policy and procedure 2.02 (Sexual assault) has been split into two parts. The old policy did not define "sexual assault" at all. The definitions in HSS 303.13 and 303.14 are simplified versions of the definitions of "intercourse" and "sexual contact" in s. 940.225, Stats., and the 1975 sexual assault law. Most of the various situations covered by s. 940.225, Stats., such as intercourse with a child, are not relevant to the prison situation. Therefore, the only distinction in these sections is between non-consensual intercourse and all other types of non-consensual sexual contact. Intercourse is considered to be the more serious offense.

The old policy and procedure 2.02 was seldom used because of the difficulty of proving the offense while protecting the victim. The new procedural rules under this chapter make it easier to hold a disciplinary hearing while protecting the safety of the victim or informant.

Lesser included offenses: HSS 303.14, Sexual assault-contact; HSS 303.15, Sexual conduct.

HSS 303.14 Sexual assault - contact.

Any inmate who intentionally has sexual contact with another person without that person's consent and knowing that it is without that person's consent is guilty of an offense. "Sexual contact" means:

(1) Kissing;

(2) Handholding;

(3) Touching by the intimate parts of one person to any part of another person. The "intimate parts" are breast, penis, buttocks, and vaginal area, whether clothed or unclothed; or

(4) Any touching of the intimate parts of another person.

NOTE: This section represents part of the former policy and procedure 2.02. The other part is HSS 303.13. See the note to that section.

Examples of violations of this section are kissing or handholding, grabbing or touching another person's breast, buttocks or genitals (even through his or her clothing), rubbing one's genitals against another person (even through clothing). If the other person consents to the contact, this section is not violated, but both persons have violated HSS 303.15, Sexual conduct.

Violation of this section is less serious than violation of HSS 303.13, and this section is a lesser included offense of that one. See HSS 303.03 on lesser included offenses. However, where an inmate has violated this section in an attempt to rape the other person, a

charge of attempted sexual assault-intercourse would be appropriate.

See chapter HSS 309 for permissible displays of affection during visits.

Lesser included offense: HSS 303.15, Sexual conduct.

183C/16

HSS 303.15 Sexual conduct.

Any inmate who intentionally does any of the following is guilty of an offense:

(1) Has sexual intercourse, as defined under HSS 303.13, with another person;

(2) Has sexual contact, as defined under HSS 303.14, with another person;

(3) Requests, hires or tells another person to have sexual intercourse or sexual contact;

(4) Exposes his or her intimate parts, as defined under HSS 303.14, to another person for the purpose of sexual arousal or gratification, or for exhibitionistic purposes; or

(5) Has sexual intercourse or sexual contact with an animal.

NOTE: This section is basically the same as the former policy and procedure 10.01.

Traditionally, non-marital sexual activity of all sorts has been a criminal offense, but outside of prison such activity is rarely prosecuted. Rather, the definition of such activity as a crime is mainly for the purpose of formally expressing disapproval. In the prison setting, because of segregation by sex, homosexual conduct is

more prevalent than on the outside, and consequently the need to express disapproval of it is stronger. Also, it is not always possible to prove lack of consent to sexual activity in situations where it is likely that one inmate is taking advantage of another. Thus, prohibiting consensual sexual contact helps to prevent sexual assault. This section also forbids consensual sex between married people. See chapter HSS 309 for permissible displays of affection during visits.

Krantz, et al., Model Rules and Regulations, (1973) does not forbid consensual sexual activity between inmates or between an inmate and another person. The omission is not explained.

183C/17

HSS 303.16 Threats.

Any inmate who intentionally does any of the following is guilty of an offense:

(1) Communicates to another his or her intent to physically harm or harass that person or another;

(2) Communicates his or her intent to cause damage to or loss of that person's or another person's property; or

(3) Communicates his or her intent to make an accusation he or she knows is false.

NOTE: As with all of the offenses against persons, the purpose of this section is the protection of the safety and security of inmates, staff and the public. The section was derived from the former policy and procedure 2.03.

The old policy 2.03 was much broader than this section and did not define "threats." Thus, an inmate could be punished for threatening to do something which he or she had a legal right to do - for example, to bring a lawsuit or to write a letter. Such a rule has a chilling effect on the exercise of the protected rights of freedom of expression and access to the courts. Therefore, this section has been narrowed so that only certain types of threats are punishable. A threat to bring a lawsuit is not prohibited by this section. If an otherwise allowable "threat" is communicated in certain ways, however, HSS 303.28, Disruptive conduct or HSS 303.25, Disrespect, might be violated.

Under the Wisconsin criminal code, the following types of threats are punishable: threats to injure or accuse of crime, s. 943.30, Stats., and threats to communicate derogatory information, s. 943.31, Stats. Under either of these statutes, an element of extortion must be present, that is, the threat must be related to a demand for money or property from the victim. Extortion is not a necessary element to find guilt under this section.

183C/18

HSS 303.17 Fighting.

Any inmate who intentionally participates in a fight is guilty of an offense. "Fight" means any situation where two or more people are trying to injure each other by any physical means, to include hitting, biting, kicking, scratching, throwing or swinging objects, or using weapons.

NOTE: A principal purpose of this section is to protect the safety and security of inmates and staff. In addition, fights create a serious risk of disruption and must be considered serious offenses for this reason. Although inmates do have a limited privilege of self defense (see HSS 303.05), as a general rule they should learn to use non-violent means of settling disputes and they should depend on correctional officers rather than their own fists to defend them when attacked. Obviously it will often be difficult for correctional officers, the hearing officer or the adjustment committee to determine who started a fight and whether or not the other person exceeded the bounds of self-defense. Therefore, avoiding such situations entirely is the safest course.

It is intended that a person should not be found guilty under both HSS 303.12, Battery, and this section for the same fight. This section should be used for the person who willingly joins a fight when someone attacks him or her.

Offenses against institutional security

HSS 303.18 Inciting a riot.

Any inmate who intentionally encourages, directs, commands, coerces or signals one or more other persons to participate in a riot is guilty of an offense. "Riot" means serious disturbance to institutional order caused by a group of two or more inmates which creates a serious risk of injury to persons or property.

NOTE: Former division policy and procedure 1.02 (Riots - Rebellion) covered a wide range of activity from very serious to minor. In order that the record of an inmate should more accurately reflect the seriousness of his or her acts, there are now three distinct offenses. HSS 303.18 is the most serious and should be used against "ringleaders" of a serious disturbance which involves violence. Those who actively participate but are not ringleaders should be charged under HSS 303.19. HSS 303.20 is designed for a non-violent disturbance - for example, a sitdown strike. A similar three-way division is used in Krantz, et al., Model Rules and Regulations (1973) at 147-149.

Lesser included offenses: HSS 303.19, Participating in a riot; HSS 303.20, Group resistance and petitions; HSS 303.28, Disruptive conduct.

HSS 303.19 Participating in a riot.

Any inmate who intentionally or recklessly participates in a riot, as defined under HSS 303.18, or who intentionally or recklessly remains in a group which has been ordered to disperse if some members of the group are participating in a riot, is guilty of an offense.

NOTE: See the note to HSS 303.18.

Lesser included offenses: HSS 303.20, Group resistance and petitions; HSS 303.28, Disruptive conduct.

HSS 303.20 Group resistance and petitions.

(1) Any inmate who intentionally participates in any group action which is contrary to the provisions under this chapter, to institution policies and procedures or to a direct verbal order from a staff member, but which does not create a serious risk of injury to persons or property, is guilty of an offense.

(2) Any inmate who intentionally joins in or solicits another to join in any group petition or statement is guilty of an offense, except that the following activities are not prohibited:

(a) Group complaints in the inmate complaint review system;
(b) Group petitions to courts; or
(c) Authorized group activity by authorized groups, such as the lifers group and rap committees.

(3) Subsection (2) only applies to petitions made within an institution. It does not apply to petitions made to people outside an institution, for example, to legislators or newspapers.

NOTE: HSS 303.20(1) differs from conspiracy (HSS 303.21) in that under this section each individual must actually disobey a rule, while under HSS 303.21 an inmate may be punished for merely planning an offense. Also, under HSS 303.21 a plan or agreement is required, while under subsection (1) spontaneous group action can be punished. Finally, punishment under this section can be added to punishment for the particular rule violated, while punishment for conspiracy cannot, because conspiracy is a lesser included offense of the planned offense.

Subsection (2) substantially follows the old policy and procedure 14.03. The inmate complaint review system is the appropriate method for bringing group complaints. To permit such complaints or statements outside the system could seriously disrupt a prison. Experience has proven that it is important that there be as few opportunities as possible for coercion of one inmate by another. Unrestricted rights to petition in groups generates intimidation and coercion as inmates try to force others to join them. The authorized methods are thought to protect inmates' rights to petition and to express their views.

Other problems are also created by unrestricted group petitions. It disrupts orderly physical movement and security by requiring more freedom of movement than is safe. It is also disruptive of programs and contributes to the formation of gangs, which pose a serious threat to institutions. Like many prison rules, this one is aimed at conduct which taken alone might not seem serious to people without experience in corrections. In Wisconsin, the experience has been that permitting such activity creates serious problems and can contribute to the erosion of authority which leads to serious prison disturbances. States that have permitted such activity have uniformly had serious problems in their institutions.

Furthermore, complaints outside the complaint system create confusion among staff. There is already provision for the investigation of complaints in the system. Staff (and their union) are frequently reluctant to cooperate in investigations made outside the system. This makes adequate investigation impossible and hurts morale and institutional security. It also makes an adequate response to the complaint impossible.

The complaint system, on the other hand, provides a structured way to investigate and respond to complaints. It requires, for example, time limits for responses, to insure that the complaints are addressed. It requires that complaints be signed. Without this, adequate investigation is usually impossible.

On balance, reliance on the complaint system seems to restrict first amendment rights only as is necessary to permit the maintenance of order in institutions.

Subsection (3) makes clear that subsection (2) only applies to petitions within an institution. There is no intention to limit petitions addressed to those outside an institution. Typically, this activity is a letter signed by more than one inmate to a newspaper or public official.

See the notes to HSS 303.18 and 303.21.

HSS 303.21 Conspiracy.

(1) If two or more inmates plan or agree to do acts which are forbidden under this chapter, all of them are guilty of an offense.

(2) The penalty for conspiracy may be the same as the penalty for the most serious of the planned offenses.

NOTE: A purpose of conspiracy statutes in general and of this section is to enable law enforcement and correctional officers to prevent group criminal or prohibited activities at an earlier stage than the stage of attempt. Group activities against the rules pose a greater risk than similar individual activities, and this justifies intervention at an earlier stage and punishment for acts which, if done by an individual, would not be against the rules.

The content of subsection (1) of this section is similar to s. 939.31, Stats., though it differs in two important respects. The two elements of conspiracy under the statute are first, an agreement, and second, an overt act in furtherance of the conspiracy by one member of the group. Under this section, overt acts are not required because a prison setting may be so volatile that it is unwise to wait for such acts. As in the statute, the maximum penalty is the same as for the offense itself; an inmate cannot be found guilty of both conspiracy and the planned offense, because under HSS 303.03 conspiracy is a lesser included offense.

The reason that conspiracy has been made a lesser included offense is the similarity between conspiracy and attempt. Both kinds of offenses

provide a sanction against activity which is preparatory to an actual offense. If the offense is completed, however, conspiracy should be included in the other offense just as attempt is.

This section has some overlap with HSS 303.20, Group resistance. However, an inmate need not personally break any substantive rule to be guilty of conspiracy; if a group of inmates agree to participate and then one inmate starts to put the plan into effect, all are guilty of conspiracy. On the other hand, no plan or agreement need be shown to prove a violation of HSS 303.20. HSS 303.20 is intended to deal with nonviolent group activity of a public, disruptive type, such as group refusal to work, while HSS 303.21 is aimed at secret plans for violations of all types.

Conspiracy is a lesser included offense of the planned offense and also of HSS 303.07, Aiding and abetting.

183D/01

HSS 303.22 Escape.

(1) An inmate who does any of the following without permission and with the intent to escape is guilty of an offense:

(a) Leaves an institution;

(b) Leaves the custody of a staff member while outside of the institution;

(c) Does not follow his or her assigned schedule; or

(d) Leaves the authorized area to which he or she is assigned and does not return promptly.

(2) Any inmate who makes or possesses any materials with the intent to use them to escape is guilty of an offense.

NOTE: Since escape is an extremely serious offense (it is one of the few disciplinary offenses which is frequently prosecuted), it is important to define it carefully. The old policy and procedure 4.01 was basically the same as this one; it read:

> Residents shall not leave the confines of the institution proper, other designated authorized areas away from the institution to which they are assigned, or the custody and control of a staff member.

The only change is that now, if an inmate is off grounds on work or study release or on furlough, mere physical deviation from his or her assigned location is not enough to prove escape. Intent to escape must also be proved. This modification recognizes that unexpected situations may arise when an inmate is off grounds and unsupervised, and a certain amount of leeway must be available to inmates to deal with such situations. Of course, an inmate who deviated from a prescribed route or left an area would probably be guilty of violating HSS 303.24, Disobeying orders. If no unexpected situation arose, however, then deviation from the schedule would create a strong inference of intent to escape.

An inmate may be prosecuted in criminal court and also for a rule violation for the same incident.

Lesser included offense: HSS 303.51, Leaving assigned area.

183D/02

HSS 303.23 Disguising identity.

Any inmate who intentionally conceals, alters or disguises his or her usual appearance with the intention of preventing identification is guilty of an offense.

NOTE: The purpose of this section is to help prevent more serious offenses, such as escape, and to promote identification of the offender in other cases.

Inmates may legitimately change their appearance in many ways: change of clothing, use of glasses and sunglasses, change of hairstyle, growing or shaving facial hair. Where such a change is the basis for a charge under this section, proof of the intent to prevent identification becomes crucial. Commission of certain offenses, for example, attempted escape, soon after such a change would be strong evidence of the intent to prevent identification.

On the other hand, where an illegitimate change of appearance is used, such as a mask or an officer's uniform, the intent to prevent identification can be inferred from the change of appearance itself.

Under the s. 946.62, Stats., an additional sentence can be added if a crime was committed while the person's identity was concealed. Under this section, however, it is not necessary to show that another offense was committed, just that an intent to prevent identification existed.

This section is based on former policy and procedure 8.04 but is narrower in scope because of the intent requirement. The old policy was promulgated prior to liberalization of grooming rules allowing mustaches, beards and long hair for men. It could have been used against an inmate who shaved, changed his or her hairstyle, dyed or straightened his or her hair, or even started or stopped wearing glasses. Thus, it needed revision.

183D/03

Offenses against order

HSS 303.24 Disobeying orders.

(1) Any inmate who disobeys any of the following is guilty of an offense:

(a) A verbal or written order from any staff member, directed to the inmate or to a group of which the inmate is or was a member;

(b) A bulletin which applies to the inmate and which was posted or distributed in compliance with HSS 303.08; or

(c) Any other order which applies to the inmate and of which he or she has actual knowledge.

