

PEEKING BEHIND THE IRON CURTAIN: How Law “Works” Behind Prison Walls

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I. INTRODUCTION

By the time I arrived at the Fox Lake Prison it was over. The institution was quiet and the air was thick with gloom. Prison guard Matt Beckley was seriously injured, but he would live. Almost every guard that I passed had an unflinching scowl on his face. Although, I knew the facts surrounding the momentous event, their look spoke to me. It told me what happened. An inmate had brutally attacked a prison guard. He grabbed Officer Beckley from behind, punched him in the face several times, slammed his head repeatedly against the floor, and ripped patches of hair from his head. When I openly queried how this could happen at Fox Lake – considered one of the “best” prisons in the Wisconsin prison system – a female guard simply retorted, “this is a prison after all.”¹

In order for prisons to function optimally, they require heavy rule orientation.²

However, because these rules govern every aspect of prison life referencing them simply as rules is a misnomer. Instead, it is best, in my opinion, to refer to them as laws mainly

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¹ Fieldnote from Fox Lake Prison, Fox Lake, Wisconsin (April 8, 2004).

² See, Walter J. Dickey, *The Promise and Problems of Rulemaking in Corrections: The Wisconsin Experience*, 1983 WIS. L. REV. 285, 287. Professor Dickey was commissioned by the Wisconsin Department of Corrections in 1978 to promulgate administrative rules. He was the principal drafter of those rules and wrote of his experience in the above listed article which advances three conclusions. First, rulemaking makes important contributions to policymaking in corrections such as identifying objectives of correctional programs and developing sensible means to achieve them. Second, several critical factors influence rulemaking’s contribution to correctional policymaking. Among them, to name a few, are the state of affairs within the correctional agency when rulemaking is undertaken; the process used for the development of the rules; and the agency’s commitment to rulemaking. Third, the experience of drafting administrative rules in Wisconsin provided important insight into the possibilities and problems of rulemaking in a correctional agency. *Id.*, at 287-288.

because they carry significant penalties for their violation. In Wisconsin specifically, and quite possibly in most prisons generally, every aspect of an inmate's life is controlled by a system of laws.³ They simultaneously structure daily life and provide the means, or at minimum the rationale, to mete discipline as a form of social control.⁴ They require that inmates maintain a daily regimen of proper grooming;⁵ be punctual and attend all required activities;⁶ never lie in general⁷ or about staff;⁸ and never disrespect another

³ See, e.g., WIS. ADMIN. CODE §303 (1982) (27 prohibited acts, including group resistance and petitions, disguising identity, disobeying orders, disrespect, soliciting staff, lying, lying about staff, creating a hazard, punctuality and attendance, entry into another inmate's quarters, refusal to work or attend school, and inadequate work or study performance); IDAHO DEP'T OF CORRECTIONS, POLICY AND PROCEDURAL MANUAL, 318-C, attachment A (1987) (83 prohibited acts, including writing, circulating, or signing a petition that threatens institutional security, quitting a prison job without approval, tattooing, insolence, lying, and trading property); INDIANA DEP'T OF CORRECTIONS, ADMINISTRATIVE PROCEDURES, MANUAL OF POLICIES AND PROCEDURES, Admin. Procedure No. 02-02-101, Appendix 1 (1983) (80 prohibited acts, including wearing a disguise, unauthorized alteration of food and drink, participating in a work stoppage, creating a dummy, insolence, lying, and being untidy); OR. ADMIN. R. 291-105-0015, at 3-4 (1989) (15 disruptive acts, including participation in an unauthorized organization, caressing, kissing and other sexual activity, disrespect, and disobedience).

⁴ See, Jim Thomas, et.al, *Exactng Control Through Disciplinary Hearings: "Making Do" with Prison Rules*, 8 JUSTICE QUARTERLY 37, 38 (1991).

⁵ WIS. ADMIN. CODE §303.56 (2000). It reads:

- (1) Any inmate whose personal cleanliness or grooming is a health hazard to the inmate or others or is offensive to 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 fails to shower at least once a week, unless the inmate has a medical excuse, is guilty of an offense.
- (3) The institution may require inmates performing work assignments which may be hazardous to maintain suitably cut hair, or to wear protective equipment. Any inmate who fails to wear such required equipment or who fails to maintain suitably cut hair is guilty of an offense.

⁶ WIS. ADMIN. CODE §303.49 (2000). It reads:

Inmates shall attend and be on time for all activities for which they are scheduled. Any inmate who violates this section is guilty of an offense, unless the following exists:

- (1) The inmate is sick and reports this fact as required by institutional policies and procedures.
- (2) The inmate has a valid pass to be in some other location.
- (3) The inmate is authorized to skip the event.

⁷ WIS. ADMIN. CODE §303.27 (2000). It reads:

Any inmate who makes a false written or oral statement which may affect the integrity, safety or security of the institution is guilty of an offense.

⁸ WIS. ADMIN. CODE §303.271 (2000). It reads:

Any inmate who makes a false written or oral statement about a staff member which may affect

inmate or staff person.⁹ In Wisconsin, the law is simply titled, “Discipline,” and can be found in the Department of Corrections’s section of Wisconsin Administrative Code.¹⁰

I expose the above small sampling of laws in order to make two notes. First, contrary to what we might expect, not all laws available to inmate violation are criminal; and second, given law’s abundance behind prison walls, it is highly probable that even the most careful inmate will at some point commit a violation during his incarceration. The abundant possibilities to violate the law, no matter how minor and no matter how criminal, exposes the inmate to a near certain likelihood of an appearance before the inmate disciplinary committee – which is an unpopular venue for inmates.

Inmate discipline, and the due process rights associated with it, has not escaped scrutiny by lawyers and legal scholars.¹¹ Since the 1800's, commentators have revisited

the integrity, safety or security of the institution or staff, and makes that false statement outside the complaint review system is guilty of an offense.

⁹ WIS. ADMIN. CODE §303.25 (2000). It reads:
Any inmate who shows disrespect to any person is guilty of an offense, whether or not the subject of the disrespect is present and even if the expression or disrespect is in writing. Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, yelling, and other acts made outside the formal complaint process which are expressions of disrespect for authority.

¹⁰ WIS. ADMIN. CODE §303 (1982).

¹¹ For a general discussion of due process rights afforded inmates, see generally, Bruce R. Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. C.R.-C.L. L. Rev. 227 (1970); James E. Robertson, *The Decline of Negative Implication Jurisprudence: Procedural Fairness in Prison Discipline after Sandin v. Conner*, 32 Tulsa L.J. 39 (1996-1997); N.E. Shafer, *Discretion, Due Process, and the Prison Discipline Committee*, 11 Crim. Just. Rev. 37 (1986); Martin Fisher, *Provisions for Due Process and Access in Counsel in Prison Disciplinary Hearings – Clutchette v. Procunier*, 2 N.Y.U. Rev. L. & Soc. Change 63 (1972); Michael Jackson, *The Right to Counsel in Prison Disciplinary Hearings*, 20 U. Brit. Colum. L. Rev. 221 (1986); George H. Funk, *Baxter v. Palmigiano: A Crippled Fifth Amendment Privilege for Inmates in Prison Disciplinary Proceedings*, 1976 Utah L. Rev. 572 (1976); Edwin W. Patterson, III, *Self Incrimination – Availability of the Privilege Limited in Prison Disciplinary Hearings, Baxter v. Palmigiano*, 8 U. Tol. L. Rev. 841 (1976-1977); Matthew Groves, *Proceedings for Prison Disciplinary Offences: The Conduct of Hearings and Principles of Review*, 28 Monash U. L. Rev. 338 (1998); Kenneth Myers and John Rabiej, *Burden of Proof and the Standard of Judicial Review in Prison Disciplinary Hearings Involving Decisions Predicated Upon Uncorroborated Hearsay Evidence*, 4 S. Ill. U. L.J. 535

the issue of what rights an inmate is due,¹² the court's role in protecting those rights,¹³ and how inmate discipline fits into the overall area of law known as Prisoners' Rights Law.¹⁴ However, empirical studies of inmate discipline have all but disappeared from the academic radar. With the exception of a small few, ethnographical studies of inmate discipline have declined over the last two decades.¹⁵ This has contributed to what sociologist Loic Wacquant refers to as the "curious eclipse" in prison research in the age of mass incarceration.¹⁶ And, he is right.

As the United States's prison population ballooned,¹⁷ a significant interest in what

(1979); Dale A. Wein, *Tibbetts v. State: Judicial Review of Prison Disciplinary Actions*, 29 S.D. L. Rev. 197 (1983-1984).

¹² *Confinement After Expiration of Sentence – Due Process Law – Prison Discipline*, 2 Crim. L. Mag. 626 (1881); *Prison Discipline – The Present State of the Question*, 14 Law Mag. & L. Rev. Quart. J. Juris. 3d ser. 11 (1862-1863); *Prison Discipline and Reformatory Treatment*, 31 Law Mag. & L. Rev. Quart. J. Juris. 3d ser. 310 (1871); *Of the Duty of Society in Regard to Criminal Legislation and Prison Discipline*, 24 Am. Jurist. & L. Mag. 306 (1840-1841).

¹³ *Judicial Intervention in Prison Discipline*, 63 J. Crim. L. Criminology & Police Sci. 200 (1972).

¹⁴ Bruce Jacob, *Prison Discipline and Inmate Rights*, 5 Harv. C.R.-C.L. L. Rev. 227 (1970); Douglass J. Mann, *Prison Discipline and the Eight Amendment: Out of the Quagmire*, 1 Am. J. Crim. L. 4 (1974); Mary Ellen Kris, *Habeas Corpus Challenges to Prison Discipline*, 43 Fordham L. Rev. 963 (1974-1975); N. E. Schafer, *Discretion, Due Process, and the Prison Discipline Committee*, 11 Crim. Just. Rev. 37 (1986).

¹⁵ Marilyn D. McShane and Michael H. Gentry, *The Use of Counsel Substitutes: Prison Discipline in Texas*, 52 Fed. Probation 27 (1988).

¹⁶ See generally, Loic Wacquant, *The Curious Eclipse of Prison Ethnography in the Age of Mass Incarceration, Ethnography*, Vol. 3, no. 4, 371-397 (Dec. 2002).

¹⁷ See, Walter J. Dickey, *Thinking Strategically About Correctional Resources*, 2000 WIS. L. REV. 279. Dickey notes that in Wisconsin, for example, the inmate population expanded from 5,700 inmates in 1987 to 20,000 inmates, 5,000 of whom were housed out of state, by the year 2000. See also, Ruth Gilmore, *Globalisation and US Prison Growth: From Military Keynesianism to post-Keynesian Militarism*, 40 RACE & CLASS 171 (1998); Paul Street, *Color Blind: Prison and the New American Racism*, 48 DISSENT 49 (Summer 2001); Troy Duster, *The New Crisis of Legitimacy in Controls, Prisons, and Legal Structures*, THE AMERICAN SOCIOLOGIST 20-29 (Spring 1995); David G. Savage, *U.S. Prison Population at Record High*, The Salt Lake Tribune, Sept. 13, 1994, at All; Curt Anderson, *U.S. Prison Population Now at All-Time High of 2 Million*, Advocate (Baton Rouge, LA) April 7, 2003, at 2A.

happens inside the prison has unfortunately not followed. Quite honestly, many of you who now hold this writing in your hands have never been inside of a prison, and in many cases have never had occasion to even visit one. That is not necessarily a bad thing, with one exception – the fewer persons who actually venture behind prison walls to investigate its operations, the less we know about one of America’s most important institutions. And to add salt to the wound, what we have gleaned about prison life from previous studies¹⁸ seems to miss the mark on law’s life behind prison walls. This fact arguably creates an inability for legal scholars to move beyond anything more than a theoretical discussion of prison law in legal scholarship.

As my research unfolded, the attack on guard Beckley served as a reference point for sharpening my own understanding of the meaning and significance of how law “works” behind prison walls. More specifically, I soon learned first hand how prison inmates and staff make sense of the law in their daily lives. For them, law is much more immediate than for us in free society. For them, it jettisons in and out of their lives on a much more frequent basis. For them, law is real; law is usual; and most importantly, law is powerful.¹⁹

This article presents the results of an ethnographical study of the inmate

¹⁸ Michael Tonry & Joan Petersilia, *American Prisons at the Beginning of the Twenty-First Century*, Prisons (Chicago Press 2000), 1-16; Christian Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (Verso Books 1999); Stephen R. Duguid, *Can Prisons Work: The Prisoner as Object and Subject in Modern Corrections* (Toronto University Press 2000); Angela Y. Davis, “Race and Criminalization: Black Americans and the Punishment Industry,” in Joy James (ed.) *The Angela Davis Reader* 61-73 (Blackwell 1998).

¹⁹ See, generally G. Hawkins, *THE PRISON* (1956); Greenberg and Stender, *The Prison as a Lawless Agency*, BUFFALO L. REV. 799 (1972); Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795(1969).

disciplinary process at the Fox Lake Correctional Institution – a minimum/medium security facility located in Fox Lake, Wisconsin, about one hour east of the capitol Madison. It is presented with two goals in mind: (1) expose how law “works” during inmate disciplinary hearings; and (2) to assess what “works” for dealing with law’s daily influence behind prison walls. Overall, it is oriented towards developing a broad understanding of how prison officials, line staff, and inmates understand and use the law as they engage in the process of punishing those already being punished.

Part II introduces the location of this study, The Fox Lake Correctional Institution, and the ethnographical methods utilized in order to examine how law “works” behind prison walls. It orients the reader to the significance of life inside what sociologist Erving Goffman famously referred to as “a total institution.”²⁰ Next, it briefly discusses how participant observation, coupled with formal and informal interviews of the staff and inmates, serve as an adequate ethnographical methodology for a study of this type.

Part III opens with insight into how law “works” by introducing the subject of this study – the Inmate Disciplinary Process. It provides a brief overview of how the process works through an explanation of its four major components: (1) writing conduct reports that serve as legal charges against the inmate; (2) classification of those charges by the

²⁰ See, generally, Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* 6 (Anchor Publishers 1961). Goffman describes “total institutions” based on the central feature that they breakdown the formal barriers separating the three spheres of life: different places, different co-participants, and different authorities. There are four leading characteristics of “total institutions.” First, all aspects of life are conducted in the same place and under the same authority. Second, each phase of a member’s daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together. Third, all aspects of the day’s activities are tightly scheduled, with one activity leading at a prearranged time into the next. Fourth, the various activities are brought together into a single rational plan designed to fulfill the needs of the

security director as either minor or major violations of the law; (3) the actual disciplinary hearing where an inmate appears before a tribunal to determine what fate will be served as punishment; and (4) the appeals process which serves as the only “real” opportunity that an inmate has to formally challenge the charges waged against him.

Next, this section presents the actual results of the study with a small sampling of cases taken from the over 100 disciplinary hearings attended. It provides real accounts of inmates, and in many cases the staff, dealing with settling charges waged against them. It accounts for how law “works” as inmates learn coping mechanisms using a variety of tactics such as admitting guilt, maintaining a good attitude and in one case, even shedding tears. It also accounts for how formal due process procedures allow for inmates to use staff advocates, some of whom try too hard and some of whom do not try hard enough, and other inmate witnesses during their disciplinary hearings.

Finally, Part IV offers an assessment of the results in an effort to instruct on what “works” for disciplining prison inmates. Inmate discipline is such a salient institution inside of prison that the question of what works best is constantly being re-evaluated by prison administration, legislators, and lawyers for both sides. Each year a small committee of mostly seasoned prison staff meets to reevaluate the IDP and the question of what works is always relevant. This section presents my evaluation of the IDP in an effort describe how no single thing works, but instead many things working together seem to produce optimal results. Section V concludes with my final assessment of how law “works” behind prison walls.

