(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 subs. (3) and (5) at any time in writing.

History: Cr. Register, August, 1980, No. 296, eff. 9-1-80.

HSS 303.79 Due process: hearing advocates. (1) (a) At each institution, the superintendent may designate or hire staff members to serve as advocates for inmates in disciplinary hearings at the institution, or staff members may volunteer to serve as advocates.

(b) At institutions that do not employ permanent full-time advocates, the superintendent shall place the names of 3 staff members who are available to serve as advocates in a particular week on a list and shall give the list to the hearing officers. The inmate shall be permitted to choose an advocate from the list of 3, except that the caseloads of advocates may be regulated by the superintendent.

(c) At institutions that employ permanent full-time advocates, the superintendent shall assign advocates to inmates. If an inmate objects to the assignment of a particular advocate because the advocate has a known and demonstrated conflict of interest in the case, the superintendent shall assign a different staff member to serve as the inmate's advocate.

(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.

History: Cr. Register, August, 1980, No. 296, eff. 9-1-80; r. and recr. (1), Register, October, 1984, No. 346, eff. 11-1-84.

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.

History: Cr. Register, August, 1980, No. 296, eff. 9-1-80.

HSS 303.81 Due process; 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 3 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 2 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 the location, vacation or being on a different shift, but there is no other reason to exclude the witness's testimony under sub. (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 subs. (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).

(7m) 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.

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(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 contitutional right to confrontation 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, is within 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 (sub. (2)), the court said:

We also hold that there must be a "written statment 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 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.

Appendix

Sub. (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.

Sub. (2) provides for one, 2 and 3 person adjustment committees. Most institutions prefer to have 3 people on an adjustment committee. This will frequently be impossible in the camp system. There is likely to be experimentation at other institutions.

Subs. (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 2 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.

Note: HSS 303.79. Subsection (1) provides the inmate in a disciplinary hearing with a limited choice of advocates to permit avoidance of conflict-of-interest problems. The choice of an advocate, however, is not the inmate's constitutional right. Paragraph (b) provides a procedure for giving inmates a choice of advocates in institutions that use volunter or assigned advocates who are regular staff members. Paragraph (c) provides for a different procedure in institutions that employ permanent advocates. This rule allows the institution to assign advocates and to regulate their caseloads. If an inmate objects to the assignment of a particular advocate because that advocate has a known and demonstrable conflict of interest in the case, the institution should assign a different advocate to the inmate. An inmate has no due process or other right to know the procedure by which a particular advocate is selected in a particular case.

Note: HSS 303.80. 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 had at the institution where the violation is alleged to have occurred.

Note: HSS 303.81. The inmate facing disciplinary proceedings should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other documentary evidence. Although we do not prescribe it, it would be useful for the adjustment committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.

The decision of whether to allow a witness to testify has been delegated to a hearing officer. Sub. (2). The time for making requests is limited under sub. (1), in order to give the hearing officer an opportunity to consider the request prior to time for the hearing, which normally must be held within 21 days. See HSS 303.78 (3).