(2) An inmate is guilty of an offense if he or she intentionally commits an act which violates an order, whenever the inmate knew or should have known that the order existed.

NOTE: There is no counterpart to this section in the criminal law, though people in the military are disciplined for failing to obey orders. Because of the close proximity of large numbers of people in a prison, prompt obedience to orders is necessary for orderly operation. Obedience is also an important aspect of learning self-discipline.

An analogy to military law is appropriate. Articles 90, 91, and 92 of the Uniform Code of Military Justice (UCMJ) cover disobeying a commissioned

officer, non-commissioned officer or other lawful order, respectively. Articles 90 and 91 cover disobedience of a direct order while Article 92 covers general orders and indirect orders. The breakdown of subsection (1) into subsections (a), (b), and (c) follows this plan. Subsection (a) covers a direct verbal order. Subsection (b) covers "general" orders, that is, those which apply to all or to a group of inmates, and which are properly posted. It is not necessary to show that the inmate actually knew of the order; it is the inmate's duty to read and remember posted or distributed orders. Subsection (c) covers situations where a posted bulletin was improperly removed from the bulletin board, situations where an order was relayed indirectly to an inmate, and any other situation where the inmate actually knew of the order even though it was not directly given to him or her or was not properly posted.

A violation of this section should not be charged where the order violated was a posted bulletin and there is a more specific section which covers the same thing. For example, HSS 303.33, Attire, requires obedience to posted policies and procedures at each institution regarding clothing. If an inmate violates the posted policies, he or she should be charged with violating HSS 303.33, not this section. However, if an officer notices the improper clothing and tells the inmate to change, but the inmate does not change, then the inmate can be charged with violating both sections. Under this section, the staff member giving the order need not say, "I am giving a direct order," although this is frequently a desirable practice.

HSS 303.25 Disrespect.

Any inmate who overtly shows disrespect for any person performing his or her duty as an employee of the state of Wisconsin is guilty of an offense, whether or not the subject of the disrespect is present. Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, spitting, yelling, and other acts intended as public expressions of disrespect for authority.

NOTE: Disrespectful behavior of the type prohibited by this section can lead to a breakdown of authority or a serious disturbance. This section is not intended to prohibit all criticism of staff members, criticism expressed through the mail or thoughts and attitudes. Nor is it directed toward activity in therapy groups, where open expression is important to treatment. It is directed at conduct within the institution which is potentially disruptive or which erodes authority, not at activity outside the institution. The former policy and procedure 1.01 is very similar to this section.

183D/05

HSS 303.26 Soliciting staff.

An inmate who intentionally does any of the following is guilty of an offense:

(1) Offers or gives anything of value to a staff member or the family of a staff member. Exception: In accordance with contraband regulations, property of an inmate may be entrusted to a designated staff member for the purpose of storage or sending it to a friend or relative of the inmate;

(2) Requests or accepts anything of value from a staff member or the family of a staff member. Exceptions: state property which the staff member is authorized to issue or property belonging to the inmate which was in storage or which has been sent or brought in;

(3) Buys anything from, or sells anything to, a staff member or the family of a staff member. Exception: hobby items for sale to the public in accordance with institutional procedures; or

(4) Requests a staff member or family of a staff member to purchase anything for him or her. Exception: the superintendent may allow this by special authorization, or may designate a staff member to handle such requests.

NOTE: This section forbids all types of contacts between inmates and staff which could lead to favoritism or bribery. Just as theft would be very difficult to control in a prison without a rule prohibiting

all transfer of property (See HSS 303.40), so bribery and favoritism would be difficult to control in the absence of a rule prohibiting all exchanges between staff and inmates. Also, the appearance of impropriety may be as destructive to inmate or staff morale as would actual impropriety. This section is derived from the former policy and procedure 3.09 and is identical in content. The only change is that the exceptions, which always existed, have been made explicit. The existence of unwritten exceptions tends to undermine respect for the rule as a whole because it may appear to the inmates to represent either half-hearted or arbitrary enforcement.

There is no counterpart to this section either in the criminal law or in Krantz, et al., Model Rules and Regulations (1973). However, the Model Rules do prohibit bribery (rule IVB-3(b)).

183D/06

HSS 303.27 Lying.

Any inmate who knowingly makes a false written or oral statement to a staff member which directly affects the integrity, safety or security of the institution is guilty of an offense.

NOTE: Purposes of this section are to help maintain orderly and efficient operation of the institution and to encourage people to tell the truth. On the outside, lying is only punished as a criminal offense if the lie was made under oath. However, in prison the contacts between inmates and state authorities are much more pervasive and a false statement, even one not made under oath, can have serious consequences. On the other hand, in Krantz et al., Model Rules and Regulations (1973), the offense of lying is limited to situations where the lie is either made under oath or is made with intent to obstruct the investigation of a suspected disciplinary offense.

This section is identical in substance to the first half of former policy and procedure 5.04. The second half of the old policy involved use of counterfeit or forged documents, etc. That half of the former policy has been added to the section on counterfeiting and forgery, now HSS 303.41.

This section is limited to lies which threaten the safety, security or integrity of the institution. See State ex. rel. Ellenburg v. Gagnon, 76 Wis. 2d 532 (1976). This, of course, may include false statements to the adjustment committee, to a hearing examiner, or in an investigation.

HSS 303.28 Disruptive conduct.

Any inmate who intentionally or recklessly engages in, causes or provokes disruptive conduct is guilty of an offense. "Disruptive conduct" includes overt behavior which is unusually loud, offensive or vulgar, and may include arguments, yelling, loud noises, horseplay, loud talking, which may annoy another.

NOTE: This section is intended to help preserve a reasonably quiet and orderly environment for the benefit of all inmates and staff. Its counterpart on the outside is "disturbing the peace." As on the outside, disruptive conduct frequently can and should be handled by a warning rather than a charge of violating this section. See HSS 303.65, Offenses which do not require a conduct report.

This section is somewhat similar to HSS 303.29, Talking. That section should be used in situations where no talking is allowed, while this one should be used where an inmate disturbs others by unusually loud talking or unusually offensive language, as well as for non-verbal disruptions. This section also overlaps with HSS 303.25, Disrespect. HSS 303.25, rather than this section, should be used when the disruptive tendency of an inmate's words or actions is due to their message of disrespect for a staff member.

HSS 303.28 is based on former policy and procedure 2.04.

Lesser included offense: HSS 303.29, Talking.

HSS 303.29 Talking.

Each institution shall post specific policies and procedures stating times and places when talking is forbidden. Any inmate who talks during those times or in those places is guilty of an offense, unless either:

(1) The inmate is replying to a question addressed to him or her by a staff member; or

(2) Talking at that time and place is necessary for the physical health and safety of the inmate or another person.

NOTE: This section is intended to help provide a reasonably quiet and orderly environment for the benefit of all inmates and staff. Even talking in a normal tone of voice can be disturbing at certain times or places, for example while others are sleeping or watching TV. Also, talking can prevent other inmates from understanding instructions from staff which are being given to a group.

The former division policy and procedure 5.01 was not uniformly enforced from institution to institution because of varying needs. Recognizing that needs vary (for example, in some institutions the rooms or cells have solid doors; in others they do not), this section merely provides notice that policies on talking do exist and are posted.

HSS 303.30 Unauthorized forms of communication.

Any inmate who communicates with another person by an unauthorized means, such as by passing notes, using sign language, signals, a telephone, any other communication device or code, is guilty of an offense.

NOTE: This is another example of a rule which prohibits action which in itself is not harmful; however, the rule is necessary as an aid in controlling more dangerous behavior. In this case, controlling secret means of communication helps prevent conspiracies and escapes. This section is not to be applied to persons speaking together in a foreign language. If at any time a deaf or mute person is an inmate at an institution, this section should not be applied to use of sign language by or to that person.

The section is derived from the former policy and procedure 5.02.

HSS 303.31 False names and titles.

Any inmate who uses any of the following is guilty of an offense:

(1) A title for himself or herself other than Mr., Ms., Miss, or Mrs., as appropriate;

(2) A name other than the name by which he or she was committed to the department of health and social services, unless the name was legally changed.

NOTE: This section is intended to protect members of the public from being misled by an inmate concerning his or her identity or status, and to avoid confusion of staff members concerning the identity of inmates. This section should not be interpreted to forbid use of common and recognizable nicknames, initials, or a shortened form of the first or last name.

This section is derived from former policies and procedures 15.01 and 15.02.

HSS 303.32 Enterprises and fraud.

(1) Any inmate who engages in a business or enterprise, whether or not for profit, or who sells anything except as specifically allowed under other sections is guilty of an offense, except that:

(a) An inmate who was owner or part owner of any business or enterprise prior to sentencing may communicate with his or her manager or partner concerning the management of the enterprise or business; and

(b) An inmate may write and seek publication of works in accordance with these rules and institutional policies and procedures.

(2) Any inmate who offers to buy or orders any item with the intention of not paying for it is guilty of an offense.

NOTE: The purpose of this section is three-fold: to prevent inmates who set up businesses from taking advantage of any member of the public; to prevent any state liability upon contracts entered into by inmates; and to prevent fraud on the public by inmates who order items and do not pay. If inmates were allowed to conduct businesses by mail from inside an institution, this would greatly increase the amount of mail and supervision required. Furthermore, it is possible an unsuspecting outsider would pay for something the inmate could not supply, leading to the unsatisfactory alternatives of a victim who has lost money, or

state liability. Inmates have opportunities to work in institutional jobs and on work release, and to sell hobby items through official channels. These opportunities plus the exception provide sufficient ways for inmates to work, make money, and learn skills.

This section is derived from former policy and procedure 14.01.

183D/12

HSS 303.33 Attire.

Each institution shall post policies and procedures describing the clothing to be issued to inmates and how it shall be worn, and the circumstances when personal clothing and accessories may be worn and how they may be worn. Any inmate who violates these policies and procedures is guilty of an offense.

NOTE: The purposes of rules on attire are: (1) to prohibit use of clothing which could create identification problems; (2) to simplify laundry and storage; (3) to prohibit use of clothing which could be used as a weapon, e.g., excessively heavy belt buckles; (4) to prohibit the use of clothing which could be used to hide contraband, e.g., lined belts; (5) to prevent the wearing of indecent outfits; and (6) to prevent the wearing of garments which could pose a danger to the wearer or others in certain work situations, or to require protective clothing for similar reasons, e.g., a hairnet.

Security needs and other circumstances vary from one institution to another, so the actual policies and procedures are to be determined at each institution and then posted. This section provides notice that these policies and procedures on clothing exist and must be followed.

If an inmate violates a clothing policy, it should ordinarily only be considered a violation of this section, not of HSS 303.24, Disobeying orders. If the inmate has refused to obey a direct order in addition to disobeying the posted policy, a charge of violating HSS 303.24 would be appropriate.

Under former division policy 8.02, policies on attire were different at each institution. Because of the different levels of security and different needs at the various institutions, no attempt was made to standardize the rules. Instead, this section gives notice that policies on clothing exist.

183D/13

Offenses against property

HSS 303.34 Theft.

Any inmate who steals the property of another person or of the state is guilty of an offense. "Steals" means obtains or retains possession of or title to the property of another, with intent to deprive the owner of it permanently, and without consent of the owner.

NOTE: Most cases of theft in prison are minor and criminal sanctions are not an effective means of deterring theft. In fact, this section alone is not considered enough to control theft without the addition of other sections such as HSS 303.40, Unauthorized transfer of property; HSS 303.50, Loitering; and HSS 303.52, Entry of another inmate's quarters.

The coverage of this section is intended to be the same as s. 943.20, Stats., although the definition of the offense is greatly simplified. Under the former policy and procedure 3.08, theft was not defined. This section should give additional guidance to the adjustment committee or hearings officer in the occasional borderline case.

Lesser included offense: HSS 303.40, Unauthorized transfer of property.

HSS 303.35 Damage or alteration of property.

(1) Any inmate who intentionally damages, destroys or alters any property of the state or of another person without authorization is guilty of an offense.

(2) Any inmate who intentionally damages, destroys or alters his or her own property without the permission of the supervisor of his or her own living unit is guilty of an offense.

NOTE: A purpose of this section is to protect the property of inmates, staff, and the state. There is a parallel criminal statute, s. 943.01, Stats., but except in extreme cases, violations of this section will probably be handled through the disciplinary process rather than by prosecution. This section is identical in coverage to the former policy and procedure 3.03 (although the language has been simplified), except for the addition of the words "without authorization." However, the limitation expressed by these words was assumed to exist even under the old policy.

Inmates may only destroy their own property with specific authorization. "Authorization" is defined under HSS 303.02. Inmates may not authorize damage or alteration of property. This is because it is important to monitor such destruction. Without current property lists, it is impossible to keep track of property in institutions.

HSS 303.36 Misuse of state property.

Any inmate who intentionally uses any property of the state in any way that is not authorized is guilty of an offense.

NOTE: See the notes to HSS 303.35 and 303.37. See too HSS 303.02.

183D/16

HSS 303.37 Arson.

Any inmate who intentionally ignites a fire and thereby creates a risk to people or property, or both, is guilty of an offense.

NOTE: The purpose of this section is to protect the property and safety of inmates and staff and the property of the state. Because of the dangerous potential of fires, arson is punishable even if no damage to property occurs (see HSS 303.35). If damage does occur, an inmate could be punished for violating both this section and HSS 303.35. In addition, starting a fire or creating a fire hazard is punishable even where not done intentionally (see HSS 303.39). Violation of this section is more serious than violation of HSS 303.39. The difference in seriousness is the reason for splitting the former policy and procedure 3.02 into two parts.

This section differs from the criminal statutes on arson, ss. 943.02-943.05, Stats., in several ways. First, this section does not require proof of any damage. Second, lack of consent or intent to defraud need not be shown; in other words, inmates may not set fire to their own property or anyone else's for any reason, except when directed to do so by a staff member. Third, no distinction is made in this section between arson of a building or of other property.

An unwritten but fairly obvious exception to this section is that under almost all circumstances, lighting a cigarette, cigar or pipe is not a violation.

Lesser included offenses: HSS 303.38, Causing an explosion or fire; HSS 303.39, Creating a hazard.

183D/17

HSS 303.38 Causing an explosion or fire.

Any inmate who intentionally causes an explosion or starts a fire is guilty of an offense.

NOTE: The purpose of this section is to protect the property and safety of inmates and staff and the property of the state. Because of the dangerous potential of explosions, intentionally causing an explosion is punishable even if no damage occurs, and if damage does occur an inmate could be punished for violating both this section and HSS 303.35. Also, negligently causing an explosion is punishable under HSS 303.39, if a hazard is thereby created.

Under the old policies and procedures there was no procedure dealing specifically with explosions. In order that each inmate's conduct record more closely reflect the seriousness of his or her offenses, and in order to give specific notice that explosions are considered serious offenses, this section was created.

Lesser included offense: HSS 303.39, Creating a hazard.

HSS 303.39 Creating a hazard.

Any inmate who intentionally, recklessly or negligently creates a hazard by fire or explosion is guilty of an offense.