The thesis for this study will surface in the pages to come, but I briefly present it

now in order to further guide your understanding. In my opinion, law is not an island unto itself. Instead, what “works” for a successful disciplinary process requires an intersection of “good” law, compassionate hearing officers, and legally conscious inmates. Looking beyond the rule of law and instead affording inmates greater protection by relying on carefully cultivated practices grounded in human engagement understanding, and compassion is what “works” – sometimes.

II. METHODOLOGY

Sociologist Mary Bosworth said it best, “doing prison research is difficult.”²¹ Some of the obstacles faced by carceral researchers are well documented in the various prison ethnographies, articles and book sections supporting this position.²² At the cusp of this difficulty are restrictions hindering researchers’ access to study life in penal institutions. In fact, widespread reluctance of prison officials to allow researchers ‘in’ has resulted in some penal scholars retreating to doing research by mail.²³ While ‘mail methodologies’ may work well for certain types of prison research, it fails to satisfy all forms of empirical inquiry. Specifically, legal ethnography, or ethnographical research of law’s operation in society, requires the researcher to engage the law as a participant

²¹ Mary Bosworth et al., *Doing Prison Research: Views from Inside*, 11(2) *Qualitative Inquiry* 249-264, 249 (2005).

²² Mary Bosworth, *Engendering Resistance: Agency and Power in Women’s Prisons* Chapter 3 (Ashgate Press 1999); Mary Bosworth, *The Past as a Foreign Country?: Some Methodological Implications of Doing Historical Criminology*, 41(3) *British Journal of Criminology* 431-442 (2001); Allison Lieblich, *Doing Prison Research: Breaking the Silence*, 3(2) *Theoretical Criminology* 147-173 (1999); Allison Lieblich et al., *Appreciative Inquiry and Relationships in Prison*, 1(2) *Punishment and Society* 71-98 (1999).

²³ Mary Bosworth et al., *Doing Prison Research: Views from Inside*, 11(2) *Qualitative Inquiry* 249-264, 251(2005).

observer – one who simultaneously watches while participating.²⁴

My relatively short connection to the Fox Lake Correctional Institution (Fox Lake) as an ethnographic field site began in January 2004, while I was serving as the William H. Hastie law teaching fellow at the University of Wisconsin Law School in Madison, Wisconsin. Fox Lake is an all-male correctional institution that is situated in Dodge County on an 85-acre plot surrounded by approximately 1200 acres owned by the State of Wisconsin. It has mainly 18 buildings which comprise everything from an Administration Building to a Recreation Building. The inmates are housed in one of three places: (1) one of six housing units; (2) one of two-144 bed dormitories; or (3) the Segregation Building. During the middle of this research project, June 2004, Fox Lake's capacity was 691 inmates. It held 1031.²⁵

An interesting feature of Fox Lake is that it is the first medium security institution in the United States to operate with a no-pass system and freedom of movement.²⁶ This primarily means that inmates move freely about the institution without a pass with the requirement that they sign in and out when they enter into designated areas. Another interesting feature is Fox Lake's philosophy – responsible living.²⁷ It emphasizes a personal responsibility approach to managing the inmates and relieves some of the

²⁴ See generally, James P. Spradley, *Participant Observation* (Wadsworth 1980); John Van Maanen, *Tales of the Field: On Writing Ethnography* 14-25 (University of Chicago Press 1988); Harry F. Wolcott, *Ethnography: A Way of Seeing* 44-51 (Alta Mira Press 1999); Michael H. Agar, *The Professional Stranger: An Informal Introduction to Ethnography* 163-166 (Academic Press 1996).

²⁵ Thomas A. Borgen, Warden, Fox Lake Correctional Institution Annual Report, July 1, 2003 - June 30, 2004, Department of Corrections, State of Wisconsin.

²⁶ *Id.* at 5.

²⁷ *Id.*

burden from the staff to act as daily overseers. According to Warden Thomas Borgen, “this is what makes Fox Lakes a success.”²⁸

One major component of my fieldwork at Fox Lake was participant observation, with field notes written up on a daily basis. Each day, immediately following the conclusion of my visit, I would sit in my vehicle in the visitor parking lot and record everything that I saw or heard that day. Technically, this is not the typical way to take fieldnotes, but I tried to appear less threatening during my research by not writing every time someone spoke or said something of interest. This also allowed me to more readily and deeper engage both the line staff and the inmates. However, at a much later stage in the research process, I asked the hearing officer if it would distract his work if I wrote during the actual disciplinary hearings. He granted me approval.

To supplement my observations, I conducted several in-depth interviews with the major players in the disciplinary process: the warden, the security director, the hearing officer, the inmate complaint examiner, and several line security officers. Additionally, I carried out shorter thematic, non-recorded,²⁹ interviews with some of the inmates which contextualized a lot of what I was observing while I was observing it. These interviews were specifically organized around issues of the role of law in their daily lives and lasted no longer than thirty minutes each.

During the project, I was interested in a diversity of opinion and legal knowledge

²⁸ Interview with Thomas Borgen, Fox Lake, Wisconsin (April 4, 2004).

²⁹ As a security measure I was not allowed to take recording devices into the correctional institution. My interviews with the warden and staff occurred outside of the prison either in my home, a local establishment, or via telephone.

within my research sample. To accomplish this goal, I did two things. First, I sought opportunities to observe different types of disciplinary hearings on a variety of charges. I observed 'waived' and 'full' due process hearings on charges that ranged from property crimes to violent fist fights. There were relatively harmless inmates who were disciplined for failing to sign out as well as inmates who were organizing gang activity in the prison. I was able to interview some of these inmates, others I was not. Second, I sought opportunities to observe disciplinary hearings that transcended racial, class, and cultural boundaries. I observed hearings for (mostly) African American inmates, White inmates, Latino inmates, gang members, Muslims, Skinheads, bikers, dope dealers, and some on the surface who appeared they were in prison because they choose to follow the wrong crowd. The insights I gained from these multiple interactions are carefully woven into this study. Many appear as ethnographical comments made by the inmates as they were experiencing, and sometimes afterwards, the disciplinary process taking place. When possible, I included the inmates' words verbatim to give credence to their insight and to avoid my analysis of what I think should have been the proper comment.

One detail that the Inmate Disciplinary Process (IDP) offers over other prison processes is that it offers a unique window into the influence of law behind prison walls. Law establishes the boundaries of the IDP and determines how it will proceed from start to finish. Also, it offers substantial insight into the legal decision making process behind bars. Since the hearing officer pronounces judgment in the presence of the inmate immediately following the presentation of evidence, the gap between making and explaining the decision is far narrower than in almost any other legal context.

I have one additional note about the worth of investigating the IDP. This process, more than others, brought me in the closest contact with the inmates and their feelings regarding law in their everyday lives. During the IDP, inmates are allowed to make a statement about the charges, present evidence in their favor, sometimes have an advocate present, and debate the relative merits of their punishment – all spread across an extremely short time period. The typical disciplinary hearing, depending on whether or not it was a full due process hearing, ranged from five to twenty-five minutes. In short, the IDP is the closest replication to a criminal court behind prison walls and presented the best venue to integrate the voice of the inmates into my study.

III. INMATE DISCIPLINE AT THE FOX LAKE CORRECTIONAL INSTITUTION

A. The Rules

In 1974, Justice White pronounced that “there is no iron curtain drawn between the Constitution and the prisons of this country.”³⁰ Theoretically, he was correct. Prison inmates retain certain rights and protections under the United States Constitution – despite their incarcerated status.³¹ Practically, I regret to state, Mr. Justice White could not have been more wrong. Typically, once a prisoner is sentenced and incarcerated in a correctional institution, his life for the most part is discarded by the general public. With

³⁰ *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

³¹ *See, e.g.* *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) (a prisoner retains all of the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law); *State ex rel. Thomas v. State*, 198 N.W.2d 675 (Wis. 1972) (imprisonment is not totally a civil death; a prisoner retains not only the freedom to have adequate access to the courts, but also the broader right to petition the government for redress of grievances). *See, also* *Cruz v. Beto*, 405 U.S. 319 (1972) (prisoners enjoy substantial religious freedom under the First and Fourteenth Amendment); *Johnson v. Avery*, 393 U.S. 483 (1969) (prisoners have access to the courts); *Lee v. Washington*, 390 U.S. 333 (1968) (prisoners are protected from invidious racial discrimination); *Haines v. Kerner*, 404 U.S. 519 (1972) (prisoners may not be deprived of life, liberty, or property without due process of law).

the exception of a small cadre of family, friends, or other interested ones, the public-at-large is not overly concerned about what happens to prisoners post-incarceration. Thus, prisons often escape the daily microscope focused on other American institutions – such as schools, churches, and government. Additionally, prison administrators remain empowered with the ultimate judicial gift – deference – leaving them to operate their institutions vis-à-vis administrative codes.³²

Almost every penal institution employs disciplinary codes prohibiting an array of activities, many of which are not criminal.³³ As a result, determining guilt or innocence is a matter of no small consequence. Potential penalties range from administrative segregation³⁴ and loss of good time credits,³⁵ to room, cell or building confinement³⁶ and

³² See, e.g., WIS. ADMIN. CODE §303 (1982) (27 prohibited acts, including group resistance and petitions, disguising identity, disobeying orders, disrespect, soliciting staff, lying, lying about staff, creating a hazard, punctuality and attendance, entry into another inmate's quarters, refusal to work or attend school, and inadequate work or study performance); IDAHO DEP'T OF CORRECTIONS, POLICY AND PROCEDURAL MANUAL, 318-C, attachment A (1987) (83 prohibited acts, including writing, circulating, or signing a petition that threatens institutional security, quitting a prison job without approval, tattooing, insolence, lying, and trading property); INDIANA DEP'T OF CORRECTIONS, ADMINISTRATIVE PROCEDURES, MANUAL OF POLICIES AND PROCEDURES, Admin. Procedure No. 02-02-101, Appendix 1 (1983) (80 prohibited acts, including wearing a disguise, unauthorized alteration of food and drink, participating in a work stoppage, creating a dummy, insolence, lying, and being untidy); OR. ADMIN. R. 291-105-0015, at 3-4 (1989) (15 disruptive acts, including participation in an unauthorized organization, caressing, kissing and other sexual activity, disrespect, and disobedience); VERMONT DEP'T OF CORRECTIONS, DOC POLICY AND OPERATING PROCEDURES, Appendix 1 (1989) (62 prohibited acts, including refusal to take drug tests, sexual proposals, possession of alcohol, and absences from head count); WEST VIRGINIA DEP'T OF CORRECTIONS, DOC POLICY DIRECTIVE 670.001, at 3-14 (1990) (72 prohibited acts, including misuse of correspondence regulations, absence from work, insubordination, and tardiness).

³³ Id.

³⁴ Administrative segregation is the same as solitary confinement – also known as the prison-within-in-a-prison – with its inhabitants isolated from the general prison population, confined to cells virtually the entire day, and excluded from prison programs and industries. HARRY E. ALLEN & CLIFFORD E. SIMONSEN, CORRECTIONS IN AMERICA: An Introduction 45 (5th ed. 1989). See, also, WIS. ADMIN. CODE §303.69 (1982).

³⁵ The US DEP'T OF JUSTICE, DICTIONARY OF CRIMINAL JUSTICE DATA TERMINOLOGY 98 (2d ed. 1981) defines good time as “the amount of time deducted from time to be served in prison . . . contingent upon good behavior . . .” Among all rule violators, 25% lost good time for their most recent offense.

loss of privileges.³⁷ The probability that inmates will face one of those penalties during his or her incarceration brings to bear the fairness of the process involved in disciplining inmates.³⁸

Over the past thirty years, the inmate disciplinary process has faced increasing judicial scrutiny. A significant number of inmate lawsuits have arisen from prison disciplinary hearings.³⁹ Most of those lawsuits allege that the adjustment committee⁴⁰ failed to follow the institution's own rules and in doing so violated the inmate's due

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RULE VIOLATORS 6, table 12 (Dec. 1989). Inmates view forfeiture of good time as the most severe disciplinary punishment. Bruce R. Jacobs and K.M. Sharma, *Disciplinary and Punitive Transfer Decisions and Due Process Values in the American Correctional System*, 12 STETSON L. REV. 1, 11 (1982).

³⁶ WIS. ADMIN. CODE §303.72 (3) and (7) (1982). During the hours of confinement, the inmate may not leave the inmate's quarters without specific permission. WIS. ADMIN. CODE §303.72 (3) (1982). The warden may, however, grant permission for attendance at religious services, medical appointments, showers, and visits from outside persons. *Id.* The warden may also remove any or all electronic equipment from an inmate's quarters if room confinement is imposed. *Id.*

³⁷ WIS. ADMIN. CODE §303.72 (2) and (4) (1982). Specific privileges that may be taken away include but are not limited to use of inmate's own TV; radio or cassette player; phone calls; participation in off grounds activities; having meals in the dining room; and canteen privileges. WIS. ADMIN. CODE §303.72 (4) (1982).

³⁸ BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISON RULE VIOLATORS 1 (Dec. 1989). As of 1986, 53% of state prisoners had been charged with at least one violation during their incarceration. More than 90% were found guilty. *Id.* On average, each inmate committed about 1.5 violations per year. *Id.*

³⁹ See, e.g. *Wolf v. McDonnell*, 418 U.S. 539 (1974) (disciplinary hearing are subject to the due process clause of the Fifth and Fourteenth Amendment); *Ponte v. Real*, 471 U.S. 491 (1985) (due process does not require that reasons for denying a witness must be given during administrative hearing); *Superintendent v. Hill*, 472 U.S. 445 (1985) (only "some evidence" required to support finding of guilt); *Cleavinger v. Saxner*, 474 U.S. 193 (1986) (hearing officers are not judges); *Sandin v. Conner*, 515 U.S. 472 (1995) (prison rules do not create a state created liberty interest in the inmate).

⁴⁰ WIS. ADMIN. CODE §303.82 (1982) The adjustment committee is typically the staff members who conduct the disciplinary hearings in the prison. They may be comprised of several individuals or of one experienced hearing officer, if resources dictate such. According to Section 303.82 of the Wisconsin Administrative Code, the adjustment committee may be comprised of

"(1) . . . one, 2 or 3 staff members appointed by the warden. At least one member of every adjustment committee shall be a supervisor."

process rights.⁴¹ Many of these lawsuits could have been avoided, however, if those involved in the hearings process paid greater attention to following the rules and understanding more about what the rules are intended to produce: a hearing process that is fair to the inmate and institution, and a hearing process that withstands judicial scrutiny.

In 1978, four years following Mr. Justice White's pronouncement,⁴² the Wisconsin State Legislature required that the Division of Corrections promulgate administrative rules "relating to all aspects of adult institutional life." In what has been described as "intensive four-year effort," adult institutional rules as well as rules relating to parole, probation, and the entire juvenile correctional system were produced.⁴³ In Wisconsin, Section 303, titled simply "Discipline," is the law that governs virtually every aspect of the inmate disciplinary process.⁴⁴

The purpose of Section 303 is plainly stated. "The department (of corrections) may discipline inmates in its legal custody," it reads.⁴⁵ This section applies to all inmates who are in the legal custody of the Wisconsin Department of Corrections pursuant "to a conviction or court order regardless of the inmate's physical custody."⁴⁶ Peculiar in the

⁴¹ See, *Anderson-El v. Cooke*, 610 N.W. 2d 821 (2000) (prison officials must follow its own rules); *Bergman v. McCaughtry*, 564 N.W.2d 712 (1997) (failure of prison officials to follow their own rules invalidates disciplinary proceedings).

