(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 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 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 afermath 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 three 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. 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 sub. (2). The idea of help from fellow inmates has not be 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. Sub. (3). If an inmate refuses to participate in a hearing, an advocate may be appointed and the proceeding held while the inmate stands mute.

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 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).