NOTE: The purpose of this section is to protect the property and personal safety of inmates and staff, and to protect state property. This is the only section under which an inmate can be punished for negligence or recklessness instead of an intentional action. Because of the high density living situation in a prison, carelessness can endanger large numbers of people and create a very serious risk. Therefore, the standard of care of reasonable people must be enforceable through the disciplinary process.

This section is derived from the former policy and procedure 3.02. However, that policy covered both intentional and negligent setting of fires, and it did not cover other types of hazards. Intentionally created risks of two kinds, fire and explosion, are now covered by HSS 303.37 and 303.38. This section is a lesser included offense of both of those sections.

HSS 303.40 Unauthorized transfer of property.

Any inmate who intentionally gives, receives, sells, buys, exchanges, barters, lends, borrows or takes any property from another inmate without authorization is guilty of an offense.

NOTE: This section is designed to aid in the prevention of a variety of other offenses or undesirable activities: theft (or forced "borrowing," or unfair "sales"); gambling; selling of favors by inmates with access to supplies, equipment, information, etc.; and the selling of sexual favors.

Most property items of significant value are easily recognizable (inmates are not allowed to keep money in their possession), so if an item belonging to one inmate is found in the possession of another, a violation of this section is easy to prove even though it may be impossible to prove that theft, gambling or some other offense took place.

Some would argue that since at least one of the two parties to an exchange of property would be guilty of an offense in each of the above examples, this additional section is not needed, and besides, this section condemns much harmless or even beneficial activity (such as friendly sharing, trading, and gift-giving) along with the abuses. For example, Krantz et al. Model Rules and Regulations (1973), contains no rule forbidding transfer of property. However, the experience in Wisconsin has been that this section is necessary to prevent abuses of the types mentioned.

The purposes of this section should be borne in mind and conduct reports not written for petty and harmless violations such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier. Authorized transfers of books are not prohibited.

The former policy and procedure 3.06 included transfers between an inmate and any other person. Unauthorized acceptance of gifts from outsiders is covered by the sections on contraband (HSS 303.42-303.47). Unauthorized transfers involving staff members are covered by HSS 303.26, Soliciting staff. Unauthorized use of state property is covered by HSS 303.36, Misuse of state property. Therefore, this section only covers transfers between inmates.

183D/20

HSS 303.41 Counterfeiting and forgery.

Any inmate who does any of the following is guilty of an offense:

(1) Intentionally makes or alters:

(a) Any document so it appears to have been made, signed, initialed or stamped either by someone else, or at a different time, or with different provisions; or

(b) Any postage stamp or postal cancellation mark; or

(2) Knowingly uses a forged, counterfeit, or altered document, postage stamp or postal cancellation mark.

NOTE: This section is broader in scope than the criminal statute, s. 943.38(1) and (2), Stats., since the statute only covers certain types of documents of "legal significance," such as contracts and public records. In the prison setting almost any writing is of potential legal significance, since letters are sometimes monitored, many memos are put into inmates' files, and notes might be used as evidence in disciplinary proceedings. Also, the smooth and fair operation of the prison depends on the reliability of records such as canteen books, passes, orders, prescriptions and files.

This section is derived from former policy and procedure 5.03. However, the old policy covered only the making or altering of a document, not its use (called "uttering" in criminal law). Use was punishable under former policy and procedure 5.04, which also covered lying. The two

old policies have been reorganized so that both forgery and "uttering" are under this section, while lying is covered by HSS 303.27.

This section is not a lesser included offense of theft; if a forged document is successfully used to obtain someone else's property, the inmate has violated both HSS 303.34, Theft, and this section.

183D/21

Contraband offenses

HSS 303.42 Possession of money.

(1) Except as specifically authorized, any inmate who knowingly has in his or her possession any of the following is guilty of an offense:

(a) Coins or paper money;

(b) A check;

(c) A money order;

(d) A savings bond; or

(e) Any other negotiable instrument.

(2) Any of the above items, if received through the mail, shall be turned over to the proper authority and deposited to the inmate's account or put in safekeeping.

NOTE: Circulation of money is not permitted within the institutions for the same reasons that transfer of property is not allowed. See the note to HSS 303.40. Since unlike other types of personal property, money is not readily identifiable, it would be impossible to prevent transfer of money if inmates were allowed to keep it in the institution. Accounts have been set up for all inmates in which they can deposit their money and from which they can send money to friends, relatives or persons selling goods. See departmental rules relating to inmate accounts.

Only knowing possession of these items is an offense; therefore, an inmate can turn in items received through the mail if he or she does so

promptly, and they will be deposited to his or her account or put in safekeeping, and he or she will not have committed any offense. Subsection (2).

Lesser included offense: HSS 303.47, Possession of contraband-miscellaneous.

183D/22

HSS 303.43 Possession of intoxicants.

(1) Except as specifically authorized, any inmate who knowingly has in his or her possession any intoxicating substance to include items which have a legitimate use and are used under the supervision of a staff member, such as approved glue or cough syrup, is guilty of an offense.

(2) All intoxicating substances prohibited by this section shall be confiscated, whether or not any violation of this section occurred.

NOTE: The purposes of this section are to prevent intoxicating substances from being brought into institutions, to protect inmates and staff from intoxicated persons and to prevent escape. People under the influence of intoxicants often act abnormally and may injure themselves or others. In a prison, intoxicants are particularly troublesome because acting without inhibition can be dangerous to others. Many inmates who try to escape and who attack staff and other inmates are under the influence. It is important to control such conduct by controlling the substances which create the risks.

See HSS 303.02 regarding the definitions of "authorization" and "intoxicating substance."

Lesser included offense: HSS 303.47, Possession of contraband-miscellaneous.

HSS 303.44 Possession of drug paraphernalia.

(1) Any inmate who knowingly possesses any device used in the manufacture of an intoxicating substance or any device used to take an intoxicating substance into the body, with intent to use the device for manufacture or use of an intoxicating substance, is guilty of an offense. A "device" includes, but is not limited to, stills, chemical laboratory equipment, hollow needles, small spoons, roach clips and marijuana or hashish pipes.

(2) Any item found which apparently violates this section may be seized. If the inmate is not guilty and the item is allowable, it shall be returned. Otherwise, it shall be confiscated.

NOTE: This section is designed to help carry out the same purposes described in the note to HSS 303.43 as the purposes for a rule against possession of intoxicating substances. It is easier to control the use of the forbidden substances if the means for making or using the substances are unavailable.

Because some items of paraphernalia may be legitimately possessed, this section contains a requirement of intent to use the item for manufacture or use of an intoxicating substance. For example, at some institutions inmates are allowed to make pipes in hobby shop, so possession of such pipes, by itself, cannot be made an offense. This does not permit the manufacture or possession of "pot pipes," however. Also, the definition of device in this section is somewhat vague. Examples are relied

on to give specificity. Without the intent requirement, this section might not give sufficient notice of what is forbidden and thus, might violate the due process clause of the fourteenth amendment to the Constitution. Of course, intent can be inferred from the circumstances and the hearing officer or committee is not required to believe a denial of intent by the accused if there is other, contradictory evidence.

In the past, there has never been a rule against possession of paraphernalia. Nevertheless, inmates who possessed such items were often disciplined, under the supposed authority of either the general prohibition against contraband or the prohibition against possession of intoxicants. This section gives more specific notice to inmates of what is forbidden.

Lesser included offense: HSS 303.47, Possession of contraband-miscellaneous.

183D/24

HSS 303.45 Possession, manufacture and alteration of weapons.

(1) Any inmate who knowingly possesses any item which could be used as a weapon, with intent to use it as a weapon, is guilty of an offense.

(2) Any inmate who makes or alters any item with intent to make it suitable for use as a weapon is guilty of an offense.

(3) Any inmate who knowingly possesses an item which is designed exclusively to be used as a weapon or to be used in the manufacture of a weapon is guilty of an offense.

(4) Any item found which apparently violates this section may be seized. If the inmate is not guilty and the item is allowable, it shall be returned. Otherwise, it shall be confiscated.

NOTE: The purpose of this section is to protect the safety of inmates and staff by taking dangerous items away from inmates whenever it appears that an inmate is planning to use an item as a weapon, and by making possession of weapons a punishable offense.

Because many items which an inmate may legitimately possess could also be used as weapons, in the case of such items an intent to use the item as a weapon must be shown. Subsection (1). Intent will usually be inferred from the circumstances. For example, possession of a razor blade which is located in a razor or in a box of blades and with other

toiletry items would not, in itself, be an offense. But carrying around a single razor blade, especially outside the cell, would probably be an offense.

Subsection (1) deals with items which are still in their original form and which have both a legitimate use and use as a weapon. Examples are knives, kitchen utensils, matches, cigarettes, tools and heavy objects. On the other hand, subsection (2) deals with items which have been altered from their original form. Examples include a spoon or table knife which has been sharpened and a razor blade which has been taped or fitted to a handle. If an inmate makes or alters such an item, there is no need to show that he or she intended to use it as a weapon. It is only necessary to show that the inmate intended to make the item suitable for use as a weapon. In most cases, such an intent can be inferred from the mere fact of making the item.

Finally, subsection (3) deals with items which have no other purpose than to be used as weapons. Examples include guns, explosives, switchblade knives and many of the homemade items which are also covered by subsection (2). Inmates are not allowed to have such items under any circumstances and they will be confiscated. Also, if an inmate knowingly has such an item in his or her possession, the inmate is guilty of an offense.

Even if an inmate is found "not guilty" under this section because there was insufficient proof of intent and the item was not something that could only be used as a weapon, in many cases the inmate will nevertheless be guilty of misuse of state property (see HSS 303.36) or

damage or alteration of property (see HSS 303.35). Examples include taking a kitchen utensil or tool away from the kitchen or shop where it is supposed to be used and altering a state owned item in a way that makes it more suitable for use as a weapon.

Lesser included offense: HSS 303.47, Possession of contraband-miscellaneous.

183D/25

HSS 303.46 Possession of excess smoking materials.

(1) Any inmate who knowingly has in his or her possession over four cartons of cigarettes or over fifty cigars is guilty of an offense.

(2) Any item found which apparently violates this section may be seized. If the inmate is not guilty, the item shall be returned as soon as its return would not put the inmate over the limit of allowable cigarettes or cigars. If the inmate is guilty, the item shall be confiscated.

NOTE: The purpose of this section is the same as the purpose of HSS 303.42, Possession of money, and HSS 303.40, Unauthorized transfer of property: to aid in the prevention of various other offenses or abuses such as gambling; the sale of favors by inmates with access to supplies, equipment or information; the sale of sexual favors; and forced "selling," "giving" or "borrowing." Cigarettes are often used as a form of money in prisons, and transfer of cigarettes is difficult to detect because cigarettes are not individually identifiable. Therefore, use of cigarettes or cigars as a medium of exchange can be curbed by preventing hoarding of large quantities. Confiscation of the excess cigars or cigarettes whenever the inmate is found guilty (subsection (2)) is an additional deterrent. But since cigars and cigarettes do not in themselves pose a threat to order and security, subsection (2) also provides that they will be returned to the inmate if he or she is found not guilty.

The present practice is not to write conduct reports when the inmate gets excess cigarettes inadvertently, for example, through the mail as a gift. Under this section, a conduct report would also be inappropriate.

Lesser included offense: HSS 303.47, Possession of contraband-miscellaneous.

183D/26

HSS 303.47 Possession of contraband-miscellaneous.

(1) Each institution shall post a list of all types of property which inmates are allowed to possess in accordance with department policies and procedures relating to personal property. Some types of property may be allowed, but only in limited quantity. Some items may be allowed but must be registered on the inmate's property list.

(2) Any inmate who knowingly possesses any of the following is guilty of an offense:

(a) Items of a type which are not allowed, according to the posted list;

(b) Allowable items in excess of the quantity allowed, according to the posted list;

(c) Nonexpendable allowable items which are required to be listed but are not listed on the inmate's property list; or

(d) Items which do not belong to the inmate, except state property issued to the inmate for his or her use, such as sheets and uniforms.

NOTE: The purposes of controlling the types and quantities of property which inmates may have with them are: (1) to prevent trading, and more serious offenses associated with it, among inmates (see HSS 303.40 and note); (2) to simplify storage; (3) to keep out items which are likely to be misused; and (4) to keep out extremely valuable items which may create jealousy among inmates. Items in subsections (2)(b) - (d) are included in order to help prevent trading and theft.

Items which are covered by this section and are not covered by any of the more specific sections are items which are not, in themselves, dangerous. Therefore, even when an inmate is guilty because he or she failed to register an item, had a prohibited item or had too many of one kind of item, the inmate's property is not confiscated. Property is disposed of or returned in accordance with HSS 303.10.

The types of items allowable vary from institution to institution, so no actual listing is given here. Rather, a listing of all allowable property should be posted at each institution in accordance with department policies relating to personal property. This section gives notice that the posted lists exist and that violation of them is a disciplinary offense.

HSS 303.48 Unauthorized use of the mail.

(1) Any inmate who uses the U.S. postal service to communicate with a person who has been declared a prohibited correspondent of that inmate in accordance with chapter HSS 309 is guilty of an offense.

(2) Any inmate who sends through the mail anything which, according to HSS 303.42-303.47, he or she may not have in his or her possession, is guilty of an offense. Items in safekeeping may be sent out at the inmate's expense. Some items which were seized may be sent out at the inmate's expense, in accordance with HSS 303.10.

NOTE: Use of the mails is an important right of prisoners which is protected by the first amendment to the U.S. Constitution and may not be abridged except under the following circumstances:

> First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than necessary or essential to the protection of the particular governmental interest involved.

Procunier v. Martinez, 416 U.S. 396, 413 (1974); X v. Gray, 378 F. Supp. 1185, 1186 (E.D. Wis. 1974), aff'd 558 F. 2d 1033. See also ACA, standard 4306, Discussion:

> Access to the public is an integral part of rehabilitation. Inmates should be permitted to communicate with their families and friends, as well as with public officials, the courts and their attorneys. All correspondence should be uncensored.

Chapter HSS 309 governs the use of the mail by inmates. Basically, inmates may correspond with anyone unless the inmate or the correspondent abuses the privilege. Then, the right to correspond with a particular person may be terminated pursuant to chapter HSS 309 or as part of a disciplinary hearing. Subsection (1) of this section only comes into play if the right to correspond with a particular person has already been terminated. If the inmate nonetheless corresponds with that person, for example by enclosing a message inside a letter or package to someone else, the inmate has violated this section.

The purposes of subsection (2) are the same as the purposes of HSS 303.42 and 303.46. See the notes to those sections. Inmates should not be allowed to send away, for safekeeping, items which were improperly acquired, such as money, drugs, weapons or the property of others. This section is only intended to apply to situations where the inmate personally puts items into an envelope or package. For example, if money from the inmate's account is sent out to pay for a purchase, there is no violation.

A person should not be charged with a violation of HSS 303.30 and this section for the same act.

Movement offenses

HSS 303.49 Punctuality and attendance.