⁴² *Wolf v. McDonnell*, 418 U.S. 539 (1974) (disciplinary hearings are subject to the due process clause of the Fifth and Fourteenth Amendment).

⁴³ *Supra*, note 2.

⁴⁴ WIS. ADMIN. CODE §303 (1982).

⁴⁵ WIS. ADMIN. CODE §303.01 (1982).

⁴⁶ *Id.*

wording is the phrase “regardless of the inmate’s physical custody.” But the phrase is vitally important. Like most state prison systems, Wisconsin too is overcrowded and therefore required to obtain out-of-state contracts to house some of its inmates in other state prisons.⁴⁷ For example, at the time of this writing fifty-three inmates are housed in Appleton, Minnesota.⁴⁸ Although outside of the state borders, they remain in the legal custody of the state of Wisconsin and, therefore, are also governed by Section 303.

According to Section 303.01(3), “the objectives of the disciplinary rules are the following: 1) the maintenance of order; 2) the maintenance of a safe setting; 3) the rehabilitation of inmates; 4) fairness in the treatment of inmates; 5) the development and maintenance of respect for the correctional system and our system of government; 6) punishment for misbehavior; and 7) deterrence of misbehavior.”⁴⁹ Codifying the rules of discipline in a clear, specific way serves these important objectives by itself. Having specific, written rules which deal with prison discipline has the advantages of stating clearly what conduct is prohibited, of eliminating the unnecessary discretion, increasing equality of treatment, increasing fairness, and raising the probability that inmates will follow the rules.⁵⁰ In a 1991 study of how prison rules exact social control in the inmate disciplinary process, Professor Jim Thomas noted that “legal rules touch the life of the

⁴⁷ According to a Division of Adult Institutions 2003 profile, the Wisconsin prison system has grown from 2,000 to over 20,000 inmates since the 1970s. See, WISCONSIN DIVISION OF ADULT INSTITUTION (2003), 9.

⁴⁸ Department of Corrections (WI), DOC-302, *Offenders Under Control on April 1, 2005* (2005), 2.

⁴⁹ WIS. ADMIN. CODE §303.01(3) (1982).

⁵⁰ WIS. ADMIN. CODE §303, Appendix, note DOC 303.01 (1982).

institution only partially.”⁵¹ He claimed that the “problem exists less between mandated rules and failure to comply than between the understanding of the institution as embodied in the promulgation of the rules and difficult reality of life in the prison.”⁵² The rules of this study make a small departure from Professor Thomas’s thesis. In reality, legal rules touch the life of the institution far more than “partially.” In fact, they are an integral part of every aspect of the functioning of the prison. Without legal rules, there could be no system of checks and balances on the due process rights of the inmates. Additionally, inmates, and the prison staff, have learned the importance of legality in the prison setting.

B. The Process

Beyond detailing the basic objectives behind inmate discipline, Section 303 also comprises a myriad of rules controlling inmate movement,⁵³ custody status,⁵⁴ work privileges,⁵⁵ and inmate possessions.⁵⁶ Moreover, a comprehensive listing of fifty-four (54) prohibited acts, along with a broad range of punitive sanctions, define and enforce the outer limits of acceptable inmate behavior.⁵⁷ There are four stages to Wisconsin’s disciplinary system. It begins when an inmate is accused of a specific rule violation and

⁵¹ See, Jim Thomas, et.al, Exacting Control Through Disciplinary Hearings: “Making Do” with Prison Rules, 8 JUSTICE QUARTERLY 37, 38 (1991).

⁵² Id.

⁵³ WIS. ADMIN. CODE §§303.49-303.52 (1982).

⁵⁴ WIS. ADMIN. CODE §303.01 (1982).

⁵⁵ WIS. ADMIN. CODE §§ 303.61-303.62 (1982).

⁵⁶ WIS. ADMIN. CODE §§303.42-303.48 (1982).

⁵⁷ WIS. ADMIN. CODE §§303.05-303.631 (1982).

is given a Conduct Report.⁵⁸ It continues through a Review by Security Director to determine if the rule violation is a “major” or “minor” violation.⁵⁹ Afterwards, a Hearing is conducted,⁶⁰ which is governed by procedures for minor violations⁶¹ or for major violations⁶² on the rules the inmate allegedly violated. Finally, all inmates are allowed to Appeal disciplinary hearing on either substantive challenges⁶³ or procedural challenges.⁶⁴

1. Conduct Reports

According to the Wisconsin Administrative Code, an inmate may receive a conduct report for violating any one of the 54 prohibited acts listed in Chapter 303 [hereinafter Disciplinary Code].⁶⁵ The Conduct Report can be written by any staff member, not solely security, who observes a rule violation.⁶⁶ If more than one staff member observes the violation of the same incident, only one report is issued on the inmate.⁶⁷ The Conduct Report must detail the facts of the rule violation and the relevant sections of the Disciplinary Code violated, even if they overlap.⁶⁸ The Conduct Report

⁵⁸ WIS. ADMIN. CODE §303.66 (1982).

⁵⁹ WIS. ADMIN. CODE §303.67 (1982).

⁶⁰ WIS. ADMIN. CODE §§303.75-303.76 (1982).

⁶¹ WIS. ADMIN. CODE §303.75 (1982).

⁶² WIS. ADMIN. CODE §303.76 (1982).

⁶³ WIS. ADMIN. CODE §303.75(6) (1982).

⁶⁴ WIS. ADMIN. CODE §303.76(7)(d) (1982).

⁶⁵ *Supra*, note 132.

⁶⁶ WIS. ADMIN. CODE §303.66 (1) (1982).

⁶⁷ *Id.*

⁶⁸ WIS. ADMIN. CODE §303.66(2) (1982).

is then referred to the Security Director for review to determine the classification of the violation – major or minor.⁶⁹ One exception to this issuance process is summary adjudication by a staff member.⁷⁰

2. Classification by Security Director

Within two (2) working days of the issuance of the Conduct Report, it is reviewed by the Security Director.⁷¹ The purpose of the Security Director's review is to either approve summary dispositions prior to entry in the inmate's records,⁷² or otherwise determine the appropriateness of the charge.⁷³ If the rule violation was summarily adjudicated, no formal Conduct Report is filed.⁷⁴ If, on the other hand, a Conduct Report is issued, then the Security Director takes one of four possible actions: (1) dismiss the charges;⁷⁵ (2) strike any rule violation that is not supported by the facts;⁷⁶ (3) add any rule violation that is supported by the facts;⁷⁷ or (4) refer the charges for further investigation.⁷⁸ The final responsibility of the Security Director's review is to divide all

⁶⁹ WIS. ADMIN. CODE §303.67 (1982).

⁷⁰ WIS. ADMIN. CODE §303.65 (1982).

⁷¹ WIS. ADMIN. CODE §303.67 (1982).

⁷² WIS. ADMIN. CODE §303.67(2) (1982).

⁷³ WIS. ADMIN. CODE §303.67(3) (1982).

⁷⁴ WIS. ADMIN. CODE §303.65(3) (1982).

⁷⁵ WIS. ADMIN. CODE §303.67(3)(a) (1982).

⁷⁶ WIS. ADMIN. CODE §303.67(3)(b) (1982).

⁷⁷ WIS. ADMIN. CODE §303.67(3)(c) (1982).

⁷⁸ WIS. ADMIN. CODE §303.67(3)(d) (1982).

remaining Tickets into either major or minor violations in accordance with the appropriate sub-chapters of the Disciplinary Code.⁷⁹

3. Disciplinary Hearing

The formal hearing procedures for Disciplinary Code violations are determined by the Security Director's classification. If a Disciplinary Code violation is considered minor, the hearing procedures under DOC 303.75 for minor violations apply.⁸⁰ Under the hearing procedures for minor violations, the inmate is first put on Notice by having a copy of the approved Conduct Report issued to him.⁸¹ Next, a hearing is scheduled to be held after two (2), but no later than twenty-one (21), working days have passed.⁸² A Hearing Officer is then assigned and a formal Hearing is conducted.⁸³ The Hearing concludes with a final Decision and Disposition – which usually includes a penalty appropriate for minor violations.⁸⁴

If a Conduct Report is classified as a major violation, the inmate elects to either accept or waive a formal due process hearing.⁸⁵ If he waives, then the hearing proceeds as if it were a minor violation.⁸⁶ If he elects a full due process hearing, then an Advocate

⁷⁹ WIS. ADMIN. CODE §303.67(4) (1982).

⁸⁰ WIS. ADMIN. CODE §303.75 (1982).

⁸¹ WIS. ADMIN. CODE §303.75(1) (1982).

⁸² WIS. ADMIN. CODE §303.75(2) (1982).

⁸³ WIS. ADMIN. CODE §303.75(3) - (4) (1982).

⁸⁴ WIS. ADMIN. CODE §303.75(5) (1982).

⁸⁵ WIS. ADMIN. CODE §303.76(1)(c)-(e) (1982).

⁸⁶ WIS. ADMIN. CODE §303.76(1)(d) (1982).

is assigned to assist the inmate in investigating the Conduct Report for the purposes of gathering defense evidence.⁸⁷ The formal hearing additionally affords the inmate the right to call witnesses,⁸⁸ introduce evidence on his behalf,⁸⁹ and submit questions to the Hearing Officer to ask witnesses.⁹⁰

4. Appeal

All inmate appeals are made to the Warden within ten (10) working days of the final disposition.⁹¹ Minor Hearings, including waived due process hearings, may appeal only the final disposition,⁹² while full due process hearings may appeal either the decision or the sentence (or penalty).⁹³ The Warden reviews all records and forms pertaining to the appeal and issues a final decision within sixty (60) days following the appeals request.⁹⁴ The Warden's decision is one of the following: (1) affirm the decision or sentence;⁹⁵ (2) modify all or part of the decision or sentence;⁹⁶ (3) reverse the decision or sentence;⁹⁷ or

⁸⁷ WIS. ADMIN. CODE §303.78 (1982).

⁸⁸ WIS. ADMIN. CODE §303.76(b) (1982).

⁸⁹ WIS. ADMIN. CODE §303.76(c) (1982).

⁹⁰ Id.

⁹¹ WIS. ADMIN. CODE §303.75(6) and §303.76(7)(1982).

⁹² WIS. ADMIN. CODE §303.75(6) (1982).

⁹³ WIS. ADMIN. CODE §303.76(7) (1982).

⁹⁴ WIS. ADMIN. CODE §303.76(7)(b) (1982).

⁹⁵ WIS. ADMIN. CODE §303.76(7)(c)(1) (1982).

⁹⁶ WIS. ADMIN. CODE §303.76(7)(c)(2) (1982).

⁹⁷ WIS. ADMIN. CODE §303.76(7)(c)(3) (1982).

(4) return the case for further consideration or to complete or correct the record.⁹⁸ The Warden’s decision is final regarding the sufficiency of the evidence, while all procedural errors are made according to the Inmate Complaint System.⁹⁹

C. How Does the Inmate Disciplinary Process “Work”?

1. Conduct Reports and Disciplinary Charges

Enforcing the Disciplinary Code at the Fox Lake Correctional Institution is an ongoing and continuous activity. All staff members, regardless of where they work, are required to keep a constant and vigil watch over inmates in their area. If an inmate commits a rule violation, the staff member is expected to file a Conduct Report citing the relevant sections of the Disciplinary Code violated.¹⁰⁰ In limited circumstances, however, a staff member is given discretion whether or not to issue a Conduct Report.¹⁰¹ In those cases, the staff member is allowed to inform the inmate that his behavior is against the rules and give a warning based on: (1) the inmate’s unfamiliarity with the rule;¹⁰² (2) lack of a similar violation within the previous year;¹⁰³ (3) the likelihood that the inmate will not repeat the violation;¹⁰⁴ or (4) disservice to the purposes of the

⁹⁸ WIS. ADMIN. CODE §303.76(7)(c)(4) (1982).

⁹⁹ WIS. ADMIN. CODE §303.76(7)(d) (1982). *See also*, WIS. ADMIN. CODE §310.08(3)(1982).

¹⁰⁰ *Supra*, note 66.

¹⁰¹ *Id.*

¹⁰² WIS. ADMIN. CODE §303.65(1)(a) (1982).

¹⁰³ WIS. ADMIN. CODE §303.65(1)(b) (1982).

¹⁰⁴ WIS. ADMIN. CODE §303.65(1)(c) (1982).

Disciplinary Rules.¹⁰⁵

Given the plethora of rules covering prison behavior, if he chooses, a staff member could spend most of each shift writing Conduct Reports. As such, most staff members at Fox Lake prefer, and thereby heavily utilize, the summary disposition process. Of the 3,333 total conduct reports issued at Fox Lake from January 2004 to December 2004, 1,481 (44%) resulted in summary dispositions. They were routinely, reserved for disciplinary infractions that were non-violent in nature. Most commonly they fell under one of three main sub-chapters of the Disciplinary Code: (1) Movements Offenses (29%);¹⁰⁶ (2) Offenses Against Safety and Health (15%);¹⁰⁷ and (3) Miscellaneous Offenses (9%).¹⁰⁸ Those three sub-chapters accounted for more than half of all summary dispositions at Fox Lake.

There were, however, certain disciplinary infractions that seldom, if ever, received summary disposition at Fox Lake. If an inmate committed an infraction against institutional security,¹⁰⁹ bodily security,¹¹⁰ or against order,¹¹¹ “there is a 100% probability that an inmate would receive a Conduct Report for rule violations in this

¹⁰⁵ WIS. ADMIN. CODE §303.65(1)(d) (1982).

¹⁰⁶ WIS. ADMIN. CODE §§303.49-303.52 (1982).

¹⁰⁷ WIS. ADMIN. CODE §§303.54-303.58 (1982).

¹⁰⁸ WIS. ADMIN. CODE §§303.59-631 (1982).

¹⁰⁹ WIS. ADMIN. CODE §§303.18-303.23 (1982).

¹¹⁰ WIS. ADMIN. CODE §§303.12-303.17 (1982).

¹¹¹ WIS. ADMIN. CODE §§303.24-303.32 (1982).

area,” according to hearing officer Captain Mel Pulver.¹¹² Subsequently, the seriousness of the rule infractions under these three (3) categories would determine if the inmate received a minor or major classification by the Security Direction. In almost all cases (97%), the classification was major.

2. Classification by Security Director

Before a disciplinary charge is forwarded to the adjustment committee, it is reviewed and classified by the Security Director.¹¹³ This review and classification process is known among the correctional staff as “magistrating the ticket.”¹¹⁴

Substantively, the Security Director’s classification is the preemptive step in issuing NOTICE to the inmate of the charges pending against him.¹¹⁵

At Fox Lake an inmate receives a copy of the Conduct Report after the conclusion of the review and classification by the Security Director.¹¹⁶ Typically, his NOTICE is delivered to the inmate while he is housed in Unit 8 – also known as the Temporary Lock

¹¹² Informal interview with Captain Mel Pulver, at Fox Lake Correctional Institution (March 6, 2004).

¹¹³ WIS. ADMIN. CODE §303.67(1982).

¹¹⁴ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (March 3, 2004).

¹¹⁵ Wolff, 418 U.S. at 564. Notice is the first and possibly most important step in the Inmate Disciplinary Process. It not only provides the inmate of the charges pending against him/her but it also informs the inmate of the date and time of the hearing on those charges. Also, Notice is important because it signals to the inmate of the timing in requesting assistance if he intends to present witnesses or evidence in defense of pending charges. Without Notice an inmate could be charged and, theoretically, have his case adjudicated without an opportunity to be heard on the charges. In Wisconsin, failure to properly notify an inmate, in the past, has resulted in invalidated disciplinary proceedings and all charges dismissed against the inmate. *See, e.g. Anderson-El v. Cooke*, 610 N.W. 2d 821 (2000) (prison officials must follow its own rules); *Bergman v. McCaughtry*, 564 N.W.2d 712 (1997) (failure of prison officials to follow their own rules invalidates disciplinary proceedings).

