

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 sub. (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 sub. (3).

Note: HSS 303.69. 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 8 days, so very spartan conditions are permissible. However, visiting and mail rights are protected by the first amendment. See *Procurier 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.

Note: HSS 303.70. 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. Sub. (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.

Note: HSS 303.71. 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 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 *Procurier 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; *Viennau v. Shanks*, 425 F. Supp. 676 (W.D. Wis. 1977).

Note: HSS 303.72. 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.

Note: HSS 303.73. 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 (sub. (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.

Sub. (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

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both a disciplinary hearing and a criminal trial on the same matter. See *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Note: HSS 303.74. 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 sub. (5). To further limit the possibility of abuse, any summarily-imposed punishment must be approved by the shift supervisor. Sub. (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.

Note: HSS 303.75. 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*.

Note: HSS 303.76. 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*.

Note: HSS 303.77. 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 record *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.

Note: HSS 303.78. 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." *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).