Inmates shall attend and be on time for all events, classes, meetings, meals, appointments and the like for which they are scheduled. Any inmate who intentionally violates this section is guilty of an offense, unless:

(1) The inmate is sick and reports this fact as required by posted institution policies and procedures;

(2) The inmate has a valid pass to be in some other location; or

(3) The inmate is authorized to skip the event.

NOTE: See the note to HSS 303.53. See HSS 303.02 for the definition of authorized.

HSS 303.50 Loitering.

Inmates shall walk at a normal pace, following a normal route, and without delay when going to and from all events, classes, meetings, meals, appointments and their quarters. Any inmate who intentionally violates this section is guilty of an offense.

NOTE: See the note to HSS 303.53.

183D/30

HSS 303.51 Leaving assigned area.

Any inmate who intentionally leaves a room or area where he or she is attending any scheduled activity such as a class, meal, religious service, group meeting or other event, or who leaves the immediate area of a work or school assignment before the event or the work or school assignment is over is guilty of an offense, unless:

(1) The inmate gets permission to leave from a staff member supervising the activity; or

(2) The inmate has a valid pass to go somewhere else at that time.

NOTE: See the note to HSS 303.53.

HSS 303.52 Entry of another inmate's quarters.

(1) Any inmate who enters the quarters of any other inmate or permits another to enter his or her quarters, is guilty of an offense, unless such entry is:

(a) Part of a work assignment and under the supervision of a staff member; or

(b) Allowed according to posted institution policies and procedures.

(2) Reaching, leaning, or putting any object or part of the body into another inmate's quarters is included in "entering."

NOTE: See the note to HSS 303.53.

HSS 303.53 Posted policies and procedures relating to movement.

Each institution may make and post specific policies and procedures regulating the movement of inmates. A violation of an individual institution's policies and procedures relating to movement is an offense.

NOTE: In general, all of the sections concerning movement have the following purposes: (1) to prevent escape by monitoring inmates' movements; (2) to prevent fights, assaults and disturbances by preventing gathering of groups except in closely supervised situations; and (3) to permit the effective monitoring of inmate activity both in the institution and while on work or study release. In addition, HSS 303.49, Punctuality and attendance, is intended to promote the smooth running of all programs of work, study and recreation, and to promote development of punctual habits by inmates. HSS 303.52 has the additional purposes of preventing theft and other illicit activity. HSS 303.50 is not intended to prohibit normal conversation between inmates who are walking.

These sections are derived from the former policies and procedures 4.02 - 4.07. The policies entitled "Group Movement" and "Individual Movement" were eliminated for the following reasons: (1) the two rules were not uniform from institution to institution, so it would be better to use posted policies; and (2) in most cases the offenses described were adequately covered by one of the other four sections or by HSS 303.20, Group resistance.

At some institutions and during certain times of day, inmates do not have to be in a particular place but have a choice of places to be, for example, in the cell, dayroom or in the yard. Each institution should post procedures to explain exactly what choices inmates have, during which hours, etc. Such posted procedures would supercede these sections to the extent they are inconsistent.

183D/33

Offenses against safety and health.

HSS 303.54 Improper storage.

(1) Food, toiletries, hobby materials, medications, cleaning supplies and certain other items shall be kept in the original containers, unless otherwise specified, and in their authorized place. Any inmate who intentionally stores any of these items in a different container or in an unauthorized place is guilty of an offense.

(2) Each institution may adopt specific procedures relating to the storage of items. Violation of these procedures is an offense.

NOTE: The purposes of this section are to aid in the enforcement of the contraband rules and to prevent possible poisoning or misuse of items due to improper labeling. The exact list of items which are covered by this section will be posted at each institution; this section only names the types of items which are likely to be covered.

HSS 303.55 Dirty quarters.

Each institution or residence area shall adopt and post specific procedures regulating the organization, neatness and cleanliness of inmates' quarters. Any inmate whose quarters do not comply with the posted procedures is guilty of an offense, provided that the inmate had knowledge of the condition of his or her quarters and had the opportunity to clean or rearrange it.

NOTE: In the close living conditions of a prison, a messy or dirty room could become a breeding ground for bacteria or a haven for pests such as insects or mice, and thus threaten the health and safety of the inmate of that room and of others. Where two or more inmates share quarters, differences in habits of neatness could lead to arguments or to an unpleasant environment for one person. Finally, development of the habit of neatness is part of rehabilitation. For all of these reasons, neatness and cleanliness of rooms is regulated. However, since the layout of rooms, the laundry arrangements and the content of rooms varies greatly among institutions, the particular requirements are not contained in this section but instead will be posted at each residence hall or institution. See HSS 303.08, Institutional policies and procedures.

The organization of living quarters is also important because it is essential for staff to be able to observe quarters and because rooms can be arranged in a way that creates a fire hazard. Thus, the organization of rooms is also subject to rule-making.

Violation of HSS 303.24, Disobeying orders, should not be charged when an inmate violates this section, unless the inmate has been warned and still refuses to clean up. Also, in many cases of violation of this section, a conduct report is probably not necessary. See HSS 303.65, Offenses which do not require a conduct report.

183D/35

HSS 303.56 Poor grooming.

(1) Any inmate whose personal cleanliness or grooming is a health hazard to himself or herself, or others, and who has knowledge of this condition and the opportunity to correct it, but does not, is guilty of an offense.

(2) Any inmate who knowingly fails to shower at least once a week, unless the inmate has a medical excuse, is guilty of an offense.

(3) Inmates performing work assignments which may reasonably be considered to be hazardous may be required to maintain suitably cut hair, or to wear protective head gear or nets. Any inmate who fails to wear such required devices or who fails to maintain suitably cut hair is guilty of an offense.

NOTE: The purpose of this section is to protect the health and safety of all inmates and staff. Pests or infections can easily spread from person to person. This section does not, however, impose standards of taste upon inmates. For example, any hair style is acceptable as long as the hair is washed and combed often enough to prevent diseases or pests, and as long as on-the-job policies concerning hair are followed. This is in conformity with the ACA, standard 4303:

> 4303: Written policy and procedure allow freedom in personal grooming, except where a valid state interest justifies otherwise. (Essential) Discussion: Inmates should be permitted freedom in personal grooming so long as their appearance does not conflict with the institution's requirements for safety, identification and hygiene. All regulations imposed should be the least restrictive necessary.

HSS 303.57 Misuse of prescription medication.

Any inmate who knowingly does any of the following is guilty of an offense:

(1) Takes more of a prescription medication than was prescribed;

(2) Takes a prescription medication more often than was prescribed;

(3) Takes a prescription medication which was not prescribed for him or her; or

(4) Possesses or takes any prescription medication except at the time and place where he or she is supposed to take it.

NOTE: Use of prescription medications must be carefully monitored because many of the medications have mind-altering qualities and could be abused just as controlled substances such as heroin, cocaine, marijuana, or alcohol can be abused. See note to HSS 303.43, Possession of intoxicants, for the reasons behind the policy of not allowing inmates to use any mind-altering drugs.

Because the very same policy explains HSS 303.43 and 303.59, and this section, inmates should not be found guilty of violating both this section and one of the others on a single occasion unless more than one type of drug was involved. Rather, the reporting officer, or the hearing officer or adjustment committee, should decide which of the sections is most appropriate.

HSS 303.58 Disfigurement.

Any inmate who intentionally cuts, pierces, removes, mutilates, discolors or tattoos any part of his or her body or the body of another, is guilty of an offense.

NOTE: The purpose of this section is to protect the safety and health of the inmates. Tattooing, ear piercing and other forms of self-mutilation can lead to serious infections. In addition, some forms of disfigurement could lead to identification problems.

The wearing of pierced earrings is allowed, but inmates whose ears are not already pierced may not get them pierced while in prison.

This section is only intended to cover injury to oneself or to another person with that person's consent. Injury to another person without his or her consent is covered by HSS 303.12, Battery.

This section is derived from former policy and procedure 13.02.

Miscellaneous offenses

HSS 303.59 Use of intoxicants.

Any inmate who intentionally takes into his or her body any intoxicating substance, except prescription medication in accordance with the prescription, is guilty of an offense.

NOTE: The reasons for the policy of not allowing inmates to use any kind of intoxicating drugs, including alcohol, are explained in the note to HSS 303.43.

Misuse of prescription medications is not covered by this section because it is already an offense covered by HSS 303.57. For the purpose of deciding which of the two sections applies, "prescription medication" means only drugs obtained properly or improperly, directly or indirectly, from pharmacy supplies at the institution. The fact that a particular drug is sometimes prescribed by some doctor somewhere does not make it a "prescription medication" for purposes of this section.

HSS 303.60 Gambling.

(1) Any inmate who gambles is guilty of an offense. "Gambles" includes betting money or anything of value on the outcome of all or any part of any game of skill or chance on an athletic contest or on the outcome of any event.

(2) Any inmate who organizes a lottery or betting pool or game played for money or anything of value, is guilty of an offense.

NOTE: Gambling is forbidden for the following reasons: (1) it can result in some players being cheated or taken advantage of; (2) it can lead to serious debts which in turn lead to violence, intimidation and other problems; (3) even without cheating or large debts, it can create strong emotions leading to violence or other discipline problems; (4) some inmates have a psychological dependence on gambling (similar to alcoholism) which has been associated with criminal behavior in the past. Removing the opportunity for gambling could help such inmates to overcome this problem.

On the outside, although all gambling except licensed bingo or lotteries is forbidden (s. 945.02, Stats.), the statute is often not enforced against persons who engage in small-scale, private, non-commercial gambling with no links to organized crime. K. Davis, Police Discretion (1975), p. 5. However, this section is aimed at just such activity.

Thus, for example, betting a pack of cigarettes on the outcome of a TV football game is an offense. It would also violate HSS 303.40, Unauthorized transfer of property, if the bet was paid. The experience of staff is that even this type of betting can lead to serious problems for the reasons listed earlier.

Subsection (2) provides that even a non-gambler can be guilty of an offense if that person organizes a game, lottery or pool.

This section is derived from the former policy and procedure 3.07.

183D/40

HSS 303.61 Refusal to work or attend school.

Any inmate who intentionally refuses to perform his or her work assignment or attend school, and who is physically able to do so, is guilty of an offense, unless he or she has specific permission to do so.

NOTE: See the note to HSS 303.62.

183D/41

HSS 303.62 Inadequate work and study performance.

(1) Any inmate whose work fails to meet the standards set for performance on his or her job or school program and who has the ability to meet those standards, is guilty of an offense.

(2) Each institution may adopt and post specific policies and procedures regulating the use of a shop, work area and classroom. Violation of these policies and procedures is an offense.

NOTE: Performance of work assignments is vital to the operation of each institution. Laundry, food preparation, cleaning, and maintenance are among the tasks performed by inmates. Enforcement, through the disciplinary process, of the duty to work is necessary to the smooth running of the institution. This section is not intended to require work on Sunday, unless the work is necessary for the running of the institution. Food service is an example of such work.

Even where an inmate is not assigned to work which is vital to the institution's operation, he or she is nevertheless required by these sections to work or study if assigned to do so. These sections are designed to instill habits of dependability and responsibility which are important in getting and keeping jobs on the outside.

The ACA approves the requirement that inmates be required to work, but disapproves forced participation in educational or treatment programs.

Standard 4295, National Advisory Commission, Corrections (1973) suggests that inmates be paid at the prevailing wage paid in the community. Such a positive incentive to work, if it could be implemented in Wisconsin, might greatly reduce the need for discipline to force the inmates to work and to perform their work properly. Also, it would duplicate much more closely the work conditions existing on the outside, and thus would provide better preparation for working after release. However, at the present time, the idea of paying inmates the minimum wage is not under serious consideration, mainly for budgetary reasons. See generally, "Minimum Wages for Prisoners: Legal Obstacles and Suggested Reforms," 74 Mich. J.L. Reform 193 (Fall 1973). See the departmental rules on compensation and extra good time.

183D/42

HSS 303.63 Violations of institutional policies and procedures and conditions on leave.

(1) Each institution may make specific substantive disciplinary policies and procedures relating to:

(a) Visiting;

(b) Recreation;

(c) Smoking;

(d) Movement within the institution;

(e) Attire;

(f) Personal property;

(g) The use of institution facilities;

(h) Talking;

(i) Sale of craft items;

(j) Authorized enterprises; and

(k) Reporting illness or injury.

(2) Violations of any specific policies or procedures authorized under subsection (1) are offenses.

(3) Violations of the conditions imposed on leave for qualified inmates are offenses.

NOTE: Each institution, due chiefly to its unique physical facilities, security requirements and programs, must have the authority to regulate the matters specified in subsection (1) more specifically and frequently

than is possible through the rulemaking process. This section provides the authority to do so. Only violations of policies and procedures authorized under this section and specified under this chapter may be treated as violations permitting punishment. Such policies and procedures must be related to the objectives under HSS 303.01.

Disciplinary procedure and penalties

HSS 303.64 Disciplinary violations - possible dispositions.

A violation of HSS 303.12-303.63 may be dealt with in the following ways:

(1) If a conduct report is not required, the inmate may be counseled and warned. Disposition in this manner is governed by HSS 303.65.

(2) A minor violation may be disposed of summarily. Disposition in this manner is governed by HSS 303.74.

(3) The violation may be referred to the security supervisor in writing by a conduct report. See HSS 303.66. Violations referred to the security supervisor may be dealt with as follows:

(a) The security supervisor may dismiss, alter or correct the report. See HSS 303.67.

(b) If the violation is a minor one, the security supervisor shall refer the matter to a hearing officer to be disposed of in accordance with HSS 303.75.

(c) If the violation is a major one, the security supervisor shall refer the matter to a hearing officer to be disposed of in accordance with HSS 303.76-303.84.

(4) Violations of the criminal law may be referred to the sheriff for further investigation and to the district attorney for prosecution. See HSS 303.73.

NOTE: This section gives an overview of the different ways a rule violation can be handled. In general, less serious offenses are handled by informal means, such as counseling, warning or summary punishment with consent of the inmate. More serious offenses are handled by more formal means, including a hearing by an impartial officer or committee at least 24 hours after notice is given, an opportunity to respond to the charges and an opportunity for appeal. In addition, in the most serious or "major" cases the accused may have the opportunity to call witnesses and present evidence, the opportunity to confront and cross-examine adverse witnesses and the assistance of a staff member in preparing for the hearing.

The disciplinary process in correctional institutions is greatly misunderstood. This is principally because commentators focus on the so-called procedural due process aspects of the system, and devote inadequate attention to the substantive definition of offenses and the less visible, though significant, administrative decisions that occur before the formal system is invoked. Another reason is that commentators put great emphasis on due process, an important value, but they ignore other important objectives of the disciplinary system. Careful evaluation of due process can only be made in the context of the whole system, and with an understanding of the values it seeks to achieve.