¹¹⁶ WIS. ADMIN. CODE §303.75(1)(1982) and WIS. ADMIN. CODE §303.76(1)(1982).

Up of TLU.¹¹⁷ After a copy of the classified Conduct Report is handed to the inmate, the original is forwarded to the office of the Security Director where they are organized and collated by the date the Conduct Report was issued. The date of issuance is important because DOC §303.75 (hearing procedures for minor violations) and DOC §303.76 (hearing procedures for major violations) both mandate that “the institution may not hold the hearing until at least 2 working days,” and not more “than 21 days after the inmate receives the approved conduct report.”¹¹⁸ Otherwise, the security director may enlarge the 21 day hearing time limit or the inmate may waive them in writing.¹¹⁹

The Security Director’s review is a vital step in the disciplinary process. It serves several purposes. First, it acts as a check on staff discretionary power. Thus, corrections staff are not permitted to issue Conduct Reports on inmates in a retaliatory fashion. Also, the review ensures that the inmate is properly charged. This, hopefully, instills legitimacy in the disciplinary process for the inmates. Finally, the review process ensures that the measures to discipline the inmate will advance appropriately; thereby alleviating inmates remaining in the Disciplinary Unit more time than is necessary to adjudicate their

¹¹⁷ When an inmate violates one of the disciplinary rules and he is issued a Conduct Report that will require a hearing, the inmate is relocated from his current unit to Unit 8 – the main Disciplinary unit at Fox Lake. While there, the inmate awaits for his Conduct Report to be magistrates and returned to him. If the inmate is given a disposition that requires him to remain in either adjustment segregation, program segregation, or disciplinary separation, he typically remains in Unit 8 for a period of time after which he is transferred to Unit 7 and later back to the general population. The best scenario for the inmate is that he receives disciplinary separation because his maximum release date is not extended due to his rule violation. According to Captain Mel Pulver, “We prefer to issue disciplinary separation as a penalty. That way we don’t extend any of the inmates maximum release date and can help the issue of overcrowding in the prison.” Interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (May 14, 2005).

¹¹⁸ *Supra*, note 191.

¹¹⁹ *Id.*

charge.

Probably most important in the review process is the necessity to determine that the inmate is properly charged. It is vital to the both the success and legitimacy of the process to check the specific fact that gave rise to the disciplinary charge against the actual charges given the inmate. If the staff members improperly charge an inmate, without the supporting facts, it is corrected at one of two points in the disciplinary process – at either the Security Director’s review or the inmate’s disciplinary hearing. In certain instances, the Security Director “may dismiss a conduct report” altogether, thereby restoring the inmate to his full status and relieving the possibility that a discipline violation will be issued on his record.¹²⁰ Although not common, dismissals do occur. In 2004, 128 of 3,333 (.04%) issued Conduct Reports resulted in dismissals. The low number demonstrates the quality of the staff in properly applying the disciplinary rules to inmate violations.

The Security Director’s review also fetters out charges against the inmate that are illegitimate. In the event an inmate receives, for example, a conduct report containing multiple rule violations, some of which are legitimate and others which are not, the Security Director is committed to a course of one of two actions. He “may strike any section number if the statement of facts could not support a finding of guilty of violating that section.”¹²¹ If in the opposite, facts are present for which the inmate was not charged, the Security Director “may add any section number if the statement of facts

¹²⁰ WIS. ADMIN. CODE §303.67(3)(a)(1982).

¹²¹ WIS. ADMIN. CODE § 303.67(3)(b)(1982).

could support a finding of guilty of violating that section and the addition is appropriate.”¹²² This process acts to heighten disciplinary charges against the inmate, thereby contributing to the seriousness at which prison rules must be attended. It, otherwise, alleviates the inmate of any wrongdoing which is not justified. It should be noted that the Security Director may reduce charges in the event of summary disposition, 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.¹²³

Finally, a Security Director’s review may end in “refer[ral] . . . for further investigation.”¹²⁴ The purpose of the referral is to clarify facts from the staff member who issued the report, or to discuss the situation with another staff member who was present at issuance. In either event, the goal is to ensure that the inmate is properly charged only for rule violations that he committed and to discourage fortuitous issuance of Conduct Reports as a means of coercion, retaliation, or punishment against the inmates.

At the conclusion of the review, the Security Director divides all remaining conduct reports into either major offenses (which includes those with both major and minor offenses) or minor offenses.¹²⁵

¹²² WIS. ADMIN. CODE §303.67(3)(c)(1982).

¹²³ WIS. ADMIN. CODE §303.67 Appendix Note.

¹²⁴ WIS. ADMIN. CODE §303.67(3)(d)(1982).

¹²⁵ WIS. ADMIN. CODE §303.67(4)(1982).

3. Disciplinary Hearings

When inmates at Fox Lake are subjected to a disciplinary hearing, it is the possibility of sanctions that they have in mind. On any given day 20 or more inmates, most with more than one charge, may be adjudicated by the hearing officer.¹²⁶ Which process the Hearing must follow is determined by whether the rule violation are determined to be a major or minor offense.

a. Minor Offenses

Minor offenses comprise the majority of charges that inmates face at Fox Lake. Between January 2004 and December 2004, for example, 1,282 (38%) hearings were conducted on 3,333 issued Conduct Reports. Of these proceedings, 1,159 (90%) were adjudicated as minor offenses, while the remaining 123 (10%) involved major offenses.¹²⁷ What constitutes a minor offense is defined by its exclusion from a list of major offenses. For example, DOC 303.68(1)(d) defines minor offenses as “any violation of a disciplinary rule which is not a major offense under sub.(3) [list of major offenses] or (5) [a minor offense and major offense on the same conduct report] or which the Security Director has not classified as a major offense.”

The normal format followed at minor offense Disciplinary Hearings begins as

¹²⁶ Captain Mel Pulvin has worked in Corrections for seventeen years and is the sole officer in charge of conducting disciplinary hearings at Fox Lake. The results of this thesis is a credit to his assistance and insight.

¹²⁷ Interview with Thomas Gozinske, Fox Lake Correctional Institution, Wisconsin (April 15, 2004).

soon as the inmate, escorted by a security officer, enters the hearing room.¹²⁸ Once the inmate is seated the hearing officer reads him the charge, obtains his plea (guilty or not guilty), and asks for his explanation of the incident. In the over 100 minor offense hearings observed, more than 90% of the inmates pled guilty, while 10% pled not guilty. If the inmate admitted the violation, the hearing officer allowed the inmate to testify to any mitigating circumstances. Afterwards, the inmate vacated the room while the hearing officer reached a decision – which included analyzing the facts, charges, and proposed disposition. Upon his return, the inmate is advised of his punishment and provided with a carbon copy of the adjudication form – explaining the evidence relied on, and the reason for the action taken. At this point, the inmate was also informed of his right to appeal the decision, and what steps he must take in order to do so. The minor hearing process on the average took no more than 5 minutes.¹²⁹

In many minor offense cases, the Disciplinary Hearings are routine affairs involving only a review of the charging staff member's report, the Security Director's report and classification, the inmate's testimony, several questions by the hearing officer, and a disposition.¹³⁰ A couple of examples of minor offense cases are presented below. In order to protect the anonymity of the inmate, only inmate numbers are used in place of names.

¹²⁸ The hearing room at Fox Lake was located in the same Unit where inmates were placed in either segregation or Temporary Lock Up. In this case, that was Unit 8.

¹²⁹ Of the 100 minor hearings observed the shortest was 3 minutes and the longest was 7 minutes.

¹³⁰ The hearings observed during fieldwork (154) varied considerably ranging from two minutes to roughly one and one-half hours. All but four of the hearings lasted twenty-seven minutes or less. The average amount of time spent on a case was nine minutes.

Case 05

Charge: Disruptive Conduct (303.28)

Security Director's Recommendation: Major Violation, but inmate waived Full Due Process Hearing.

Inmate Plea: Guilty

Observation: On the disciplinary report, the officer wrote, "while escorting inmates #391006, and other inmates, from Unit to rec area, inmate 391006 shouted profanity by saying 'this is bullshit' in the presence of other inmates and guards." The inmate was charged with disruptive conduct and the Security Director, because of the level of disrespect to the guards, classified it as a major violation. Inmate waived his full Due Process Hearing rights and the hearing proceeded without witnesses or rights to a staff advocate.

The hearing officer read this report to the inmate along with the Security Director's review of the violation. The hearing officer next asked the inmate what he had to say about the offense. The inmate explained that he and other inmates were being escorted from their unit to the recreation area. When they arrived, the guard released the inmates for recreation time. Suddenly, the guard realized that other members of the unit had not yet been escorted back in from the recreation area, and called to reassemble the inmates. The guard then required them to return to their unit and informed the inmates that he would take them to recreation in a few minutes. On the way back to the unit, inmate 391006 stated that someone shouted, "fuck that shit, you released us," to which he openly replied, "this is some bullshit," in front of 40 inmates.

Inmate 391006 stated that he was 100% guilty of the charges and that he just got "caught up in the moment." He apologized to the hearing officer for his behavior and stated that it would not happen again. He also remained very jovial during the entire hearing. The hearing officer informed inmate 391006 that his explanation made sense, but that he "had to be more careful when emotions get tense." He also explained to inmate 391006 that although he had only been in prison for one year, he had better learn to "control himself." After deliberating for a few minutes, he found the inmate guilty of Disruptive Conduct in violation of DOC 303.28. Since inmate 391006 only had four minors in the past, he sentenced him sparingly.

Final Disposition: 3 days adjustment, then back to unit.

Evidence Relied On: Officer's conduct report and inmate testimony.

Reason for Disposition: Four previous minor violations and limited time in prison.

Length of Hearing: 5 minutes.

Case 27

Charge: Violating Policies and Procedures (303.63)

Security Director's Recommendation: Minor violation

Inmate Plea: Guilty

Observation: This disciplinary report was written by a staff teacher at Fox Lake. On the disciplinary report, the staff member wrote, "[w]hile inmate 406386 was using the computer in class, I discovered that he was using the computer program in an unauthorized manner."

During the hearing, the hearing officer read the conduct report to the inmate and explained the charges against him. The hearing officer also pulled a series of paper

signs from under the table and presented them to the inmate. He asked the inmate, “did you make these.” The inmate admitted to making the signs, which he had no choice because the signs imprinted his name in different fonts and colors. The officer then asked the inmate if he had anything to say.

The inmate explained that he was in his computer class where they were learning to make Power Point presentations. After he finished his assignment, he was waiting for the teacher to come review his work, but she was helping another student. He stated that he “was so excited about what the program could do,” that he started playing with it and figured out how to make signs. Then he just made some signs of his names, but didn’t thing anything of it because, “I wasn’t looking at porno or something like that. I didn’t think it was a big deal,” he stated. “I was simply playing with the computer.”¹³¹

The hearing officer explained that being in a computer class was a privilege and that he had just abused that privilege. He told the inmate that although he was “playing” with the computer, that he was not in class to play and that his actions constituted a violation of classroom policies and procedures. The hearing officer deliberated for a few minutes and recalled the inmate to the room. The inmate was found guilty and given 3 days adjustment and 30 days disciplinary separation.

Final Disposition: 3 days adjustment segregation and 30 days disciplinary separation.

Evidence Relied On: Conduct report, documentary evidence, and inmate admission.

Reason for Disposition: Inmate has to learn early that computer use is restricted.

Length of Hearing: 6 minutes.

b. Major Offenses

Major offenses require a different type of handling. Because of the seriousness of the offense,¹³² the penalty possibilities,¹³³ and the possibility of change in the inmate’s classification or release date,¹³⁴ specific attention must be paid to the due process requirements mandated

¹³¹ Inmate testimony during Disciplinary Hearing #27, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

¹³² WIS. ADMIN. CODE §303.68(1)(c)(1982) defines a major offense in two ways. First, it is “a violation of a disciplinary rule for which a major penalty may be imposed if the accused inmate is found guilty.” Id. Second, any violation of the following is considered a major offense: battery; sexual assault (intercourse or contact); inciting or participating in a riot; cruelty to animals; escape; disguising identity; arson; counterfeiting and forgery; possession of intoxicant, drug paraphernalia, weapons (manufactured or altered); misuse of prescription medication; and use of intoxicants. WIS. ADMIN. CODE §303.68(3)(1982).

¹³³ WIS. ADMIN. CODE §303.68(1)(a)(1982). The list of major penalties include adjustment segregation (DOC 303.69 and DOC 303.84); program segregation (DOC 303.70 and DOC 303.84); loss of good time or extension of mandatory release date (DOC 303.84); disciplinary separation (DOC 303.70); room confinement for 16-30 days; loss of recreation privileges for over 8 days for inmates in segregation; building confinement for over 30 days; and loss of specific privileges for over 60 days. WIS. ADMIN. CODE §303.68(1)(a)(1982).

¹³⁴ WIS. ADMIN. CODE §303.84(1)(j)(1982) reads “in every case where an inmate is found guilty of

Section 303.

(1) Notice

When an inmate is alleged to have committed a major violation and the Security Director has reviewed the conduct report, staff must give the inmate a copy of the approved conduct report within two (2) working days.¹³⁵ The purpose of the notice is to inform the inmate of the following: (1) the rule violated;¹³⁶ (2) the potential penalties or other potential results;¹³⁷ and (3) the inmate's rights to a full due process hearing or waiver of that right in writing.¹³⁸

(2) Choice of Waiver or Full Due Process Hearings

If an inmate prefers he may waive his full due process rights (hereafter Waiver) and proceed with his hearing under the guidelines for minor offenses.¹³⁹ The Waiver provisions recognize that the inmate technically committed a major offense but wishes to proceed informally without the assistance of an Advocate or witnesses. An inmate would chose to waive a formal due process hearing in those instances where he would prefer to admit guilt and accept his punishment rather than proceed with a lengthy hearing.

Although less formal than full due process hearings, waivers are an important part of the IDP. The inmate is given notice of the charges pending against him, the hearing is adjudicated in a timely manner, the inmate is given opportunity to testify (or explain) what prompted the

one or more violations of the disciplinary rules, one or more of the following penalties shall be imposed . . . (j) loss of good time for an inmate whose crime was committed before June 1, 1984, . . . or extension of the mandatory release date for an inmate whose crime was committed on or after June 1, 1984.”

¹³⁵ WIS. ADMIN. CODE §303.76(1)(1982).

¹³⁶ WIS. ADMIN. CODE §303.76(1)(a)(1982).

¹³⁷ WIS. ADMIN. CODE §303.76(1)(b)(1982).

¹³⁸ WIS. ADMIN. CODE §303.76(1)(c)(1982).

¹³⁹ WIS. ADMIN. CODE §303.76(1)(d)(1982).

offense, and the inmate is given a written finding of guilt, the punishments, and the reasons for it.¹⁴⁰

(a). Waived Due Process Hearings

Waivers are common at Fox Lake. On 570 (17%) occasions, inmates at Fox Lake chose to waive their right to a full due process hearing. One of two reasons typically prompted the waiver. Either the inmate wanted to gain favor from the hearing officer by accepting responsibility for his actions and “taking his punishment like a man,” as one inmate claimed,¹⁴¹ or the inmate did not believe that he could prevail on defending against the major offense and preferred not to “waste the time of the hearing officer,” claimed another.¹⁴² In either instance, the major motivation behind Waiver was to, hopefully, gain some favor from the Hearing Officer during the decision and disposition stage of the disciplinary hearing.

The majority of the hearings observed were waived due process hearings. Of the 152 hearings attended, 130 (85%) inmates opted for the less formal hearing in hopes of a lenient disposition. In most cases, their strategy worked. They often found favor in the Hearing Officer and received a lenient disposition for accepting responsibility for their actions. What was less predictable, however, was the variety of approaches undertaken by the inmates to gain favor. I point out three main approaches below.

i). Admitting Guilt

In many instances, the inmate would enter the hearing room and admit guilt for his actions. The admission often occurred prior to the adjustment committee reading the necessary

¹⁴⁰ WIS. ADMIN. CODE §303.75(1982). DOC 303.75 apprises the standards and requirements for waived due process hearings, that proceed as minor hearings, including guarantees of notice; time limitations; hearing officers requirements; the hearing; decision and disposition, and the appeal.

¹⁴¹ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (May 12, 2005).

¹⁴² Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (May 12, 2005).

charges. “The sooner I accepted responsibility the quicker the hearing would be over; and I looked good to the Captain [Pulver],” one inmate rationalized.¹⁴³ “I know that’s why I got a more lenient sentence.”¹⁴⁴

Several other inmates followed suit. Of the 130 minor offense, and waived due process, hearings observed, 120 (92%) inmates admitted guilt. In some instances, the penalty was harsh, although admittedly less harsh with the guilty admission. Routinely, the inmates resolved that the penalty was forthcoming anyway, and the less harsh it was the better. “I knew that Cap [tain Pulver] was gonna sock it to me, man I screwed up bad. I just tried to show him that I was a man and I could do my time rain or shine,” claimed one inmate.¹⁴⁵ Consider the following cases.

Case 25

Charge: Violation of Institutional Policies and Procedures (303.63) and Inadequate Work Service (303.62)

Security Director’s Recommendation: Minor Violation

Inmate Plea: Guilty

Observation: This inmate was charged with failing to sign in when he entered into the cell area (violation of institutional policies and procedures) and failing to perform adequately at his present job (inadequate work service) in the kitchen, because he left his area unclean.

During the hearing, the hearing officer read the inmate the charges against him and gave him an opportunity to explain his actions. The inmate responded, “guilty as charged, Cap[tain Pulver].”¹⁴⁶ The inmate did not even attempt to offer explanation for his actions.

Final Disposition: 30 days disciplinary separation

Evidence Relied On: Conduct Report and Inmate Testimony

Reason for Disposition: 8 conduct reports in the past 3 months.

Length of Hearing: 3 minutes.

Case 32

¹⁴³ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (May 17, 2005).

¹⁴⁴ *Id.*

¹⁴⁵ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (May 17, 2005).

¹⁴⁶ Inmate testimony during Disciplinary Hearing #25, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

Charge: Punctuality and Attendance (303.49) & Being in an Unassigned Area (303.511).

Security Director's Recommendation: Major Violations (extenuating circumstances).

Inmate Plea: Guilty

Observation: This inmate was new to the facility but was under watch for suspected gang activity. The gang officers had observations of him socializing with known members of the Latin Kings gang. When this inmate presented himself for his hearing, he admitted guilt in order to receive a light sentence.

The hearing officer explained to him that he was charged with being in an unassigned area. The inmate was supposed to be in class, but was instead found in the recreation area. When given an opportunity to explain himself, the inmate stated, "I thought class was cancelled. There was no teacher or students there when I arrived. So I went to rec[reation]."¹⁴⁷ The hearing officer asked the inmate why did not return to his cell area to which the inmate responded, "I don't know."

The inmate was asked to leave the room while the hearing officer revealed the particulars of the case. Since this inmate was new, the prison staff did not want to allow him an opportunity to associate with the prison gangs. It was confirmed by a reliable informant that this inmate expressed interest in associating with the prison gang. Rather than allow him that opportunity, which would undoubtedly lead to more rule violations in the future, the hearing officer wished to "cut the snake off at the head and get him out of that unit," as he explained.¹⁴⁸

When the inmate returned he was given a harsh sentence as compared to the nature of his offense – 6 days adjustment, 180 days disciplinary separation – the maximum sentence allowed.¹⁴⁹

Final Disposition: Maximum Sentence

Evidence Relied On: Conduct Report, Gang Officer's Report, Inmate Testimony

Reason for Disposition: Suspected gang activity (requiring removal from unit).

Length of Hearing: 8 minutes.

ii). Attitude Matters

Another approach used by the inmates to gain favor was to have a positive attitude regarding the hearing and penalty. In several cases, combined with those that accepted guilty, the inmate's were oddly jubilant in the hearing room. What made their behavior odd was that some of them would spend the next 180 days in Unit 8, restricted confinement, with limited

¹⁴⁷ Informal comments made by inmate during Disciplinary Hearing #32, Fox Lake Correctional Institution, Wisconsin (Feb. 3, 2004).

¹⁴⁸ Informal comments made by hearing officer Captain Mel Pulver during Disciplinary Hearing #32, Fox Lake Correctional Institution, Wisconsin (Feb. 3, 2004).

¹⁴⁹ See DOC 303.84 Schedule of Penalties, 303.511 which authorizes that an inmate charged with this offense may be sentenced to 6 days adjustment segregation and 180 days disciplinary separation.

privileges.¹⁵⁰ Yet they managed to smile, laugh, and even joke with the adjustment committee.

In five (5) cases, however, attitude had a profound effect on the outcome. If an inmate displayed a poor attitude towards the hearing, the hearing officer, or the responsibility for their actions, the possibility of a less harsh penalty dissipated. In one case, an inmate came into the hearing, accused the staff member of lying on the conduct report, accused the hearing officer of conducting the hearing dishonestly, and called one of the officers a “motherfucker.”¹⁵¹ Subsequently, his sentence was not only harsh, but he had additional charges that he would face for disrespecting the officer.¹⁵²

Examples of cases demonstrating how attitude mattered are presented below. What is most notable is the initial charge and the penalty when attitude is positive as compared to the initial charge and penalty when attitude is poor. “The word on the yard,” claimed one inmate, “is that Cap[tain Pulver] likes for you to be a man, so be a man, and be respectful.”¹⁵³

Case 82

¹⁵⁰ In prison, privileges are the most important item of preservation for inmates. When an inmate is sent to the disciplinary unit, Unit 8, they forfeit, or have seriously circumscribed, certain privileges that they previously enjoyed. DOC 303.69 (adjustment segregation), DOC 303.70 (program segregation); and DOC 303.71 (controlled segregation) each vary the following privileges allotted disciplined inmates: visitation and telephone calls, correspondence, showers, special procedures, leaving cell, exercise, good time allotted, observation, and time served allotted.

¹⁵¹ The use of bad language is strictly prohibited by the Wisconsin disciplinary code. According to DOC 303.25, titled Disrespect, any inmate who shows disrespect to any person is guilty . . . , whether or not the subject of the offense is present at the time. Disrespect includes . . . derogatory or profane writing, remarks or gestures, name-calling, yelling, or other acts made outside the formal complaint process which are expressions of disrespect for authority. “Disrespect is something we take very seriously at Fox Lake,” claims Captain Pulver, “because it leads to so many other discipline problems.” Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (Feb. 3, 2004).

¹⁵² After cursing during the hearing, this inmate was immediately ushered from the hearing room and had a re-hearing scheduled for a different date. The re-hearing would include charges of disrespect (DOC 303.25), lying about staff (DOC 303.271), disruptive conduct (DOC 303.28) and threats (DOC 303.16). Unfortunately, I was not able to attend the rehearing for scheduling conflicts. I did, however, learn that this inmate was eventually transferred to a different facility because his erratic behavior posed a threat to the safety of the institution.

¹⁵³ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (Feb. 3, 2004).

Charge: Disruptive Conduct (303.28) and Disobeying Orders (303.24).

Security Director's Recommendation: Minor Violations

Inmate Plea: Guilty (with a positive attitude)

Observation: This inmate was charged with questioning a guard regarding his attitude towards the inmate. The hearing officer read the charges to the inmate and gave him a chance to explain himself. The inmate claimed that he left his key in his cell while he went to the bathroom. When he returned, his cellmate had left the room and locked it. The inmate then proceeded to the guard and asked to him to give him his key or at least unlock the room. The guard refused. The inmate found his cellmate, got the key, entered to take his items and left the area. When he returned to the area later that day, he asked the guard, "do you have a problem with me? Why wouldn't you give me a key earlier?" The guard then issued the conduct report for disrespect and disobeying orders. The disobeying orders charge was dismissed during the hearing.

The hearing officer explained to the inmate that he cannot ask officers if they "have a problem" with him. That is disrespect and he will, rightfully, be charged. The inmate, who remained with a positive attitude, accepted the hearing officer's words of wisdom and smiled gracefully. Since the inmate had not major tickets, had been locked up for 2 years, and only received one ticket in the past, he was sentenced to 15 days of 24 hour room confinement and sent back to his unit.

Final Disposition: 15 days of 24 hour room confinement

Evidence Relied On: Conduct Report and Inmate Testimony

Reason for Disposition: Inmate had a good record and a good attitude.

Length of Hearing: 5 minutes.

Case 92

Charge: Disrespect (303.25), Disruptive Conduct (303.28), Violation of Institutional Rules and Procedures (303.63).

Security Director's Recommendation: Major (waived full due process)

Inmate Plea: Not Guilty

Observation: This hearing contrasted considerably with the one detailed above. In this case the conduct report claims that the inmate was watching television and the Sergeant on duty proscribed no talking during the show. The inmate made some noise at which time the Sergeant told him to "stop." The inmate responded to the Sergeant, "just relax." The inmate was taken to his cell at which time the Sergeant informed the inmate that he was going to write a conduct report for his actions. The inmate responded, "do whatever you gotta do guy."

During the hearing the inmate denied the allegations of the conduct report. The inmate claims that he was not watching television, but was instead talking with some other inmates when the guard came over and shouted at him – to which he responded, "relax." When the guard told him he was getting ticket, he told the guard, "do what you gotta do." He never admits to calling the guard, "guy." The hearing officer asked the inmate if he felt he was disrespectful. The inmate said, "No, he doesn't feel that he was being disrespectful, but only honest with the guard." The hearing officer informed the inmate that his actions were disrespectful and that he does believe that he called the guard, "guy." This inmate had a visible negative disposition toward the hearing officer, the charges against him, and the disciplinary hearing.

Final Disposition: 3 days adjustment and 30 days disciplinary separation, then back

to a different unit.

Evidence Relied On: Conduct Report

Reason for Disposition: Negative Attitude

Length of Hearing: 7 minutes.

iii). Shedding Tears

One particular approach to leniency was unused by many other inmates, I suspect because it was not attempted to gain favor from the Hearing Officer. Instead it was a real reaction to the situation. Rather or not it was purposeful, the next inmate found sympathy from the hearing officer because of his reaction to the disposition and penalty. His case is presented below.

Case 37

Charge: Possession of Contraband - Miscellaneous (303.47),

Possession, Manufacture and Alteration of Illegal Weapons (303.45)

Security Director's Recommendation: Major Violation (waived full due process)

Inmate Plea: Guilty on all Charges

Observation: This was a particular interesting case. The inmate had only been present at Fox Lake for a period of 2 months. In fact, this was his first time in prison and he was having difficulty adjusting. In this case, the officer's conduct report read, "Inmate 454956 removed a razor blade from a disposable shaver and put in a comb to make a weapon for himself."

The hearing officer read the charges and the conduct report to the inmate, who in response looked baffled by the charges. The inmate was even more shocked when the hearing officer explained that the charges against him were very serious and that he was going to spend some significant time in segregation. The hearing officer then asked if the inmate had anything to say in his defense. The inmate explained that it was all a misunderstanding. He needed to trim his beard (the inmate had a full beard) and he asked around if he could borrow someone's electric trimmer. He then explained that one of the elder inmates explained him that he would have to do an "old prison trick." The elder instructed the inmate to take a razor blade from his disposable shaver and put it in his comb. Then simply comb his beard normally and the razor would trim his beard for him. The inmate explained that is exactly what he did and that he was not trying to manufacture a weapon, but was simply trying to keep himself groomed.¹⁵⁴

¹⁵⁴ An interesting dichotomy is worth noting here. If an inmate exhibits poor grooming (ie. which includes suitably cut hair) he can be charged with a rule violation under DOC 303.56. If an inmate manufactures a weapon (which includes altering any item making suitable for use as a weapon) he can be charged with a rule violation under DOC 303.45. A closer read of this inmate's situation demonstrates that in an effort to avoid one rule violation, he violated a more serious one, yet his punishment did not reflect consideration of the special circumstance.

The hearing officer told the inmate that his story sounded reasonable, but that altering any item that could be used in the future as a weapon was serious, even if it that was not his original intent. He then told the inmate that although he believed his story, he could leave nothing to chance, he had to sentence him accordingly but would make the sentence, in his opinion, light. Without deliberation, the hearing officer sentenced the inmate to 3 days adjustment segregation, and 30 days disciplinary separation. The inmate looked on in disbelief and asked “what did that [sentence] mean?” It was explained that he would spend 3 days in solitary segregation, and then another 30 days separated from the remainder of the population. The inmate starred at the hearing officer and broke down in tears. He cried profusely, and pleaded not to be punished so harshly. After gathering himself, he was escorted to his segregation cell.

Final Disposition: 3 days adjustment segregation and 30 days disciplinary separation.

Evidence Relied On: Officer’s conduct report and the inmate’s testimony.

Reason for Disposition: Serious of the offense and length of time in prison.

Length of Hearing: 10 minutes.

At the conclusion of this hearing, the hearing officer (Captain Pulver) stated, “I am worried about this guy.” Although this was his first time in prison and his first rule violation, “the problem was that his conduct, although seemingly innocent, amounted to a major violation – possession, manufacture and alteration of weapons,” he stated.¹⁵⁵ “I believed this guy, but we have to take weapons manufacturing seriously around here, because the first time we don’t, one of my men will get his face slashed.”¹⁵⁶ Captain Pulver noted that he “found the inmate’s reaction so shocking, that I am going to refer that guy to psych[iatric] immediately.”¹⁵⁷ He continued, “at this rate, he won’t last long in here. Right now I consider him a suicide risk.” When asked what more could he have done, he replied “my hands were tied.”¹⁵⁸ Since the inmate committed a major violation,

¹⁵⁵ Informal comments from Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (May 4, 2004).

¹⁵⁶ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (May 4, 2004).

¹⁵⁷ A Wellness Committee was held on 4 May 2004, during which time Capt. Pulver referred inmate #454956.

¹⁵⁸ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin

Captain Pulver noted that “I have to demonstrate the seriousness of it to him. Hopefully, he will learn and not do it again. But, I must admit, this is one of those times that I don’t like the rules.”¹⁵⁹ The inmate was referred to the Wellness Committee later that afternoon.

(b) Full Due Process Hearings

If the formal due process hearing is elected by the inmate, then DOC 303.76(e) requires that the inmate be informed of all of the following: (1) that the inmate may present oral, written, documentary and physical evidence;¹⁶⁰ (2) the inmate may have the assistance of a staff advocate;¹⁶¹ (3) the adjustment committee may permit direct questions or written questions to be asked of witnesses;¹⁶² (4) the adjustment committee may prohibit repetitive, disrespectful or irrelevant questions;¹⁶³ (5) the inmate may appeal the final disposition;¹⁶⁴ and (6) that, in special circumstances, the adjustment committee may conduct the hearing outside of the presence of the inmate.¹⁶⁵

Because of the very limited times that inmates requested full due process hearings

(May 4, 2004).