Restating these objectives is important, because we cannot be reminded too often of the purposes of the system. It is crucial that order be maintained in institutions, both for the safety of inmates and staff and to provide an environment in which people can be constructively involved in programs. While the so-called formal process for discipline helps achieve these values, so do less formal measures. For example, an officer in a cell hall may maintain order by exercising sound judgment in writing conduct reports. In perhaps the majority of violations, counseling and a warning to the inmate is more effective and more efficient in maintaining order than invoking the formal process. It is also more fair, and develops respect for authority rather than detracting from it. This in itself is rehabilitative, because it contributes to the process of teaching people to live within acceptable limits. It also helps people understand that the system is not unnecessarily harsh and unyielding.

These objectives, as well as the objectives of punishment and deterrence, can also be served in the more formal process. Unnecessary formality may in fact detract from some of these objectives. For example, a formal adversary procedure may make it impossible to counsel an inmate about misbehavior, when counseling is more important than punishment. But, increasingly, there has been pressure to rely on formal procedure. Sometimes, this detracts from fairness and other values served by the system. This is not to say that inmates should not be treated fairly.

One of the goals of the disciplinary procedure rules is to provide a speedy and fair determination of guilt or innocence. Speed is important because: (1) memories may fade and evidence grow stale as time passes; (2) an accused inmate may be in temporary lockup pending a hearing; (3)

the time of institution staff should be conserved as much as possible to save money and to allow them to spend time on other functions; (4) a pending disciplinary charge can have adverse effects on an inmate's morale, assignment and transfer or parole prospects. Therefore, it should be resolved as quickly as possible.

The goal of fairness is advanced by the procedural rules in several ways: (1) the hearing officer or adjustment committee is impartial; (2) the officer's or committee's decision must be based on the evidence presented, and on a preponderance of that evidence; (3) various safeguards assure that the inmate's side of the story is fully presented. In some cases, any or all of the following are allowed: a staff member's help in preparing for the hearing, an opportunity to present evidence and witnesses, and an opportunity to confront and cross-examine adverse witnesses. In all cases, the inmate can make a statement on his or her own behalf; (4) the officer or committee is required to make a written report of the decision and reasons for it. This allows review of the decision; (5) there are guidelines set out to help the staff member make certain decisions, such as the decision whether to write a conduct report and the decision of what punishment to impose.

More procedural safeguards of the type just discussed could have been required to make disciplinary procedure resemble a criminal trial. Fairness might be increased somewhat by such additional safeguards. However, there are countervailing factors to be considered. Complex procedure may interfere with a speedy resolution of the case, which is important for reasons discussed earlier. An increase in the adversary quality of a disciplinary hearing is not desirable, because a more

adversary hearing may tend to overemphasize the importance of a relatively minor incident and harden attitudes of inmates and staff toward each other. It may make counseling impossible. A discussion of the negative aspects of a highly adversary hearing is found in Gagnon v. Scarpelli, 411 U.S. 778, 787-788 (1973):

> 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 than to continue nonpunitive rehabilitation. Certainly, the decision-making 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.

Scarpelli, of course, dealt with probation and parole revocation, but the need for flexibility and informality also exists in the prison disciplinary situation, as explained in Wolff v. McDonnell, 418 U.S. 539, 562-563 (1974):

> [P]roceedings 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.

It is accurate to say that, in the disciplinary process, correctional staff are dealing with a wide range of behavior. Their objectives are varied and are sometimes in conflict. There is nothing improper about this. The variety of objectives and conduct makes for complexity. This chapter seeks to permit individualized, fair treatment of violators, while avoiding unnecessary complexity and meaningless procedures.

HSS 303.65 Offenses which do not require a conduct report.

(1) Staff members are not required to make official conduct reports on all observed violations of the disciplinary rules. Under any of the following conditions, the officer may merely inform the inmate that his or her behavior is against the rules and discuss the inmate's behavior and give a warning if:

(a) The inmate is unfamiliar with the rule;

(b) The inmate has not violated the same or a closely related rule recently (whether or not a conduct report was made);

(c) The inmate is unlikely to repeat the offense if warned and counseled;

(d) Although the inmate's acts were a technical violation of a rule, the purposes of this chapter would not be served by writing a conduct report in the particular situation.

(2) An offense which is always considered major, in accordance with HSS 303.68, may not be disposed of in accordance with this section. A conduct report must be written if a major offense occurs.

(3) No official report of dispositions in accordance with subsection (1) of this section is required.

(4) The security director may strike a charge if he or she believes a conduct report is inappropriate, in accordance with HSS 303.67.

The decision by the security director not to strike or to strike is not reviewable by the hearing officer, adjustment committee or superintendent.

NOTE: In the past, discretion has always been exercised in the decision of whether or not to write conduct reports. This section recognizes that it is not desirable or necessary to handle all observed rule violations through the formal disciplinary process, and it provides guidelines for the exercise of discretion by correctional officers. This helps to increase uniformity and to increase understanding of the disciplinary rules and the enforcement policy among both inmates and staff.

Non-enforcement of a disciplinary rule in certain situations is closely analogous to non-enforcement of criminal laws by police. Two noted commentators have strongly urged that police enforcement policies be made public in the form of administrative rules in order to provide public input and review of the policies, to increase uniformity of application, to provide guidelines to individual officers, and to provide notice to the public of the standard of behavior expected of them. K. Davis, Police Discretion (1975); H. Goldstein, Policing a Free Society (1977). This section also conforms to the ACA, standard 4315:

> Written guidelines should specify misbehavior that may be handled informally. All other minor rule violations and all major rule violations should be handled through formal procedures that include the filing of a disciplinary report.

Although this section limits the officer's discretion (for example, an officer may not handle a major offense, such as fighting, informally), there is still considerable scope for the officer's judgment, for example, in deciding whether the inmate is likely to commit the offense again. The officer's experience can guide him or her in making this judgment better than a detailed rule could. Also, even if the officer may handle a rule violation informally, this section does not require the officer to do so when in his or her judgment discipline is needed.

Subsection (1)(d) refers to the purposes of the individual sections and the rules generally in HSS 303.01. A statement of the purpose of each disciplinary rule in this chapter can be found in the note to that section. These notes in some cases give examples of situations where the rule should normally not be enforced. For example, the note to HSS 303.40, Unauthorized transfer of property, states that: "[C]onduct reports [should] not [be] written for petty and harmless violations of this section, such as exchanging single cigarettes, when there is no evidence that the exchange is related to any abuse such as those mentioned earlier."

183E/02

HSS 303.66 Conduct report.

(1) Except under the conditions described in HSS 303.65, any staff member who observes or finds out about a rule violation shall do any investigation necessary to assure himself or herself that a violation occurred, and if he or she believes a violation has occurred, shall write a conduct report. If more than one staff member knows of the same incident, only one of them shall write a conduct report.

(2) In the conduct report, the staff member shall describe the facts in detail and what other staff members told him or her, and list all sections which were allegedly violated, even if they overlap. Any physical evidence shall be included with the conduct report.

(3) There should be only one conduct report for each act or transaction that is alleged to violate these sections. If one act or transaction is a violation of more than one section, only one conduct report is necessary.

NOTE: If an officer has decided, using the guidelines in HSS 303.65, that counseling or warning an inmate is not the best response to a particular infraction, the next step is to write a conduct report. The contents of the conduct report are described in subsection (2). A conduct report is the first step for all three types of formal disciplinary procedures: summary punishment, minor offense hearing and major offense hearing.

If the officer did not personally observe the infraction, subsection (1) requires that he or she investigate any allegation to be sure it is believable before writing a conduct report. An informal investigation by the reporting officer can save the time of the adjustment committee by weeding out unsupported complaints, and can also provide additional evidence to the adjustment committee if any is found. Also, it is fairer to the inmate to spare him a hearing when the officer cannot uncover sufficient evidence.

Subsection (3) provides that there should be a conduct report for each action which is alleged to violate the sections. If one action violates three sections only one report is required. Presumably, the report would list the sections violated and state the relevant facts. This is an effort to avoid unnecessary use of forms.

There is no "statute of limitations" for writing the report. Rather, the guiding factor, when there is time between the alleged offense and the conduct report, should be whether the inmate can defend himself or herself and not be unfairly precluded from doing so due to the passage of time.

HSS 303.67 Review by security office.

(1) Each working day, the security director shall review all conduct reports written since the previous working day.

(2) Conduct reports which resulted in summary disposition must be reviewed and approved prior to entry in any of the inmate's records.

(3) Conduct reports should be reviewed for the appropriateness of the charges.

(a) The security director may dismiss a conduct report if he or she believes that, according to HSS 303.65, it should not have been written.

(b) The security director shall strike any section number if the statement of facts could not support a finding of guilty of violating that section.

(c) The security director may add any section number if the statement of facts could support a finding of guilty of violating that section and the addition is appropriate.

(d) If no section numbers remain, a conduct report must be destroyed.

(e) The security director may refer a conduct report for further investigation.

(4) The security director shall divide all remaining conduct reports into major and minor offenses. See HSS 303.68.

(a) Minor offenses shall be disposed of in accordance with HSS 303.75.

(b) Major offenses and conduct reports charging both major and minor offenses shall be disposed of in accordance with HSS 303.76-303.84.

(5) Following the review described in this section, the security director shall sign all reports he or she has approved.

NOTE: A conduct report is the initial step in the formal disciplinary process. It can be written by any correctional staff member. Unless the accused inmate admits the charges and submits to summary punishment (see HSS 303.74), the next step is review by the security office. The purpose of the review is to improve the consistency of the reports so that the rules are used in the same way in all reports, and to check the appropriateness of the charges in light of the narrative description section of each report. The review is not a substitute for continuing supervision and training of officers to make sure they all use the rules in the same way; however, it can serve as a tool in the supervision of officers while at the same time making sure that an inmate is not forced to go through a hearing based on an inappropriate charge, or conversely is not let off because the violation charged was under the wrong section.

If summary disposition of the case has already occurred, the security office also reviews the conduct report. The same type of review for the appropriateness of charges should be made, as well as a review of the appropriateness of writing a conduct report (see HSS 303.65) and of the appropriateness of the sentence imposed. The security director may reduce the punishment or charges, if a violation has been treated summarily but may not add to them, since summary punishment is based on consent of the inmate and the inmate has only admitted the charges which were originally written on the conduct report. Only if the conduct report and the punishment are approved may a record of the violation be included in the inmate's files.

183E/04

HSS 303.68 Major and minor penalties and offenses.

(1) (a) A "major penalty" is adjustment segregation as defined in HSS 303.69 and 303.84, program segregation as defined in HSS 303.70 and 303.84, loss of earned good time under 303.84, or all three where imposed as a penalty for violating a disciplinary rule. Any minor penalty may be imposed for a violation where a major penalty could be imposed. Restitution may be imposed in addition to or in lieu of any major penalty.

(b) A "minor penalty" is a reprimand, loss of recreation privileges, building confinement, room confinement, loss of a specific privilege, extra duty, and restitution in accordance with HSS 303.72 and 303.84. Restitution may be imposed in addition to or in lieu of any other minor penalty.

(c) A "major offense" is a violation of a disciplinary rule for which a major penalty may be imposed if the accused inmate is found guilty.

(d) A "minor offense" is any violation of a disciplinary rule which is not a major offense. Only minor penalties may be imposed for a minor offense.

(2) Any violation of the following sections is a major offense:

Section	Title
303.12	Battery
303.13	Sexual assault - intercourse
303.14	Sexual assault - contact
303.18	Inciting a riot
303.19	Participating in a riot
303.22	Escape
303.23	Disguising identity
303.37	Arson
303.41	Counterfeiting and forgery
303.45	Possession, manufacture and alteration of weapons
303.57	Misuse of prescription medication
303.59	Use of intoxicants

(3) An alleged violation of any section other than those identified as major in subsection (2) of this section may be treated as either a major or minor offense. The security director shall decide whether it should be prosecuted as a major or minor offense, if the offense has not been disposed of summarily in accordance with HSS 303.74. To determine whether an alleged violation should be treated as a major or minor offense, the following criteria should be considered:

(a) Whether the inmate has previously been found guilty of the same or a similar offense, how often, and how recently;

(b) Whether the inmate has recently been warned about the same or similar conduct;

(c) Whether the alleged violation created a risk of serious disruption at the institution or in the community;

(d) Whether the alleged violation created a risk of serious injury to another person; and

(e) The value of the property involved, if the alleged violation was actual or attempted damage to property, misuse of property, possession of money, gambling, unauthorized transfer of property, soliciting staff or theft.

(4) Any conduct report containing at least one charge of a major offense shall be handled as a major offense, even if it also includes minor offenses.

(5) Any alleged violation of a rule which may result in a suspension of visiting or correspondence privileges, work or study release, or leave shall be treated as a major offense, although the inmate may waive this.

NOTE: For the reasons given in the note to HSS 303.64 and in Wolff v. McDonnell, 418 U.S. 539 (1974), greater procedural safeguards are used when a greater punishment is possible. The dividing line between the two types of formal hearing is the same as the one used in Wolff, supra. If segregation or loss of good time is imposed, then all

of the Wolff safeguards apply. If other lesser punishments are used, then a less formal procedure is used. In order to preserve the option of using a major punishment, the security office will designate a conduct report as containing a "major offense" whenever it seems possible that either segregation or loss of good time will be imposed by the adjustment committee. Some offenses must always be considered major offenses; these are listed in subsection (2). Violations of other sections will be considered individually and it is left to the security director's discretion whether to treat an offense as major or minor. However, guidelines for the exercise of this discretion are given in subsection (3).

183E/05

HSS 303.69 Major penalties: adjustment segregation.

(1) Conditions. Adjustment segregation may not exceed eight days. It may only be imposed for a major offense by the adjustment committee or the hearing officer. Only one person shall be kept in each segregation cell, except when overcrowding prevents it. Each cell must meet the following minimum standards: clean mattress, sufficient light to read by at least 12 hours per day, sanitary toilet and sink, and adequate ventilation and heating.

(2) Necessities. The following shall be provided promptly upon request for each inmate in adjustment segregation but may not necessarily be kept in the cell: adequate clothing and bedding; a toothbrush, toothpaste, soap, a towel, a face cloth and a small comb, unless the inmate is allowed to use his or her own such hygiene supplies; paper, envelopes, stamps and pens (the cost of stamps may be deducted from the inmate's account); and holy books. The same diet as provided to the general population at the institution shall be provided.

(3) Other property. Inmates in adjustment segregation may have material pertaining to legal proceedings and books provided by the institution librarian in adjustment segregation.

(4) Visits and telephone calls. Inmates in adjustment segregation shall be permitted visitation and telephone calls in accordance with chapter HSS 309.

(5) Mail. Inmates in adjustment segregation may receive and send mail in accordance with the departmental rules relating to inmate mail.

(6) Showers. Inmates in adjustment segregation shall be permitted to shower at least once every four days.

(7) Special procedures. No property is allowed in the cell except that described in subsections (1), (2) and (3), and letters received while in adjustment segregation. Smoking is forbidden. Each institution may establish specific procedures relating to talking. No yelling or whistling is permitted.

(8) Leaving cell. Inmates in adjustment segregation may not leave their cells except for urgent medical or psychological attention, showers, visits and emergencies endangering their safety in the cell.

(9) Good time. An inmate shall not earn extra good time while he or she is in adjustment segregation. Wages are not paid to inmates in adjustment segregation.