¹⁵⁹ The Wellness Committee was held on May 4, 2004 where the mental and physical health of the inmates was discussed. Inmate 454956 was added to the list of clinical watch because of his crying depression during the disciplinary hearing. The clinical psychiatrist stated that she would “visit him this week.” The researcher was present during the Wellness Committee meeting.

¹⁶⁰ WIS. ADMIN. CODE §303.76(e)(1)(1982).

¹⁶¹ WIS. ADMIN. CODE §303.76(e)(2)(1982).

¹⁶² WIS. ADMIN. CODE §303.76(e)(3)(1982).

¹⁶³ WIS. ADMIN. CODE §303.76(e)(4)(1982).

¹⁶⁴ WIS. ADMIN. CODE §303.76(e)(5)(1982).

¹⁶⁵ WIS. ADMIN. CODE §303.76(e)(6)(1982).

at Fox Lake it was difficult to observe this process in action. However, of the twenty-four (24) full due process hearings observed, two main themes consistently emerged: (1) the trouble with advocates; and (2) the trouble with inmate witnesses. In both themes, they worked to the disadvantage of the inmates.

i) Representation by Advocate

According to DOC 303.78, “at each institution, the warden may designate or hire staff members to serve as advocates for inmates in disciplinary hearings at the institution.”¹⁶⁶ The advocate’s purpose “is to help the accused inmate to understand the charges against the inmate and to help in the preparation and representation of any defense the inmate has, including gathering evidence and testimony, and preparing the inmate’s own statement.”¹⁶⁷ DOC 303.78 goes one step further. It provides advocate assistance for every inmate involved in a major rule violation regardless of the inmates limitations or the difficulty of the proceedings.¹⁶⁸ When an inmate elects to have a full due process hearing, an advocate is automatically assigned to assist him. In other words, the right is activated by simple election.

But, there is a problem. Although electing to have an advocate is a simple process for the inmates, finding one who will faithfully discharge his duties is not so simple. Even though DOC 303.78(1)(a) authorizes the Warden to hire advocates,¹⁶⁹ there

¹⁶⁶ WIS. ADMIN. CODE §303.78(1)(a)(1982).

¹⁶⁷ WIS. ADMIN. CODE §303.78(2)(1982).

¹⁶⁸ WIS. ADMIN. CODE §303.76(e)(2)(1982).

¹⁶⁹ WIS. ADMIN. CODE §303.78(a)(1)(1982) reads, “At each institution, the warden may designate or hire staff members to serve as advocates for inmates during disciplinary hearings at the institution.

are none on the payroll at Fox Lake. “We simply don’t have enough full due process hearings to justify a full or part-time staff member to solely act as an advocate,” explains Warden Tom Borgen.¹⁷⁰ “Thus it make no sense to waste our budget on a salary for advocates. Instead, I assign the task to present staff members and rotate the responsibility among my present staff. Given my budgetary limitations, that is the best we can do.”¹⁷¹ There are two issues that arise with the Warden’s system: the advocates either try too hard, or they don’t try hard enough.

a) Advocates (Who Try Too Hard)

The staff members assigned to serve as advocates typically comes from various departments at the prison. Advocates range from prison teachers to prison maintenance workers. One difficulty presented with using random staff members as advocates, as opposed to hiring them, resides that the appointed staff, sometimes, try to hard at their position. In most cases, appointed staff advocates are unaware that they do not have typical attorney-client privilege during the hearing process. Also, advocates have limited power to present evidence, question witnesses, make arguments to the adjustment committee, or object to any aspect of the proceedings.¹⁷² This has presented problems

¹⁷⁰ Interview with Warden Tom Borgen, Fox Lake Correctional Institution, Wisconsin (Aug. 10, 2004).

¹⁷¹ *Id.*

¹⁷² DOC 303.78(2) does allow for the advocate to “speak on behalf of the accused inmate at a disciplinary hearing,” it is unclear in the rules whether that power extends to direct or cross-examination of witness, the presentation of evidence, or the making of objections (legal or non-legal) during the proceedings. At Fox Lake the practice is that the advocate is not vested with any powers that legal counsel would have on behalf of the inmate if the proceeding were a trial. In fact, Captain Pulver explicitly states, “disciplinary hearings are not like trials, and therefore, we have no attorney-acting advocates in the hearing room.” Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (Feb. 10, 2004).

over the years. “I have had to remind a few to many advocates about what they can’t do during the hearings.” explains Captain Pulver.¹⁷³ “They come in here, especially if they are new, thinking that they are the next Perry Mason, and jump bad during the hearing. I have to remind them that this is my hearing and they are here as a courtesy, not as a right. Then I call my guards and have them escorted out of the Unit.”¹⁷⁴

The appendix to DOC 303.78 supports Captain Pulver’s position. It states that “the choice of an advocate, however, is not the inmate’s constitutional right,” like the choice of an attorney.¹⁷⁵ Instead, the advocate is more like an assistant for the inmate and is required to conduct themselves accordingly. Since there is no confidentiality between the inmate and the staff advocate, the advocate must reveal all information to the hearing officer, even if it is contrary to the inmates’ innocence. As noted earlier by Captain Pulver, the problem arises when the advocate is not aware of this requirement. Consider the case presented below as an example of an advocate who tried too hard but was unaware of the requirement to divulge incriminating information about the inmate. The outcome was disadvantageous to the inmate.

Case 62

Charge: Fighting (303.17)

Security Director’s Recommendation: Major Violation - Full Due Process Hearing

Witnesses: 1

Inmate Plea: Not Guilty

Observation: This inmate was charged with fighting with another inmate while in the bathroom (outside of the view of the cameras) and while in the cell of another inmate

¹⁷³ Interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (Aug. 4, 2004).

¹⁷⁴ *Id.*

¹⁷⁵ WIS. ADMIN. CODE §303.78(1982), Appendix.

(outside the view of the cameras). The staff advocate was an instructor at the prison and had served as a staff advocate for more than the past three years.

During the hearing, the hearing officer read the charges against the inmate and asked him how did he plead. The staff advocate responded, “not guilty,” and the hearing officer informed the advocate that the inmate had to respond. The inmate then responded, “not guilty – with an explanation.” The staff advocate leaned towards the inmate and spoke in his ear, and the inmate responded likewise. The hearing officer, noticeably irritated at this point, reminded the advocate that he was not a lawyer and there were no confidential communications between him and the inmate. The hearing officer next asked the staff advocate what the inmate had told him. The advocate appeared surprised, but was reminded that he had to reveal the communication because the request was coming from a Captain of the security staff. The advocate informed the Captain that the statement was not a security issue, but acquiesced nonetheless. The advocate informed the hearing officer that he told the inmate to change his plea to simply not guilty to which the inmate responded, “but I did fight, I just want to explain myself.”¹⁷⁶

The hearing officer raised an eyebrow and looked with surprise at the advocate. The hearing officer then explained to the inmate that the advocate is not his lawyer and he (the advocate) is required to report all communications. The hearing officer asked the inmate if the advocate’s statement was true, to which the inmate replied, “yes.” The hearing officer concluded the hearing and asked the inmate to leave the room while he deliberated. Out of the presence of the inmate, the hearing officer admonished the advocate for his actions. He reminded the advocate that “one of the purposes of the disciplinary hearings is to rehabilitate the inmates for violating rules, not encourage them to lie to authority.”¹⁷⁷ The advocate asked if the “inmate was going to receive the full sentence because of me.”¹⁷⁸ The hearing officer responded that “the inmate was receiving the full sentence because that is what he should receive for fighting, but you need to stop encouraging them to lie.”¹⁷⁹

Final Disposition: 6 days adjustment segregation and 240 days of disciplinary separation.

Evidence Relied On: Conduct Report and Testimony from Staff Advocate

Reason for Disposition: Fighting and Purporting to Lie

Length of Hearing: 15 minutes.

b) Advocates (Who Don’t Try Hard Enough)

Another problem that arises with staff advocates is opposite those that try too hard – some do not try hard enough. Although assigned the responsibility to help the inmate, some staff

¹⁷⁶ Inmate testimony in Disciplinary Hearing #92, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

¹⁷⁷ Informal communications between hearing officer and staff advocate during Disciplinary Hearing #92, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

¹⁷⁸ Informal comments from staff advocate during Disciplinary Hearing #92, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

advocates despise performing this responsibility for a variety of reasons – the main one being conflict of interest. According to one advocate, “I hate this job. It makes me take the side of the inmate against my fellow officers. It’s us against them in here [prison], and being an advocate puts me on the wrong side of the battle.”¹⁸⁰ This staff advocate was a maintenance worker. He worked on the case presented below.

Case 64

Charge: Disruptive Conduct (303.28), Disrespect (303.25)

Security Director’s Recommendation: Major Violation - full due process hearing.

Witnesses: 1

Inmate Plea: Not Guilty

Observation: In this case, the inmate received a conduct report for disruptive conduct while he was at work in the kitchen. Upon receiving the ticket, he loudly asked the guard, “man what about my warning? Don’t I receive a warning?” The guard claimed that the inmate’s actions disrupted the work environment with loud talking because the other inmates stopped work to look in their direction. The guard also charged that speaking to him loudly and referring to him as “man” amounted to disrespect according to DOC 303.25.

Present at the hearing were the inmate, his staff advocate, his one witness and the hearing officer. The charges were read to the inmate and his witness was escorted out of the room. The hearing officer asked the inmate if he wanted to respond the charges. The inmate looked at his advocate, who sat motionless during the hearing. It appeared that the inmate wanted the advocate to speak. After a brief moment of uncomfortable silence, the inmate finally spoke. He explained that he “was concerned with the policy and procedures followed by the guard because the guard did not issue the inmate a warning prior to writing the ticket.”¹⁸¹ The inmate admits that he was late for work and denies ever getting loud with the guard or publicly challenging the guard’s authority. The hearing officer asked the staff advocate if he had anything to offer, to which the advocate uninterestedly responded, “no.”¹⁸²

The witness was requested to present his testimony. The witness claimed that he “was within 10 feet of the guard and he did not loud-talk enough to draw my

¹⁷⁹ *Id.*, *supra* note 177.

¹⁸⁰ Informal interview with Staff Advocate #2, Fox Lake Correctional Institution, Wisconsin (May 3, 2004).

¹⁸¹ Inmate testimony during Disciplinary Hearing #94, Fox Lake Correctional Institution, Wisconsin (Aug. 9, 2004).

¹⁸² Testimony from Staff Advocate #3 during Disciplinary Hearing #94, Fox Lake Correctional Institution, Wisconsin (Aug. 9, 2004).

attention.”¹⁸³ The witness also claimed that “work was not disrupted.”¹⁸⁴ At this point the advocate could have asked for the charges to be dropped because it the alibi witness contradicted the Conduct Report, but the advocate did nothing. Both the witness and the inmate were escorted from the room while the hearing officer deliberated. During deliberations, the staff advocate did not try to support the inmate’s case. Instead, he asked the hearing officer, “what are you gonna do?”¹⁸⁵ To which the hearing officer responded in query, “what should I do?”¹⁸⁶ The advocate responded, “give him 3 days adjustment and send back to his unit.”¹⁸⁷ The hearing officer nodded in agreement.

When the inmate returned, the hearing officer explained his position to the inmate. “I am gonna give you 3 days adjustment and send you back to your unit,” he stated. He continued, “although you had a witness that supported your testimony, your staff advocate seems to believe that you should still get 3 days adjustment.” The inmate looked surprisingly at his advocate. The hearing officer continued, “maybe if more inmates from the kitchen stepped up to support your story or if your advocate seemed adamant about your case, we could have had a different outcome, but, this time, I am going to take your advocate’s recommendation for punishment – he thinks you should be punished and he may know the story behind your case better than me.”¹⁸⁸

Final Disposition: 3 days adjustment segregation then back to unit.

Evidence Relied On: Conduct Report and Lack of Advocate Support.

Reason for Disposition: No support from Staff Advocate.

Length of Hearing: 20 minutes.

Several observations were peculiar to the outcome of this hearing. The level of disengagement demonstrated by the staff advocate was remarkable. Moments existed for the advocate to support the inmate but, instead, he did nothing. There were moments during the hearing that the hearing officer glanced up from his chart to make eye contact with the advocate as if waiting for him to suggest something. However, the staff

¹⁸³ Witness (inmate) testimony during Disciplinary Hearing #94, Fox Lake Correctional Institution Wisconsin (Aug. 9, 2004).

¹⁸⁴ *Id.*

¹⁸⁵ Informal comments from Staff Advocate #3 during Disciplinary Hearing #94, Fox Lake Correctional Institution, Wisconsin (Aug. 9, 2004).

¹⁸⁶ Informal comments from hearing officer during Disciplinary Hearing #94, Fox Lake Correctional Institution, Wisconsin (Aug. 9, 2004).

¹⁸⁷ *Id.*, *supra* note 185.

¹⁸⁸ *Id.*, *supra* note 186.

advocate simply sat there staring down at the table. Note that the advocate did speak during deliberations, but his words did not support the inmate. Instead, he suggested that the inmate receive time in the segregation unit rather than exoneration. This caused the hearing officer to completely disregard the witness's alibi testimony and, instead, act upon the suggestion of the staff advocate – who again did not support the inmate. Although the inmate was not given a full penalty for his rule violation, it is implied from the hearing officer's comments that the inmate could have been found not guilty if his advocate had supported his position.

Staff advocates who do not faithfully discharge their duties create some troublesome outcomes – to which the inmates have no recourse. Since the advocate has no fiduciary relationship with the inmate, the inmates have no legal grounds to complain that the advocate did not perform his duties satisfactorily – as would otherwise be available in the case of incompetent legal representation.¹⁸⁹ Further, the advocate is only required to support the inmate, not seek his exoneration. Since the inmate is removed from the hearing room while the hearing officer and advocate speak, the inmate may never know to what extent the advocate did or did not support the inmate's case. Even though the inmate can complain about his advocate through the prison's Inmate Complaint System, he will most likely lose because there is no actionable basis for the complaint.¹⁹⁰

¹⁸⁹ See, generally, James D. Holzauer, *The Contractual Duty of Competent Representation*, 63 *Chi.-Kent L. Rev.* 255 (1987); Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 *B.C.L. Rev.* 531 (1987-1988); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 *Wis. L. Rev.* 473 (1982).

¹⁹⁰ The Wisconsin Administrative Code for the Department of Corrections provides a formal process by which all inmates may file complaints about various aspects of the correctional institution in

Although not observed at Fox Lake, the possibilities for abuse of the process remain endless when advocates do not faithfully discharge their duties.

ii) Witnesses

The common law recognizes that inmates may call witnesses who are “necessary for a proper understanding of the case . . . [and] . . . reasonably available,” and whose appearance will not be “unduly hazardous to institutional safety or correctional goals.”¹⁹¹ DOC 303.81(1) complies with standard by providing guidelines for witnesses during full due process hearings. It provides that “the accused [inmate] may directly or through an advocate make a request to the security office for witnesses to appear at the major violation hearing, including requests for the appearance of the staff member who signed the conduct report.”¹⁹² An inmate may present “no more than 2 witnesses . . . and shall make the request within 2 days of the service of notice.”¹⁹³

However, potential problems arise with the election of witnesses as they specifically pertain to safety or coercion issues. Hypothetically speaking, witnesses may be attacked for their participation in a specific inmate’s hearing or forced to participate, and even possibly lie to the hearing committee, under the threat of violence or retaliation. In Wisconsin, DOC 303.81(3) and DOC 303.81(5) attempt to guard against those issues. DOC 303.81(3) states, “witnesses requested by the accused . . . shall attend the

which they reside. The complaints are governed by Chapter 310, titled, Complaint Procedures. *See*, WIS. ADMIN. CODE §310 (1982).

¹⁹¹ Wolff, 418 U.S. at 566.

¹⁹² WIS. ADMIN. CODE §303.81(1) (1982).

¹⁹³ *Id.*

disciplinary hearing unless the following exists: (a) the risk of harm to the witness if the witness testifies.”¹⁹⁴ The goal here is to prevent inmate from using power or coercion to force weaker inmates to provide supporting testimony. If a witness is denied for the above reason, the inmate will most likely complain that he was not allowed to present evidence on his behalf. But, DOC 303.81(5) attempts to alleviate that issue by allowing confidential or anonymous witnesses. It states, “if the institution finds that testifying would pose a risk of harm to the witness, the [adjustment] committee may consider a corroborated, signed statement under oath from that witness without revealing the witness’s identity.”¹⁹⁵

Almost all of inmates who elected full due process hearings at Fox Lake also requested witnesses. After witnessing five (5) hearings, an interesting pattern emerged. The behavior of the witnesses became increasingly peculiar. They would willingly appear at the hearing, but when allowed to testify (always out of the presence of the accused inmate)¹⁹⁶ they offered nothing in terms of an alibi for the accused inmate. In some cases, their testimony was almost laughable. According to one inmate, the tension that arose was “being a snitch and bitch.” He explained, “when you rat out another inmate you are labeled a snitch, that’ll get you a beat down. When you help another

¹⁹⁴ WIS. ADMIN. CODE §303.81(3) (1982).

¹⁹⁵ WIS. ADMIN. CODE §303.81(5) (1982).

¹⁹⁶ The process required the witnesses to swear before the accused inmate that they were present to testify on his behalf, and then they were escorted out of the room while the formal charges were read. When it was time to testify, the accused inmate was escorted out of the room while the witness was escorted into the hearing room. This process was performed for each witness that was present to testify. Afterwards, the witnesses were escorted from the hearing back to the cell units before the final disposition and penalty was assigned to the accused inmate.

inmate out too much, you are labeled his bitch, meaning you would sell your own ass for him – that would get you a beat down also. As you can see, nobody likes being called to be a witness.”¹⁹⁷ Consider the case presented below as an example of how inmate witnesses manage the tension.

Case 63

Charge: Disruptive Conduct (303.28), Disrespect (303.25), Lying (303.27), Fighting (303.17)

Security Director’s Recommendation: Major Violation - full due process hearing

Witnesses: 2

Inmate Plea: Not Guilty

Observation: On the disciplinary report the officer wrote, “Inmate 117718 and a group of 3 other inmates were playing cards when suddenly inmate 117718 rose up from the table and threw cards across the table at another inmate. He then threatened to “kick the ass” of the other inmate and invited him into the bathroom where they could fight out of the sight of the cameras. He then walked around the table and hit the other inmate in the back of the head. The other inmate got up and followed inmate 117718 towards the bathroom but turned instead and went into his cell. Inmate 117718 continued to taunt the other inmate and was eventually taken to TLU.”

At the hearing, the hearing officer read the charges to the inmate and asked him how did he plead, to which he responded, “not guilty.” Inmate 117718 claimed that he was playing cards and had gotten upset, but placed the cards down on the table and walked around the table towards the other inmate. He denies ever calling him a name, hitting him in the head, or inviting him to the restroom to fight. The advocate stated that the witnesses would corroborate inmate’s 117718 story.

The witnesses were called in individually and they both responded with the same story. They claimed that they saw inmate 117718 get upset and that when he placed the cards on the table to walk around to the other side, they both put their heads down and did not see a thing. They both further testified that because they had their heads down, they were unable to provide eyewitness testimony to the event. Both, witnesses were excused. The staff advocate was shocked.

Inmate 117817 was returned to the room and informed that his witnesses failed to corroborate his story. The inmate looked surprised and glanced towards the advocate, who nodded in the affirmative. The hearing officer then pronounced his final disposition for the hearing.

Final Disposition: Maximum sentence - 8 days adjustment segregation and 360 days disciplinary separation.

Evidence Relied On: Conduct Report and Eyewitness Testimony

Reason for Disposition: Seriousness of the offense and uncorroborated eyewitness testimony.

Length of Hearing: 25 minutes.

¹⁹⁷ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (April 8, 2004).

4. Appeal

The disciplinary hearing appeals process in Wisconsin, and as practiced at Fox Lake, is paper-based. Unlike the hearing themselves, there are no formal proceedings that require the presence of inmates, hearing officers, witnesses or staff advocates. Instead, after a disciplinary hearing, whether major or minor, an inmate has 10 days to appeal his decision.¹⁹⁸ All appeals are handled by the warden. The warden has the power to issue one of the following as part of his review:

1. Affirm the adjustment committee's decision and sentence.
2. Modify the adjustment committee's decision or sentence.
3. Reverse the adjustment committee's decision, in whole or in part.
4. Return the case to the adjustment committee for further consideration to complete or correct the record.

In all cases, the warden's decision is final regarding the sufficiency of the evidence. If an inmate, however, wishes to appeal procedural errors in the hearing he must utilize the Inmate Complaint Review System (ICRS) under DOC 310.08 (3) – Scope of Complaint Review System.

After exhausting appeals on the sufficiency of the evidence under either DOC 303.75 or 303.76, “an inmate may use the ICRS to challenge the procedure used by the adjustment committee or hearing officer . . .,” DOC 310.08(3) reads. In order to do so, the inmate must follow the procedures for filing a complaint under DOC 310.09, which instructs that the inmate must “ file the complaint in writing on form supplied for that

¹⁹⁸ WIS. ADMIN. CODE §§ 303.75(6) and 303.76(7) (1982) both state that an inmate may appeal a disposition of a hearing within 10 days to the warden. DOC 303.76(7) goes further to clarify that, in the case of full due process hearings, the 10 day time limits begins “after either a due process hearing or after the inmate receives a copy of the decision, whichever is later.”

purpose and the inmate . . . shall sign the complaint.”¹⁹⁹ It is important to note that in Wisconsin, an ICRS complaint cannot challenge the substance of the decision reached by the disciplinary committee, but should only address procedural problems involved in the inmate’s discipline.²⁰⁰

A number of inmates at Fox Lake never bother to file an appeal. “What difference does it matter,” claims one inmate, “I did it [committed the violation], so I have to be punished . . . plus the Cap [tain Pulver] was fair.”²⁰¹ Some inmates, however, are not satisfied. They file appeals, but interestingly, fail to adhere to the rules stipulated in the ICRS.

During 2004, 129 inmate appeals were filed utilizing the ICRS at Fox Lake. Given that 1,852 hearings were conducted, the appeals rate (7%) seems insignificant. What is significant, however, is the manner in which the majority of complaints are grouped. A large majority of the 2004 appeals fell into one of three categories: (1) ineffective assistance of counsel; (2) disagreement with the guilty decision; or (3) disagreement with the penalty – all “non-procedural issues” according to ICRS examiner Tom Gozinske. Because most of these appeals fell outside the purview of the guidelines set by the ICRS, they were easily dismissed. However, despite the inmates’ access to the appellate rules set forth in DOC §310.08(3), it was apparent that inmates either failed to understand those rules governing the process or they lack respect for them – either scenario is problematic.

¹⁹⁹ WIS. ADMIN. CODE § 310.09(1) (1982).

²⁰⁰ *See* WIS. ADMIN. CODE §310.08(3) (1982).

IV. A GENERAL ASSESSMENT OF WISCONSIN'S PRISON DISCIPLINARY PROCEEDINGS: WHAT "WORKS"

Fox Lake Correctional Institution serves as an important case study insofar as its disciplinary system, generally provides inmates with stronger procedural protections than those required by the general common law. This section will incorporate the Fox Lake observations into a more general discussion of what "works" as it pertains to inmate discipline in Wisconsin. The following areas will be considered: (a) written rules and regulations; (b) impartiality of the adjustment committee; (c) provision for counsel advocates, witnesses, and confrontation/cross-examination of adverse witnesses; (d) evidentiary standards; and (e) appeals process.

A. (Clearly Written) Rules and Regulations "Work"

Since the disciplinary process begins with the promulgation and application of law behind prison walls, the dissemination of law detailing prohibited conduct is an important feature of the disciplinary process. Although there has been limited legal discussion about whether inmates have a right to be informed of institution rules and regulations prior to being charged with a disciplinary violation, Fox Lake distributes such information.²⁰² It is crucial not only those inmates receive notice of what actions are proscribed; the definitions of the acts must be sufficiently specific to convey a definite warning as to what actions will be sanctioned. Overly general or vague regulations may

²⁰¹ Informal interview with inmate, Fox Lake Correctional Institution,, Wisconsin (April 5, 2004).

²⁰² How often this happens is impossible to tell. It does not appear that the adjustment committee will recommend such action unless, as one of its office states, "an inmate is willing to give up information equal to the seriousness of his bust." While they may occasionally intervene at the point of appeals, they do not seem to get involved in disposition of a case with the adjustment committee.

result in the abuse of discretion, or arbitrary rule enforcement by prison staff. While it is not possible, nor desirable, to require complete exactitude in every disciplinary rule that is promulgated, it is important that inmates have a reasonably clear idea of how to conduct themselves if they wish to remain charge free. Unfortunately, as one survey reports:

[P]rison officials, because of their intense pre-occupation with security, sometimes lose their sense of judgment in adopting disciplinary rules. Many prison disciplinary rules punish conduct which does not threaten security of the prison and are not necessary for maintaining security and order. Certainly, if an inmate commits an act which would constitute a crime in the free world, or he jeopardizes the security of the institution or the safety of inmates or staff, he should be appropriately punished . . . however, prison disciplinary codes often transcend the criminal code, regulating every aspect of the lives of inmates. They punish trivial, innocuous conduct.²⁰³

Fox Lake does a thorough job of ensuring that its inmates are informed of the nature and proceedings pertaining to the disciplinary process. Upon entry into Fox Lake, each inmate receives a copy of Chapter 3 of the Wisconsin Administrative Code – which details the possible violations and procedures that an inmate may face while incarcerated.²⁰⁴ Also, each inmate receives a copy of the Inmate Handbook (Handbook) which places the disciplinary process in simple to read language. The purpose of this approach, according to Warden Tom Borgen, is to “ensure that the inmates are well informed of the rules and regulations that regulate their incarceration here at Fox Lake.”²⁰⁵ The further use of a Handbook drives Warden Borgen’s point to facilitate the

²⁰³ See Resource Center on Correctional Law and Legal Services, *Survey of Prison Disciplinary Practices and Procedures* (1974), 9, Babcock, *Due Process in Prison Discipline Proceedings*, 22 B.C.L. Rev. 1009 (1981), 1015.

²⁰⁴ Informal interview with Captain Melvin Pulver, Fox Lake Correctional Institution, Wisconsin (April 5, 2004).

²⁰⁵ Interview with Warden Tom Borgen, Fox Lake Correctional Institution, Wisconsin (Sept. 2004). Tape recording.

inmate's ability to make informed decisions. Fox Lake does a thorough job, in my opinion, to reinforce the rules contained in the disciplinary code and to ensure that inmates are aware of those rules.

B. Impartial Hearing Tribunal "Works"

In many cases, the value of due process is either realized or compromised during the course of a disciplinary hearing. Thus, fairness and impartiality are realized if the hearing is oriented towards fact-finding – defined as the disinterested determination of an inmate's innocence or guilt – and the provision of a meaningful opportunity to present a defense. Likewise, these ideals are compromised if the hearing becomes merely a forum wherein the main issue to resolve is what sanction to impose.

Wisconsin stipulates that the disciplinary committee must, regardless of its composition, be impartial.²⁰⁶ Impartiality is generally interpreted to mean that no member of a tribunal conducting a hearing may have investigated the charge, witnessed the incident, or have personal knowledge of the material facts of the case.²⁰⁷ If a member of the tribunal falls into one of these categories, in most states, he is disqualified from hearing the case. Nonetheless, the extent to which disciplinary committees are, in fact, impartial is compromised invariably by several factors: the very nature of the closed prison setting, the feeling on the part of the committee members that

²⁰⁶ WIS. ADMIN. CODE §303.82(2)(1982) which reads, "No person who has substantial involvement in an incident, which is the subject of a hearing, may serve on the committee for the hearing."

²⁰⁷ See Babcock, *supra* note 203, at 1055-60 and Harvard Center for Criminal Justice, *Judicial Intervention in Prison Discipline*, 63 CRIM.L.C. & POL.SCI. 200 (1972) for a good discussion of the general issue of impartiality.

they are obliged to support fellow staffers in any conflict with an inmate, and the predominant emphasis on what sanction to impose. These factors are rooted in the social and organizational dynamics of a prison, an issue that will be discussed below. For now, it is instructive to recall the situation at Fox Lake.

Disciplinary hearings at Fox Lake were obviously concerned with what sanction to impose in those instances where the hearing officer found an inmate guilty of an institutional infraction. However, in contrast to findings of an earlier study,²⁰⁸ Fox Lake disciplinary hearings on the whole were not concerned solely with final disposition. Instead, the majority of the disciplinary charges referred to the hearing officer involved relatively minor violations. Likewise, as many of the inmates who appeared at the disciplinary hearing did so with one or two minor violations, a large majority of the disciplinary hearings were routine, did not involve the presence of, nor request for, witnesses, counsel-advocates, or confrontation/cross-examination. It is reasonable to argue that where there is a commitment to fact-finding and to the impartial evaluation of an inmate's innocence or guilty, this commitment should manifest in a certain percentage of not guilty findings. This was the case at Fox Lake.

A small, but relevant, percentage of charges are dismissed against inmates every year. Of the 3,333 conduct reports issued at Fox Lake in 2004, 128 (4%) resulted in dismissals. Although this number is not large, it accounts for the total dismissal of all charges against the inmate. There exists also occasions where inmates are issued

²⁰⁸ See, Harvard Center for Criminal Justice, *supra* note 207, at 210-11, Flanagan, *Discretion in the Prison Justice System*, 19 J. RESEARCH IN CRIME & DELINQ. 216, L. Carrol, HACKS, BLACKS AND CONS (1979), E. Wright, THE POLITICS OF PUNISHMENT (1983).

multiple violations on one ticket and some of those charges may be dismissed. This occurred routinely during observations at Fox Lake, of which approximately 60 partial dismissals were witnessed.

Findings of guilt were a rather routine matter. In most cases, this was simply the product of the inmate admitting his guilt, and thus not prolonging the hearing process, solely to avoid a harsh disposition. By the time Fox Lake inmates appear before the adjustment committee, they are presumed guilty, they know they cannot win their case, and thus opt for the doing what is necessary to achieve a light disposition. As one inmate put it, “man, the cards are stacked against us, by the time we come in here we are just trying to please the Cap [tain Pulver] so we can get out of here and back to the GP [general population] as soon as possible.”²⁰⁹

C. Advocates and Witnesses Do Not “Work”

If the value of due process is to be realized (i.e., an inmate is to be given a meaningful opportunity to present a defense), then safeguards that are recognized to be of critical importance to an inmate facing disciplinary action must, where warranted, be made available. Those safeguards include advocate assistance, and the right to present alibi witnesses.

While not necessarily so for minor hearings at Fox Lake, there is clearly a need for inmate representation in disciplinary proceedings involving serious, or major, infractions. This is so, due to the increasing complexity of the procedural rules governing such proceedings, the severity of the sanctions that may result, and the marked inability

²⁰⁹ Informal interview with inmate, Fox Lake Correctional Institution, Wisconsin (May 5, 2004).

of many inmates to adequately articulate and present their defense. It goes without saying that permitting the accused to call witnesses and present documentary evidence constitutes key ingredients in a meaningful defense. Provision for this safeguard: [G]ives the accused the opportunity to corroborate his own version of events, to prove an alibi defense, and in general to overcome his captors' suspicions as to his veracity by reason of his substantial interest in the outcome of the proceedings.²¹⁰ Not only is this opportunity a critical adjunct to the right to make a statement on one's behalf, but the testimony of third parties may provide the disciplinary tribunal with corroborating details that enable it to decide the case in an accurate and rational way.