(10) Observation. A person placed in observation while in adjustment segregation receives credit toward the penalty being served.

(11) Transfer. An inmate may be transferred from one institution to another while in adjustment segregation in accordance with chapter HSS 302.

NOTE: This section reflects the conditions in adjustment segregation as they already exist at most institutions. The purpose of this section is to promote uniformity among all the institutions, to make sure minimum standards are met and to inform inmates what to expect.

Adjustment segregation lasts a maximum of eight days, so very spartan conditions are permissible. However, visiting and mail rights are protected by the first amendment. See Procunier v. Martinez, 416 U.S. 396 (1974); Mabra v. Schmidt, 356 F. Supp. 620 (W.D. Wis. 1973).

While extra good time is not earned in this status, fractions of days are not deducted. See the departmental rules on extra good time and compensation.

183E/06

HSS 303.70 Major penalties: program segregation.

(1) Conditions. Program segregation may not exceed the period specified in HSS 303.84. It may only be imposed for a major offense by the adjustment committee or the hearing officer. Only one person shall be kept in each segregation cell, unless overcrowding prevents it. Each cell must meet the following minimum standards: clean mattress, sufficient light to read by at least 12 hours per day, sanitary toilet and sink and adequate ventilation and heating.

(2) Necessities. The following shall be provided promptly upon request for each inmate in program segregation: adequate clothing and bedding; a toothbrush, toothpaste, soap, a towel, a face cloth and a small comb, unless the inmate is allowed to use his or her own such hygiene supplies; paper, envelopes, stamps and pens (the cost of stamps may be deducted from the inmate's account); and holy books. The same diet as provided to the general population at the institution shall be provided.

(3) Property. Inmates in program segregation shall be allowed to have any property in their cells which can feasibly be moved from quarters of the general population, except as follows:

(a) For the first 35 days in segregation, an inmate may not receive his or her personal electronic or electric units such as a television radio, cassette player, stereo receiver.

(b) If an inmate commits a major offense during the first 35 days in segregation, the inmate shall not receive such electronic units until 35 days from the date of the offense.

(c) If an inmate is found guilty of three offenses, either major, minor, or any combination thereof while in segregation, the inmate shall lose such personal electronic equipment for 35 days upon being found guilty of the third offense.

(4) Visits and telephone calls. Inmates in program segregation shall be permitted visitation and telephone calls in accordance with chapter HSS 309.

(5) Mail. Inmates in program segregation may receive and send mail in accordance with departmental rules relating to mail.

(6) Showers. Inmates in program segregation shall be permitted to shower at least once every four days.

(7) Services and programs. Social services, clinical services and program and recreation opportunities shall be provided as possible but must be provided at the individual's cell, unless otherwise authorized by the security director. A program of exercise shall be provided for inmates in program segregation.

(8) Leaving cell. Inmates in program segregation may not leave their cells except for medical or clinical attention, showers, visits, exercise and emergencies endangering their safety in the cell.

(9) Good time and pay. Inmates in program segregation earn neither extra good time nor compensation.

(10) Canteen. Inmates in program segregation may bring approved items in from the canteen on the same basis as all other inmates but may not go to the canteen in person.

(11) Special rules. Smoking is permitted if no hazard is thereby caused. Talking is permitted in a normal tone during approved times. No yelling or whistling is permitted.

(12) Review of program segregation. An inmate's status in program segregation may be reviewed at any time and he or she may be placed in the general population at any time by the superintendent. Such status must be reviewed every 30 days by the superintendent. Such review shall include a recommendation by the security director as to whether the inmate should remain in program segregation and an evaluation of the inmate by either the crisis intervention officer or the adjustment program supervisor, or both.

In deciding whether an inmate should be removed from program segregation and placed in the general population, the superintendent shall consider:

(a) The offense, including:

1. Its nature and severity;
2. Mitigating factors;

3. Aggravating factors; and

4. Length of sentence to program segregation;

(b) Motivation and behavior of the inmate, including:

1. Attitude toward himself or herself and others and changes in his or her attitude;

2. Goals of the inmate;

3. Physical and mental health; and

4. Attempt to resolve emotional and mental disorders;

(c) Institutional adjustment, including:

1. Disciplinary record;

2. Program involvement;

3. Relationship to staff and inmates; and

4. Security problems created by release;

(d) Programs, including:

1. Social and clinical services available to help the inmate; and

2. Any programs available to help the inmate.

NOTE: This section reflects the conditions in program segregation as they already exist at at least one institution. The purposes of this section are to promote uniformity among all the institutions, to make

sure minimum standards, possibly required by the eighth amendment's "cruel and unusual punishment" clause are met and to inform inmates what to expect.

Since program segregation may last for almost one year (or longer if a new offense is committed), the conditions are not as spartan as in adjustment segregation. In particular, more personal property is allowed and there is an opportunity to take advantage of programs.

Subsection (7). A person's stay in program segregation may not be extended and he or she may be released at any time through the procedure established under this section.

183E/07

HSS 303.71 Controlled segregation.

(1) Use. Any inmate in TLU or segregation of any kind who exhibits loud and seriously disruptive behavior or destructive behavior toward the contents of the cell or himself or herself may be put into controlled segregation upon order of the shift supervisor. No inmate may be placed in controlled segregation unless a conduct report is written for the conduct giving rise to the use of controlled segregation. The adjustment committee shall review the report to determine if disciplinary action is appropriate. Controlled segregation lasts for not more than 72 hours for a single inmate. After an inmate has been in controlled segregation for a total of 72 hours, he or she must be returned to a regular segregation cell for at least 24 hours before he or she may be returned to controlled segregation.

(2) Conditions. Only one person shall be kept in each segregation cell, except in emergencies. Each cell must meet the following minimum standards: clean mattress, sufficient light to read by for at least 12 hours per day, sanitary toilet and sink and adequate ventilation and heating.

(3) Necessities. The following shall be provided for each inmate in controlled segregation: adequate clothing, essential hygiene supplies upon request, and the same diet as provided to the general population. While an inmate is acting in a disruptive manner, close control of all property shall be maintained.

(4) Visits. Inmates in controlled segregation may not receive visits except from their attorney or with permission from the security director.

(5) Mail. Inmates in controlled segregation may receive and send mail in accordance with departmental rules relating to mail. Correspondence materials may be provided if they do not pose a threat to anyone.

(6) Special Rules. No property is allowed in the cell except that described in subsections (2) and (3), letters received while in controlled segregation and legal materials. Smoking is forbidden. Talking is permitted in a normal tone. No yelling or whistling is permitted.

Inmates in controlled segregation may not leave their cells except in emergencies endangering the inmate's safety in the cell or with permission from the security director or his or her designee.

(7) Good time. An inmate in controlled segregation earns extra good time and compensation if he or she was doing so in the previous status.

(8) Records. Inmates in controlled segregation shall be visually checked every half hour. A written record or log entry shall be made at each such interval noting the emotional condition of the inmate.

(9) Credit. An inmate in controlled segregation receives credit toward a term of program segregation and adjustment segregation during such period of confinement.

NOTE: Controlled segregation is not intended as punishment but, as its name implies, it is to be used where it has been impossible to control a person in segregation. The purpose of the section is to promote uniformity in the use of controlled segregation and to make sure minimum standards are met. In particular, incoming and outgoing mail is still allowed as if the inmate were not in segregation. This is a logical extension of Procunier v. Martinez, 416 U.S. 396, (1974). See also X v. Gray, 378 F. Supp. 1185 (E.D. Wis. 1974), aff'd 558 F. 2d 1033; Vienneau v. Shanks, 425 F. Supp. 676 (W.D. Wis. 1977).

183E/08

HSS 303.72 Minor penalties.

Minor penalties in accordance with HSS 303.68 and 303.84 shall include:

(1) Reprimand. A reprimand is any oral statement by the committee or hearing officer to an inmate when the inmate is found guilty of a disciplinary offense. The reprimand should only be recorded if no other penalty is given.

(2) Loss of recreation privileges. Recreation privileges include sports or exercise periods, movies, and leisure activities outside the cell, either on grounds or off grounds.

(3) Room confinement. Room confinement may be imposed during non-school or non-work program hours, including weekends, for a maximum of 10 days. During the hours of confinement, the inmate may not leave his or her quarters without specific permission. Permission may be granted for religious services, medical appointments, showers, and visits from outside persons, if these must occur during the hours of confinement. Any or all electronic equipment may be removed from an inmate's quarters if room confinement is imposed.

(4) Loss of a specific privilege. Specific privileges which may be lost if abused include: use of inmate's own TV, radio or cassette player; phone calls; participation in off grounds activities; and having meals in the dining room. These privileges may be taken away for up to 30 days for the first offense, for up

to 60 days for the second, and permanently for the third. However, visiting and mail may be suspended for periods of time in accordance with departmental rules relating to resources for inmates.

(5) Restitution. Restitution is payment to the owner for the replacement or repair of stolen, destroyed and damaged property or for medical bills. Property for which restitution is ordered shall be valued at the cost of replacing or repairing such property, whichever is less. An inmate may be ordered to make full or partial restitution. Money may be withheld from earnings or taken from an inmate's account to satisfy the requirement to make restitution.

(6) Extra duty. An inmate may be assigned extra work or school duty for a specific number of hours without pay or be required to report as ordered to a school or a work assignment for as long as 10 days.

(7) Building confinement. This is confinement to the building in which the inmate resides.

NOTE: This section describes each of the minor penalties which may be imposed. The purpose of this section is to standardize the punishments used so that an inmate's disciplinary record is easier to understand, and to inform inmates of what to expect. There should be no referral to the program review committee for reclassification if a minor penalty is imposed, unless there has been a recent accumulation of such penalties.

HSS 303.73 Referral for prosecution.

(1) The superintendent of each institution shall, in conjunction with the local district attorney, develop a policy stating which offenses should be referred for prosecution. The policy should cover the following points:

(a) Which statutory crimes should be considered for prosecution;

(b) The amount of evidence needed before prosecution should be considered;

(c) The circumstances in which, even though a violation of the criminal statute can be proved, there should not be prosecution (for instance, less serious battery); and

(d) Which disciplinary offenses may include a crime which is referred for prosecution.

(2) When one of the offenses mentioned in subsection (1) (d) above is alleged in a conduct report, the security director shall review the conduct report in light of the policy to determine if the case should be referred to the district attorney.

(a) If necessary, the security director shall order an investigation to determine if sufficient evidence exists for referral to the district attorney.

(b) If the security director refers the offense to the district attorney, the district attorney shall decide whether to bring charges against an inmate.

(3) Whether or not the review described in subsection (2) results in prosecution being started, the incident may be handled as a disciplinary offense.

NOTE: A number of rules cover conduct which is sometimes a criminal offense. However, many petty matters would probably not be prosecuted by the district attorney even if brought to his attention - for example, gambling. Also, in most cases, even outbreaks of violence are handled through disciplinary procedures rather than by prosecution. This section requires the superintendent to work with the district attorney in developing a policy on prosecution of crimes committed within the institution. The frustration and waste of time involved in referring cases which are dropped can be avoided, as well as the possibility of failing to refer a case which ought to be prosecuted. Naturally, the final decision is left up to the district attorney (subsection (2)(b)).

In developing the policy on referral, it will become obvious that the disciplinary rules do not follow the criminal statutes exactly. Some crimes are not covered by the disciplinary rules. These are generally "white collar" crimes which are unlikely to be committed in prison. Some rules cover both criminal and non-criminal activities. An example is HSS 303.43, Possession of intoxicants, which covers possession of alcohol as well as prescribed drugs. The notes to the individual sections explain the differences between each rule and the similar criminal statute.

Subsection (3) provides that disciplinary procedure can go forward even if the case will also be prosecuted as a criminal offense. This option is often needed for control because criminal procedure takes a long time and because a criminal conviction merely lengthens an inmate's sentence without changing the conditions of confinement. For some inmates, a longer sentence is very little deterrent. Also, it provides no protection to potential victims because the offender is not segregated from the general population. There is no double jeopardy in having both a disciplinary hearing and a criminal trial on the same matter. See Baxter v. Palmigiano, 425 U.S. 308 (1976).

183E/10

HSS 303.74 Summary disposition procedure.

(1) An inmate may be summarily found guilty and punished for minor rule infractions in accordance with this section.

(2) Before an inmate is summarily found guilty and punished, a staff member:

(a) Shall inform the inmate of the nature of the alleged infraction and the contemplated penalty; and

(b) Shall inform the inmate that the incident may be handled summarily or that it may be handled through the formal disciplinary process.

(3) If the inmate agrees to summary disposition, the staff member shall inform the inmate of the punishment.

(4) Before imposing the punishment, the staff member shall get the oral or written approval of the shift supervisor. If the shift supervisor disapproves of the summary disposition, the alleged infraction shall either be handled through the formal disciplinary process or the disposition shall be altered so that it is approved by the shift supervisor.

(5) Punishments imposed pursuant to this section shall not exceed the following:

(a) Reprimand;

(b) Loss of a specific privilege for 1 to 15 days, except visits and mail;

(c) Two nights in room confinement;

(d) Loss of recreation privilege for 1 to 15 days;

(e) Extra duty beyond the normal work day; or

(f) Building confinement.

(6) A record of dispositions made pursuant to this section shall be written on an appropriate form indicating that summary disposition has been made and approved by the shift supervisor.

NOTE: The availability of summary disposition avoids the necessity of a disciplinary hearing when the inmate agrees to summary disposition. Summary disposition is only allowed in relatively minor cases, those where the punishment is only one of the punishments listed in subsection (5). To further limit the possibility of abuse, any summarily-imposed punishment must be approved by the shift supervisor. Subsection (4). Also, summary punishments must be reviewed and approved by the security office before being entered in the inmate's disciplinary record or other files. See HSS 303.67.

In the recent past, summary disposition has not been used extensively. A hearing was held on all offenses. This section thus streamlines disciplinary procedure in minor, uncontested cases. One purpose of the section is to encourage summary disposition, where appropriate.

183E/11

HSS 303.75 Hearing procedure for minor violations.

(1) When an inmate is alleged to have committed a minor violation and the security director or his or her designee has reviewed the conduct report pursuant to HSS 303.67 and it has not been disposed of summarily in accordance with HSS 303.74, a copy of the approved conduct report shall be given to the accused inmate no later than two working days preceeding the hearing date. The conduct report shall include the offense or offenses charged, the facts upon which the charges are based, the sources of information, the date of the hearing, and shall order the inmate to appear at the hearing. The hearing shall be held not less than two days nor more than twenty-one from the date the approved conduct report is given to the inmate. The inmate can request more time to prepare, and it should be granted by the hearing officer unless there is no good reason to do so.

(2) At the hearing, a hearing officer, appointed under subsection (6), shall review the conduct report and discuss it with the inmate. The inmate shall be provided with an opportunity to respond to the report and make a statement about the alleged violation. The hearing officer may question the inmate. The inmate has no right to a staff advocate, to confront witnesses, or to have witnesses testify on his or her behalf.

(3) The hearing officer shall decide the guilt or innocence of the inmate on each charge, decide the punishment, and announce these decisions to the inmate. Penalties for minor violations

shall be imposed in accordance with HSS 303.72. HSS 303.83 and 303.84 apply for major violations when a due process hearing is waived under HSS 303.76(6).

(4) A finding of guilty shall be based on the preponderance of the evidence, and the institution must establish this.

(5) The hearing officer shall write the finding of guilt for each charge, the punishment and the reasons for it on the conduct report and return it to the security office for record entry and compliance with the disposition.

(6) The superintendent shall appoint one or more staff members to serve as hearing officers. Only persons who are eligible to serve on the adjustment committee may be appointed. A hearing officer with direct personal involvement in the conduct report, shall not hold a hearing on that conduct report.

(7) An inmate may waive the time limits provided in this section in writing.

(8) An inmate may appeal the disposition of a minor hearing within 10 days to the superintendent.

NOTE: The minor hearing procedure has several safeguards to protect the inmate from an erroneous or arbitrary decision. It is used in the following situations: (1) When the inmate did not agree to summary disposition, because he or she contested the facts or for some other reason; (2) When the appropriate punishment, if the inmate is found guilty, is more severe than permitted on summary disposition but not so

severe as to require a full due process hearing; and (3) When a due process hearing was waived by the inmate.

The protections present in the minor hearing procedure are: subsection (1) -- notice of the charges; subsection (2) -- opportunity for the inmate to explain or deny the charges; subsection (4) -- a decision based on the evidence and on a preponderance of the evidence; subsection (6) -- an impartial hearing officer; and HSS 303.85 - no records are kept in any offender-based file if the inmate is found not guilty.

The ACA, standard 4334, Discussion, draws the line between "major" and "minor" violations in a different place: "Minor violations usually are those punishable by no more than a reprimand or loss of commissary, entertainment or recreation privileges for not more than 24 hours." Because minor penalties as defined in HSS 303.68 include several which are more severe, the minor offense disciplinary procedure is somewhat more formal than that recommended in the ACA.

HSS 303.76 Hearing procedure for major offenses - notice.

When an inmate is alleged to have committed a major violation and the security director has reviewed the conduct report pursuant to HSS 303.64, the following procedure shall be followed:

(1) A copy of the approved conduct report shall be given to the inmate within 24 hours of its approval.

(2) The inmate shall be informed in writing of the rules which he or she is alleged to have violated.

(3) The inmate shall be informed in writing of the potential penalties which may be imposed and other potential results, such as, removal from work release and forfeiture of a MAP contract.

(4) The inmate shall be informed that he or she has a right to a due process hearing or that he or she may waive this right in writing. The inmate shall be informed that if a due process hearing is chosen, the inmate may present oral, written, documentary, physical evidence, and evidence from voluntary eye witnesses in accordance with these sections; that he or she has a right to the assistance of a staff advocate in accordance with these sections; that the adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness; that repetitive, disrespectful, and irrelevant questions may be forbidden; and that the inmate may appeal the finding and disposition of the adjustment committee in accordance with HSS 303.78.

(5) The inmate shall be informed that he or she may waive the right to a due process hearing and the rights specified in subsection (4). The inmate shall be informed that if the right to a due process hearing is waived, the conduct report shall be disposed of as follows:

(a) The inmate shall appear before a hearing officer under HSS 303.75 or the adjustment committee as soon as possible but no later than 21 days;

(b) The inmate may present his or her version of the facts;

(c) The staff member who made the conduct report need not be present;

(d) The hearing officer or adjustment committee may question the inmate and otherwise investigate the case and shall decide the guilt or innocence of the inmate and the punishment to be imposed; and

(e) The inmate may appeal the finding and punishment to the superintendent.

(6) If the inmate elects to waive his or her rights to a due process hearing, he or she shall do so in writing. This writing shall be returned to the security office. An inmate may waive this right at any time.

NOTE: HSS 303.76, 303.78-303.80, and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539, 564 (1974). With respect to notice, the subject of this section, the court said:

> 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.

See the note to HSS 303.77 concerning waiver of the right to a due process hearing.

See the note to HSS 303.78 on the other requirements of Wolff, supra.

HSS 303.77 Hearing procedure for major violations when due process hearing waived.

If an inmate waives his or her right to a due process hearing of the type described in HSS 303.76, a disciplinary hearing shall be held in accordance with HSS 303.75. Such a waiver does not constitute an admission of the alleged violation.

NOTE: Just as a criminal defendant may waive his or her right to a trial, so an inmate accused of a disciplinary offense can waive his or her right to a due process hearing. In that case, a hearing of the type used for minor offenses is held. The inmate still has an opportunity to make a statement, an impartial hearing officer, a decision based on the evidence, and an entry in the records only if the inmate is found guilty. See HSS 303.75 and note.

To ensure that any waiver is a knowing, intelligent one, the inmate must be informed of his or her right to a due process hearing and what that entails (HSS 303.76(4); informed of what the hearing will be like if he or she waives due process (HSS 303.76(5)); and the waiver must be in writing (HSS 303.76).

A waiver is not an admission of guilt.

HSS 303.78 Major hearing procedure - due process.

(1) The due process hearing shall be held in accordance with HSS 303.76. At a due process hearing, the conduct report shall be read aloud and all witnesses for or against the accused, including the accused himself or herself and the staff member who wrote the conduct report, shall have a chance to speak. The adjustment committee may require physical evidence to be offered. The adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness. Repetitive, disrespectful or irrelevant questions may be forbidden.

(2) After the hearing the adjustment committee shall deliberate in private, considering only the evidence which was presented to it and the inmate's records. The institution must establish guilt. The adjustment committee may find the inmate guilty or not guilty. A committee of three may find a person guilty if at least two of the three members find by a preponderance of the evidence that he or she is guilty, and if two agree upon a sentence, may sentence. A committee of two or of one may find a person guilty if they unanimously find by a preponderance of the evidence that he or she is guilty and may sentence if they are unanimous as to the sentence. If a sentence is not agreed upon, the matter shall be referred to the superintendent. The committee shall then recall the accused and his or her advocate (if any) and announce its decision. The accused and his or her advocate (if any) shall each receive a written copy of the decision.

(3) The due process hearing shall be held not sooner than 2 days and not more than 21 days after service of notice that the inmate is charged with a violation. This period can be enlarged or diminished if the security director approves and the inmate agrees.

(4) Any time within ten days after a due process hearing, an inmate who is found guilty may appeal the decision and/or punishment to the superintendent.

(5) The superintendent shall review all records and forms pertaining to the appeal within 10 days following the request.

(6) After review, the superintendent shall:

(a) Affirm the adjustment committee's decision and the punishment;

(b) Affirm the adjustment committee's decision but reduce the punishment (in type or quantity); or

(c) Reverse the adjustment committee's decision. In this case, all records of the decision must be removed from all offender-based files. Records may be kept for statistical purposes only.

(7) If the punishment is reduced or eliminated by appeal, the superintendent shall order the change immediately.

(8) An inmate may waive the time limits set in subsections (3) and (5) at any time in writing.

NOTE: HSS 303.76, 303.78, 303.79, 303.80 and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). As summarized in the syllabus of the case, those requirements are:

(a) Advance written notice of charges must be given to the inmate, no less than 24 hours before an appearance before the adjustment committee.

(b) There must be "a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." Morissey v. Brewer, 408 U.S. 471, 489 (1972).

(c) The inmate should be allowed to call witnesses and present documentary evidence in his or her defense if permitting him or her to do so will not jeopardize institutional safety or correctional goals.

(d) The inmate has no constitutional right to confrontaton and cross-examination in prison disciplinary proceedings, such procedures in the current environment, where prison disruption remains a serious concern, being discretionary with the prison officials.

(e) Inmates have no right to retained or appointed counsel in such proceedings, although counsel substitutes may be provided in certain cases.

A final requirement was impartiality of the committee. The court held that a committee consisting of the associate warden-custody, the correctional industries superintendent, and the reception center director was sufficiently impartial. The makeup of the adjustment committee is specified in HSS 303.82. See the discussion of smaller committees in the note to HSS 303.82.

These requirements are satisfied by this chapter as follows:

(a) Advance written notice: HSS 303.76;

(b) Written decision based on the evidence: HSS 303.78(2);

(c) Opportunity to call witnesses and present evidence, except where it jeopardizes institutional safety or correction goals: HSS 303.78(1), and HSS 303.81. HSS 303.81 requires advance screening of requested witnesses and gives guidelines for the screening process;

(d) Confrontation and cross-examination, in the prison officials' discretion: HSS 303.78. Subsection (1) limits the committee's discretion somewhat more than Wolff requires it to be limited; under this section, cross-examination can only be stopped if the questions are "repetitive, disrespectful or irrelevant"; and

(e) Counsel substitutes in certain cases: HSS 303.79.

On the subject of requiring a written statement by the committee (subsection (2)), the court said:

> 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. s. 83-185(4) (Cum. 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 is 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.

Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974).

On cross-examination and confrontation of adverse witnesses, the court said:

> 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.

Id. at 568.

Subsection (1) does not greatly limit the adjustment committee's discretion to prohibit cross-examination and confrontation, as it appears to do,

because of the fact that the witness need not be called at all. The committee may rely on hearsay testimony if there is no reason to believe it is unreliable. See HSS 303.86, Evidence.

Subsection (2) provides for one, two and three person adjustment committees. Most institutions prefer to have three people on an adjustment committee. This will frequently be impossible in the camp system. There is likely to be experimentation at other institutions.

Subsections (4) - (6) provide for an appeal. Appeal is not required by Wolff v. McDonnell; in fact, an opportunity for appeal is not even an element of required due process in a criminal proceeding. Griffin v. Illinois, 351 U.S. 12 (1956). Appeal or review is one of three ways of controlling discretion, according to Kenneth Culp Davis. The other two are limiting discretion by placing outer limits, and structuring discretion by listing guidelines or factors to be considered. Appeal increases uniformity in decision-making, may eliminate or reduce abuses of discretion, and provides an opportunity for the superintendent to review the work of his or her subordinates in handling disciplinary cases.

HSS 303.79 Due process hearing: advocates.

(1) At each institution, the superintendent may designate staff members to serve as advocates or they may volunteer. The names of advocates who are available to serve that week shall be put on a list and given to the hearing officer. The inmate shall be permitted to choose the advocate from a list of three, though the caseloads of advocates may be regulated by the superintendent.

(2) The advocate's purpose is to help the accused to understand the charges against him or her and to help in the preparation and presentation of any defense he or she has, including gathering evidence and testimony, and preparing the accused's own statement. The advocate may speak on behalf of the accused at a disciplinary hearing or may help the accused prepare to speak for himself or herself.

(3) A training program for advocates should be conducted as often as possible. The training program should cover the following subjects:

(a) Proper role of the advocate;

(b) Techniques of interviewing the accused;

(c) Conduct covered and not covered in each disciplinary rule including the significance of lesser included offenses;

(d) Techniques of factual investigation;

(e) The elements of violations in the rules; and

(f) Defenses.

NOTE: HSS 303.76, 303.78, 303.79, 303.80 and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). One of these requirements is that:

> Where an illiterate inmate is involved ... 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.

Id. at 570.

The purpose of the advocate is stated in subsection (2). The idea of help from fellow inmates has not been followed; the only advocates allowed to accompany an inmate to a hearing are officially-designated staff advocates. However, the advocate does more than merely read to the illiterate or do legwork for those in TLU. If the issues are complex, the advocate, to be effective, needs some training in the application of the rules and the gathering of evidence. Thus, there should be a training program for advocates. Subsection (3). If an inmate refuses to participate in a hearing, an advocate may be appointed and the proceeding held while the inmate stands mute.

HSS 303.80 Due process hearing: place.

The due process hearing may take place at the institution where the alleged conduct occurred, at a county jail or at the institution to which an inmate has been transferred.

NOTE: In the past, disciplinary hearings were held only at the institution to which the inmate was assigned at the time of the misconduct. Transfer brought disciplinary proceedings to an end. This was undesirable for a variety of reasons. Therefore, this section provides for hearings at the new location.

Generally, it is desirable to provide hearings where the violation occurred. This practice is current division policy. Sometimes, this is impossible, particularly in the camp system. When it is impossible, fairness requires that the inmate have the same protections where the hearing is held as he or she would have at the institution where the violation is alleged to have occurred.

HSS 303.81 Due process hearing: witnesses.

(1) Requests for witnesses may be made by the accused to the advocate who shall deliver them to the security office. Except for good cause, an inmate may present no more than three witnesses. If an inmate does not have an advocate, the request shall be sent directly to the security office. Such requests must be made within two days of the service of notice as provided in HSS 303.76.

(2) After all witness requests have been received, the hearing officer shall review them and do any investigation necessary to determine whether the witnesses should be called.

(3) Witnesses requested by the accused should be required to attend the disciplinary hearing unless:

(a) There is a significant risk of bodily harm to the witness if he or she testifies; or

(b) The inmate's witness does not want to testify; or

(c) The testimony is irrelevant to the question of guilt or innocence; or

(d) The testimony is merely cumulative of other evidence and would unduly prolong the hearing; or

(e) If an inmate witness must be transported to a county jail to testify, the advocate may be required to interview the witness and report on the testimony to the committee in lieu of a personal appearance by the witness.

(4) If an inmate witness will be unavailable due to hospitalization, transfer or release, or if a staff member witness will be unavailable due to illness, no longer being employed at that location, vacation or being on a different shift, but there is no other reason to exclude the witness's testimony under subsection (3), then the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing.

(5) If a witness's testimony would be relevant and useful to the adjustment committee but the witness does not wish to testify, or if testifying would pose a significant risk of bodily harm to the witness, the hearing officer may attempt to get a signed statement to be used at the disciplinary hearing. See HSS 303.86, Evidence, for the circumstances under which the adjustment committee can consider such a statement without revealing the name of the witness.

(6) If it is not possible to get a signed statement in accordance with subsections (4) and (5), the hearing officer may consider other evidence of what the witness would say if present.

(7) After determining which witnesses will be called for the accused, the hearing officer shall notify the inmate of the decision in writing

and schedule a time for a hearing when all of the following people can be present:

(a) Adjustment committee members;

(b) Advocate, if any;

(c) Officer who wrote the conduct report;

(d) Other witnesses against the accused (if any);

(e) Accused; and

(f) Witnesses for accused (if any).

In the case of inmate witnesses and the accused, an attempt should be made to avoid conflict with off ground activities, but these persons may be required to attend the hearing even if it conflicts with other activities.

(8) Witnesses who are not inmates or staff may not be required to attend hearings nor may they be contacted by advocates. Rather, the adjustment committee shall designate a staff member, usually the work release coordinator, to interview any such witness and report to the committee.

(9) The hearing officer shall prepare notice of the hearing and give it to the accused, the advocate (if any), the committee and all witnesses, including the staff member who wrote the conduct report.

NOTE: 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

HSS 303.82 Adjustment committee.

(1) Due process disciplinary hearings shall be conducted by a committee of one, two, or three staff members appointed by the superintendent. Persons eligible to serve on an adjustment committee are: superintendents, assistant superintendents, supervisors, correctional officers, social workers, and any other equally responsible staff members. At least one member of each committee made up of two or three members shall be from the treatment staff. At least one member of all adjustment committees shall be a supervisor.

(2) No person who has direct personal involvement in an incident which is the subject of a hearing may serve on the committee for that hearing. Committee members should find out the subject matter of hearings in advance in order to allow replacement of committee members if necessary and avoid the necessity of postponing a hearing.

(3) An adjustment committee may hold a hearing even if the inmate has waived due process, if it is more convenient for the committee to hold the hearing than to schedule a hearing before a hearing officer. In that case the committee should follow the procedure for a hearing before a hearing officer.

(4) When a single hearing officer is sitting on the adjustment committee pursuant to sub. (1), or after the waiver of due process, he or she has the same authority as given the adjustment committee under this chapter.

NOTE: Wolff v. McDonnell, 418 U.S. 539 (1974), requires that the adjustment committee members be impartial in the sense that they should not have personally observed or been a part of the incident which is the basis of disciplinary charges. However, the court specifically held that a committee member could be "impartial" even if he or she was a staff member of the institution. Nevertheless, this section provides for some diversity on the panel by the requirement that at least one member be from the treatment, rather than custodial, staff.

The use of one and two member committees is new. There are two principal reasons for it. The camp system has never held due process hearings because of the fact that the staff is small and it is impossible to involve staff from distant institutions. For example, some camps have as few as four staff members. To provide a three person committee and an advocate and to prevent the complainant from being one of these people is impossible. Of course, there would be no one to supervise the camp during the hearing, either. The conflict between the desire to have due process hearings at the camps and limited resources is resolved by permitting smaller committees.

The problem of available staff also exists at larger institutions. So many staff can be tied up in the process that other important functions are neglected. It is thought that fairness can be achieved by relying on smaller committees while other correctional objectives are also achieved.

HSS 303.83 Sentencing considerations.

In deciding the sentence for a violation or group of violations, the supervisor making summary disposition or the adjustment committee or hearing officer who is holding the hearing shall consider the following:

(1) The inmate's overall disciplinary record, especially during the last year;

(2) Whether the inmate has previously been found guilty of the same or a similar offense, how often, and how recently;

(3) Whether the alleged violation created a risk of serious disruption at the institution or in the community;

(4) Whether the alleged violation created a risk of serious injury to another person;

(5) The value of the property involved, if the alleged violation was actual or attempted damage to property, misuse of property, possession of money, gambling, unauthorized transfer of property, soliciting staff or theft;

(6) Whether the inmate was actually aware that he or she was committing a crime or offense at the time of the offense;

(7) The motivation for the offense;

(8) The inmate's attitude toward the offense and toward the victim, if any;

(9) Mitigating factors, such as coercion, family difficulties which may have created anxiety and the like;

(10) Whether the offense created a risk to the security of the institution, inmates, staff or the community; and

(11) The time he or she spent in TLU.

NOTE: This section sets out the considerations which are actually used in deciding, within a range, how severe an inmate's punishment should be. It does not contain any formula for deciding the punishment. The actual sentence should be made higher or lower depending on the factors listed. For instance, if this is the fourth time the inmate has been in a fight in the last year, his or her sentence should be greater than average, unless other factors balance out the factor of the bad record.

The purpose of this section is to focus the committee's or officer's attention on the factors to be considered, and to remind them not to consider other factors such as personal feelings of like or dislike for the inmate involved.

HSS 303.84 Sentencing procedure and schedule of penalties.

(1) In every case where an inmate is found guilty of one or more violations of the disciplinary rules, only one of the following penalties shall be imposed, except as provided in subsection (2) and HSS 303.68-303.72:

(a) Reprimand;

(b) Loss of recreational privilege for 1-30 days;

(c) Room confinement for 1-10 days;

(d) Building confinement for 1-30 days;

(e) Loss of a specific privilege for 1-30 days for the first offense, for 1-60 days for the second offense and permanently for the third, and mail and visiting privileges as provided in the departmental rules relating to mail and visiting;

(f) Adjustment segregation for 1-8 days;

(g) Extra duty without pay for 1-10 days;

(h) Program segregation for a specific term of 30, 60, 90, 120 or 360 days;

(i) Loss of good time; or

(j) Restitution.

(2) Punishment imposed pursuant to subsection (1) is subject to the following:

(a) Adjustment segregation, program segregation, and loss of good time may be imposed for a single major offense. At one hearing, the maximum penalty is the most severe penalty the inmate could receive for any single offense of which he or she is found guilty. The duration of such penalties may not exceed the following:

SCHEDULE OF PENALTIES
(Maximum in days)

		Adjustment Segregation	Program Segregation	Good Time Loss
Offenses against bodily security				
303.12	Battery	8	360	20
303.13	Sexual assault - intercourse	8	360	20
303.14	Sexual assault - contact	8	360	20
303.15	Sexual conduct	4	120	10
303.16	Threats	5	120	10
303.17	Fighting	8	360	20
Offenses against institutional security				
303.18	Inciting a riot	8	360	20
303.19	Participating in a riot	6	360	10
303.20	Group resistance and petitions	4	120	10
303.21	Conspiracy	Maximum for completed offense		
303.22	Escape	8	360	20
303.23	Disguising identity	8	360	20
Offenses against order				
303.24	Disobeying orders	4	60	10
303.25	Disrespect	5	60	10
303.26	Soliciting staff	8	360	20
303.27	Lying	5	60	10
303.28	Disruptive conduct	5	60	10
303.29	Talking	4	60	0
303.30	Unauthorized forms of communication	5	60	10
303.31	False names and titles	4	60	0
303.32	Enterprises and fraud	6	120	5
303.33	Attire	4	60	0
Offenses against property				
303.34	Theft	8	360	20
303.35	Damage or alteration of property	6	120	15
303.36	Misuse of state property	4	60	0
303.37	Arson	8	360	20
303.38	Causing an explosion or fire	4	120	15
303.39	Creating a hazard	4	60	10
303.40	Unauthorized transfer of property	5	120	0
303.41	Counterfeiting and forgery	8	360	20

		Adjustment Segregation	Program Segregation	Good Time Loss
Contraband offenses				
303.42	Possession of money	8	360	20
303.43	Possession of intoxicants	8	360	20
303.44	Possession of drug paraphernalia	8	360	20
303.45	Possession, manufacture and alteration of weapons	8	360	20
303.46	Possession of excess smoking materials	4	60	0
303.47	Possession of contraband - miscellaneous	6	120	10
303.48	Unauthorized use of the mail	8	360	20
Movement offenses				
303.49	Punctuality and attendance	4	120	5
303.50	Loitering	4	120	5
303.51	Leaving assigned area	5	120	10
303.52	Entry of another inmate's quarters	8	360	20
303.53	Posted policies and procedures relating to movement	6	120	10
Offenses against safety and health				
303.54	Improper storage	4	60	5
303.55	Dirty quarters	4	60	0
303.56	Poor grooming	4	60	0
303.57	Misuse of prescription medication	8	360	20
303.58	Disfigurement	5	120	10
Miscellaneous				
303.59	Use of intoxicants	8	360	20
303.60	Gambling	4	60	0
303.61	Refusal to work or attend school	4	60	0
303.62	Inadequate work or study performance	4	60	5
303.63	Violation of institutional policies and procedures and conditions on leave	4	60	5
303.06	Attempt	Maximum for completed offense		
303.07	Aiding and abetting	Maximum for completed offense		

At one hearing, the maximum penalty possible for a single violation when a minor penalty is imposed is 30 days loss of specific privileges for the first offense, 60 days for the second offense and permanently for the third, 30 days building confinement, 10 days room confinement, or 10 days extra duty without pay. For more than one violation, the total sentence may not exceed the sum of the maximum penalties for the separate violations. The adjustment committee or hearing officer need not assign separate penalties where there is more than one violation.

(b) Loss of earned good time may be imposed as a punishment only where the violation is regarded as especially serious because of its nature or the inmate's prior record - generally, only in cases where program segregation is also imposed. The number of days lost on one occasion may be based on the number of prior occasions on which the inmate lost good time and shall not exceed the following:

Number of prior occasions	Maximum number of days lost
None	five
One	ten
Two	fifteen
Three or more	twenty

(c) Restitution may be imposed in addition to any other penalty.

NOTE: There are two limits on sentences which can be imposed for violation of a disciplinary rule: (1) A major punishment cannot be imposed unless the inmate either had a due process hearing, or was given the opportunity for one and waived it. Major punishments are program and adjustment segregation and loss of good time; and (2) Only certain lesser punishments can be imposed at a summary disposition. See HSS 303.74. This section limits both the types and durations of punishments.

In every case, where an inmate is found guilty of violating a disciplinary rule, one of the penalties listed in subsection (1) must be imposed. Cumulative penalties may be imposed in accordance with subsection (2). For example, an inmate cannot be punished with both room confinement and adjustment segregation. However, if adjustment segregation is imposed, program segregation or loss of good time, or both may also be imposed. The inmate will then serve his or her time in each form of segregation and lose good time.

Sentences for program segregation may only be imposed in specific terms. The possible terms are 30, 60, 90, 120 and in some cases, 360 days. This is contrary to, for example, adjustment segregation where terms from 1-8 days may be imposed. The specific term represents the longest time the inmate will stay in segregation unless he or she commits another offense. However, release prior to the end of the term is possible. HSS 303.70 provides that a placement in program segregation may be reviewed at any time and must be reviewed at least every 30 days.

Subsection (2)(a) also provides that sentences imposed at one hearing cannot be cumulated to result in a sentence longer than certain maximums. The

reasons for this limit are: first, the offenses for which an inmate is sentenced at a single hearing are usually based on a single incident and may be closely related to each other, and second, the punishments begin to lose effectiveness as a deterrent beyond a certain point.

The terms in subsection (2)(a) are maximums and should be imposed rarely.

The limits on loss of good time which are found in subsection (2)(b) are required by s. 53.11(2), Stats. This statute limits the number of days of good time which can be lost to five for the first offense, ten for the second, and twenty for each subsequent offense. This section also creates an intermediate stage of the loss of fifteen days. In addition, this section follows current practice by limiting loss of good time to serious offenses. On the other hand, loss of good time must be imposed by the committee or hearing officer - it is never automatic.

See HSS 303.68-303.72 and notes.

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HSS 303.85 Recordkeeping.

(1) Records of disciplinary infractions may be included in an inmate's case record only in the following situations:

(a) If the inmate was found guilty by summary disposition procedure (See HSS 303.74); or

(b) If the inmate was found guilty by a hearing officer or an adjustment committee. Records must be removed if an appeal is successful (See HSS 303.78).

(2) Records of alleged disciplinary infractions which have been dismissed or in which the inmate was found not guilty may be kept for statistical purposes, but they may not be considered in making program assignment, transfer, or parole release decisions, nor may they be included in any inmate's case record.

NOTE: See the department rules relating to adult offender-based records, chapter HSS 307, for more specific information on recordkeeping.

HSS 303.86 Evidence.

(1) (a) "Evidence" is any statement or object which could be presented at a disciplinary hearing or in a court of law, whether or not it is admissible.

(b) Evidence is relevant if that evidence makes it appear more likely or less likely that the inmate committed the offense of which he or she is accused, for example: (1) An inmate is accused of threatening another inmate. Testimony that the accused and the other inmate had a loud argument the day before is relevant. It indicates a possible motive for a threat and makes it appear more likely that a threat occurred. (2) An officer testifies that the accused has lied to him or her on previous occasions. This is relevant if the testimony of the accused varies from the conduct report.

(2) (a) An adjustment committee or a hearing officer may consider any relevant evidence, whether or not it would be admissible in a court of law and whether or not any violation of this chapter occurred in the process of gathering the evidence.

(b) An adjustment committee or a hearing officer may refuse to hear or admit relevant evidence for any of the following reasons:

1. The evidence is not reliable, for example: opinions which

are not supported by factual observation; hearsay (statements made outside of the hearing); reputation of the witness;

2. The evidence, even if true, would be of marginal relevance, for example: evidence of prior acts by the accused or a witness, to show that he or she is repeating a pattern; or

3. The evidence is merely cumulative of evidence already received at the hearing and is no more reliable than the already admitted evidence, for example: testimony of other inmates corroborating the accused's story, when corroboration has already occurred.

(3) If a witness is unavailable to testify, a written statement, a transcript of an oral statement, or a tape-recorded statement may be considered. Unavailability means death, transfer, release, hospitalization, or escape in the case of an inmate; death, illness, vacation, no longer being employed at that location, or being on a different shift in the case of a staff member.

(4) If a witness refuses to testify in person and if the committee finds that testifying would pose a significant risk of bodily harm to the witness, the committee may consider a corroborated, signed statement under oath from that witness without revealing the witness's identity. The contents of the statement shall be revealed to the accused, though the statement may be edited to avoid revealing the identity of the witness. The committee may question

the witnesses, if they are otherwise available. Two anonymous statements by different persons may be used to corroborate each other. A statement can be corroborated in either of the following ways:

(a) By other evidence which substantially corroborates the facts alleged in the statement such as, eyewitness account by a staff member or circumstantial evidence; or

(b) By evidence of a very similar violation by the same person.

(5) After disposition has been reached by the adjustment committee, and if a finding of guilt results, restricted informant material shall then be forwarded to the security office for retention in the restricted security department file with all other copies of the entire hearing results.

The original conduct report and all due process documents shall be placed in the inmate's case record. However, restricted informant reports shall be placed only in the security department restricted file. Restricted records shall be retained or disposed or according to the provisions of chapter HSS 307, Adult-offender-based records.

NOTE: This section makes clear that the rules of evidence are not to be strictly followed in a disciplinary proceeding. Neither the officers nor the inmates have the training necessary to use the rules of evidence, which in any case were developed haphazardly and may not be the best way of insuring the reliability of evidence. Thus, a more flexible

approach is used. The main guidelines are that the hearing officer or committee should try to allow only reliable evidence and evidence which is of more than marginal relevance. Hearsay should be carefully scrutinized since it is often unreliable: the statement is taken out of context and the demeanor of the witness cannot be observed. However, there is no need to find a neatly labeled exception; if a particular piece of hearsay seems useful, it can be admitted.

Subsections (3) and (4) address the problem of the unavailable witness. Subsection (3) contemplates that the statement and the identity of the maker will be available to the accused. Subsection (4) permits the identity of the witness to be withheld after a finding by the committee or hearing officer that to reveal it would substantially endanger the witness. This is not often a problem, but it does arise, particularly in cases of sexual assault. To protect the accused, it is required that there be corroboration; that the statement be under oath; that the content of the statement be revealed, consistent with the safety of the inmate. In addition, the committee or hearing officer may question the people who give the statements.

Subsection (5) deals with the handling of information received from a confidential informant. This information will not be placed in the inmate's case record where it would be accessible to him or her, but will be filed only in the security office. See chapter HSS 307 for the handling of records which are classified "restricted."