Although Fox Lake permits inmate offenders to call witnesses to testify on their behalf, the actual opportunity, and success in doing so, remains limited. Captain Pulver explains that "in certain instances, an inmates request for witnesses may be denied on the basis of one of three reasons: (1) the testimony lacks relevance; (2) the testimony is repetitious; or (3) the safety of the witness might be placed in jeopardy were he to appear."²¹¹ He continues, "in either case, the inmates rights take less precedence over the safety of the institution."²¹² These reasons are also frequently recognized by other sources as well.²¹³ Although, some case law subsequent to Wolff has strengthened an inmate's

²¹⁰ Babcock, *supra* note 203, at 1039.

²¹¹ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (April 5, 2004).

²¹² *Id.*

²¹³ RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, *supra* note 203, at 22. As this survey indicates, in most states, inmates trained as paralegals serve as advocates for the accused.

rights to call witnesses,²¹⁴ the courts generally defer to the judgment of prison officials whenever a request for witnesses is, in fact, denied.²¹⁵

When a witness is excluded from testifying at a disciplinary hearing, written response for the denial generally is not required. However, in Wisconsin, written response is provided. Fox Lake finds that providing reasons are more than helpful. “Denials for inmate witnesses are always recorded,” claims Captain Pulver. “That way we try to show the inmate that we are fair, and if the inmate eventually appeals, which they almost always do, and it ever makes it to court, we are protected because we recorded our actions.”²¹⁶

Inmates do not have any rights whatsoever to confront and cross examine adverse witnesses. Nor do prison officials have to record their reasons for denying such a request. However, in adversarial proceedings where the facts in question are contested and where governmental action may have an individual outcome, confrontation/cross-examination has traditionally been considered “one of the immutable principles of our jurisprudence.”²¹⁷ It is an important procedural tool for resolving disputed facts, checking faulty memories or mistakes of identity, and for reducing the: “[P]otential for abuse of the disciplinary process by persons motivated by malice, vindictiveness,

²¹⁴ Herman, *Due Process in Prison Disciplinary Proceedings: Meyers v. Alldredge*, 29 GUILD PRAC. 79, 87 (1970).

²¹⁵ Babcock, *supra* note 203, at 1067.

²¹⁶ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (April 5, 2004).

²¹⁷ *See Joint Anti-Fascists Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1951).

intolerance, prejudice or jealousy. . . whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control.”²¹⁸

Fox Lake does not provide inmates with the opportunity to confront and cross-examine witnesses whose testimony is adverse to their case. Because of safety issues, inmates are allowed to present alibi witnesses, but not cross-examine adverse witnesses against them. Rarely were adverse witnesses required for any hearing. In the vast majority of cases, the accuser is known to the inmate – he is the staff person who writes the disciplinary charge. Although the right exists, there were no observed instances where inmates chose to request the appearance of the hearing officer who signed the conduct report. Especially in those types of cases, experience has shown that providing inmates with this due process guarantee has not undermined prison security, nor has it damaged relations between the keeper and the kept – probably because it is seldomly exercised by the inmate.²¹⁹

Some disciplinary cases at Fox Lake utilize adverse information supplied by an anonymous inmate informant.²²⁰ In these instances, the denial of confrontation/cross-examination is justified if it is clear to the hearing committee that permitting it would create a justified risk of reprisal. On the other hand, because denying this opportunity

²¹⁸ See Marshall’s dissent in *Wolff*, 418 U.S. at 585-86.

²¹⁹ Babcock, *supra* note 203, at 1071 reports that at least thirty jurisdictions allow “the accused or his representative to question either all witnesses who appear at the hearing, or at least the charging officer.” Written statements from confidential informants are more often than not taken in lieu of direct testimony.

²²⁰ Ten hearings were observed where anonymous statements were taken from inmate informants.

significantly reduces the accused inmate's ability to prepare a defense, and at the same time carries the potentiality for seriously undermining due process, it is essential, though not required, that the tribunal determine that the informant is credible, and that his testimony/information is reliable.²²¹ While it is critical that all steps be taken to safeguard the identity of the informant, the comment below is all too true in the prison setting:

No experienced penologist or inmate would seriously contend that the identity of a staff or inmate witness is likely to remain a secret from the accused for very long. The circumstances of any incident giving rise to disciplinary proceedings necessarily limits the potential witnesses to those present. In addition, prison 'grapevines' are much too effective to achieve that degree of secrecy in most instances. Protection against possible retaliation requires more than non-confrontation while its denial may well result in injustice.²²²

D. Evidentiary Standards "Work"

There exists very little case law expressly addressing the issue of what constitutes the burden of proof that must be satisfied prior to the imposition of disciplinary sanctions. Few meaningful guidelines exist specifying what type of evidence is necessary to sustain a finding of guilt. While it is apparent that evidentiary requirements directly impact upon disciplinary outcomes, to date, the quantum of proof necessary to establish the guilt of an inmate offender is a "preponderance of the evidence," or "substantial evidence."²²³ Hence, in most jurisdictions or prisons, including Fox Lake, the de facto level of

²²¹ Terrence Fleming, *Noble Holdings as Empty Promises: Minimum Due Process at Prison Disciplinary Hearings*, 7 New Eng. J. on Prison L. 145, 154 (1981).

²²² Id. at 172, citing *Murphy v. Wheaton*, 381 F. Supp. 1252, 1258. I would concur with Fleming where he states that this may be done by interviewing the confidential informant on camera, and by permitting the accused to submit questions to be asked of the informant. *Nobel Holdings*, supra note 221 at 170.

²²³ *Murphy v. Wheaton*, 381 F. Supp. 1252, 1258 (N.D. Ill. 1974).

evidence that is considered sufficient to send an inmate to disciplinary segregation or to remove earned good-time is quite low. In fact, it is generally the case that the disciplinary report and the results of an investigation into the incident are the evidentiary ingredients that form the basis for disciplinary conviction.²²⁴

A written record of the proceeding is of value to subsequent administrative or judicial review. However, the actual substance of what is recorded varies considerably. While some states require “a complete report of the initial incident, a summary of the evidence presented at the hearing, the actual decision, and the reasons for those decisions,”²²⁵ Fox Lake requires much more. “We document everything,” claims Captain Mel Pulver.²²⁶ “We don’t want to face the embarrassment of having one our hearings thrown out [by the courts] because we did not provide sufficient documentation for our decision,” he continues.²²⁷ One study supports Captain Pulver’s trepidations. “Disciplinary boards generally provide insufficient reasons in their written statements to explain their verdicts, ” concludes the Resource Center on Correctional Law and Legal Services.²²⁸ Fox Lake instead tries to avoid the complications, usually arising under judicial review of the hearing, that follows an incomplete or inaccurate record of the

²²⁴ Meyers and Rabiej, *Burden of Proof and the Standard of Judicial Review in Prison Disciplinary Hearings Involving Decisions Predicated Upon Uncorroborated Hearsay Evidence*, 4 So. U. L.J. 535 (1979).

²²⁵ Babcock, *supra* note 203.

²²⁶ Informal interview with Captain Mel Pulver, Fox Lake Correctional Institution, Wisconsin (April 6, 2005).

²²⁷ *Id.*

²²⁸ RESOURCE CENTER ON CORRECTIONAL LAW AND LEGAL SERVICES, *supra* note 203, at 26.

proceedings – by utilizing a substantial check-list that safeguards against improper documentation.²²⁹

E. Appeals Do Not “Work”

There exists no relevant case law that mandates an inmate be given a chance to appeal an adverse disciplinary decision. Yet, at the institutional level, administrative mechanisms for reviewing inmate appeals contribute greatly to impartiality and fairness in the disciplinary hearing process. Additionally, appeals facilitate uncovering factual errors, and identify potential trouble spots in the adjudication of cases for which remedial action may be taken. As noted earlier, the need for a complete record of the hearing is obvious.

Independent of the courts, Fox Lake utilizes specific procedures that enable inmates to appeal disciplinary convictions.²³⁰ While some states specify that appeals are automatic, Fox Lake has a series of steps that the inmate must undertake to file a successful appeal.²³¹ The inmate must not only file all appeals through the Inmate Complaint Review process, but the appeal must be on the proper basis – factual or procedural depending on the classification of the rule violation.²³² Regardless of the basis for the appeal, it is usually reviewed by a higher level prison administrator – which

²²⁹ At the time of this writing, the check-list referred to above is being edited by ICE Tom Gozinske to ensure that it complies with proper legal and institutional standards for full documentation of all disciplinary hearings. It is unavailable for reproduction at this time.

²³⁰ WIS. ADMIN. CODE §303.75(6) and 303.76(7)(1982).

²³¹ *Id.*

²³² *Id.*

at Fox Lake is the Warden.²³³ Nevertheless, if criteria are not available to govern the review, or the disciplinary penalties are suspended pending final disposition of the case, the appeals process is quickly reduced to form over substance.

V. CONCLUSION

What do we learn regarding how law “works” behind prison walls based on our experience with prison disciplinary practices and procedures at Fox Lake? Perhaps the most discernable change fostered by law, encompassing both administrative rules and case law, is that at Fox Lake the disciplinary system is, in fact, a system. Although there still exists notable limitations associated with what actually “works” to make the disciplinary process at Fox Lake in particular, and Wisconsin in general, a fair one, there is a shift in balance of power between the keeper and kept – both symbolic and real. Prisoners have certain due process rights which prison officials are obliged to respect.²³⁴ An inmate’s guilt may no longer be taken for granted. Rather, real proof that the inmate committed an institutional infraction must be provided. This places some checks on the exercises of official discretion, while simultaneously requiring a modicum of accountability for the decisions that are made.²³⁵ To their consternation, staff, especially prison guards, now find that poorly written or vaguely worded disciplinary reports may

²³³ WIS. ADMIN. CODE §303.75(6) and 303.76(7)(b)(1982).

²³⁴ *Wolf v. McDonnell*, 418 U.S. 539 (1974) (disciplinary hearing are subject to the due process clause of the Fifth and Fourteenth Amendment); *Ponte v. Real*, 471 U.S. 491 (1985) (due process does not require that reasons for denying a witness must be given during administrative hearing); *Superintendent v. Hill*, 472 U.S. 445 (1985) (only “some evidence” required to support finding of guilt); *Cleavinger v. Saxner*, 474 U.S. 193 (1986) (hearing officers are not judges); *Sandin v. Conner*, 515 U.S. 472 (1995) (prison rules do not create a state created liberty interest in the inmate).

²³⁵ See, generally *Anderson-el v. Cooke*, 610 N.W.2d 821 (Wis 2000) (prison officials are accountable for following their own rules); *Bergman v. McCaughy*, 564 N.W.2d 712 (Wis 1997) (failure

result in either a finding of not guilty or a dismissal of the charge against the inmate.

It is important to note that law does not directly challenge the legitimacy of the prison's power structure. Nor does it challenge prison official's use of discretion to maintain institutional order and control. Rather, it challenges arbitrary applications of power along with the exercise of discretion in the absence of accountability. Law, as it is written, requires prison officials to follow a sequence of legitimated steps before sanctioning an inmate for misconduct. Legality mandates the creation of an adjudicatory system which is designed, theoretically, to provide inmate offenders with fair and impartial treatment. This is the main value not only of formal prison rules, but also of due process law. How this is so will be shown using Fox Lake's disciplinary system as illustration.

Recall that a small number of inmates at Fox Lake received a major hearing for rule violations. In these types of cases the disciplinary process was quite formal and deliberate in nature. The hearing officer usually granted an inmate's request for witnesses, counsel advocates, and/or confrontation/cross-examination (though usually less often than the former two). Moreover, the accused was given ample opportunity to fully contest the charge(s) in a hearing that occasionally lasted between 15-25 minutes. Before reaching a decision, the hearing officer reviewed whatever evidence was available concerning the incident, usually going over it together with the accused. While most of the inmates in these cases were eventually found guilty, it was not always the case.

A case was presented in an earlier section involving a very serious assault by one

of prison to follow its own rules invalidates prison disciplinary proceedings).

prisoner upon another.²³⁶ An inmate was subsequently charge with the assault based on testimony supplied by the witnesses. Given the seriousness of the incident and the presence of the witnesses, it was apparent at the outset of the hearing that the onus was on the inmate to prove that he was innocent. In the absence of law, this inmate would have been given a summary hearing, and probably sanctioned severely. Instead, he received a lengthy hearing, during which he was permitted the assistance of a counsel-advocate, and the opportunity to call two of his own rebuttal witnesses to corroborate his version of the events. The provision of legality provided a series of evidential insertions that challenged the veracity of the accusing witness. This case illustrates that if the procedural safeguards associated with legality are permitted during the course of a disciplinary hearing, they offer an opportunity for an inmate to demonstrate his innocence – if he is, in fact, innocent.

The overall impact of law's ability to mediate the tension between fairness and arbitrariness inherent in the penal relationship, however, has been blunted by several factors including: the volume of disciplinary charges that are processed at any given time, the failure of inmate advocates to properly carry out the function of their responsibilities, the failure of alibi witnesses to be willing to assist other inmates, and an appeals process that is either mis-guided or mis-understood – depending on who you ask. Again, the situation at Fox Lake is instructive.

Recall that at Fox Lake during 2004 3,333 conduct reports were issued by prison officials. However, a large number of them, 1,481 to be exact, were dismissed

²³⁶ See Case 93, *supra* page 47.

summarily – leaving only 1,852 to be adjudicated. Of those remaining cases, only 123 were resulted in full due process hearings leaving 1,729 adjudicated as minor hearings. This means that a majority of inmates prefer to have their hearing adjudicated without the full gambit of due process requirements of the law – effectively waiving their right to advocate assistance and alibi witnesses. This, however, works well at Fox Lake because given the financial resources there, and quite possibly in other prisons, the prison disciplinary system is not equipped to extend full due process on a continuing basis to all inmates who receive formal hearings.

Ninety-three percent of the prisoners who appeared in disciplinary hearings at Fox Lake did not request full due process hearings. In those instances where just two out of three safeguards were provided, the hearings often turned into rather lengthy affairs, sometimes resulting in postponements so that more witnesses could be called or additional evidence gathered. If even a small number of those inmates who did not request any of the aforementioned safeguards had actually done so, one of two outcomes would have developed: either their requests would have been granted, leading to longer hearings and more delays, or more likely their requests would have been denied with much more frequency. This indicates that the amount of law “working” at any given time at Fox Lake depended on the fact that a significant number of inmates did not bother to request the full gambit of what the law allows. This, of course, is not optimal because it rests on the proposition that the inmates will not volitionally overload the system as opposed to a system that is always prepared.²³⁷ But, the sheer number of charges

²³⁷ Given the volume of disciplinary traffic alone, it is the case that:

processed is not the only factor that compromises the effectiveness of how law “works”; other factors are also implicated.

Law’s operation behind prison walls is neither self-enforcing, nor is it always clear precisely what is required by a particular rule. Moreover, prison officials have been accorded considerable discretion in choosing when to provide important procedural protections. Thus, it is the case that unless prison officials exercise the discretion they are permitted fairly and impartially, the disciplinary system is reduced to one of form over substance.²³⁸ Most prison officials acknowledge that inmates are entitled to fair treatment during the course of a disciplinary hearing. They may not be sanctioned without due process.²³⁹ However, this attitude is firmly rooted within and tempered by a set of institutional assumptions regarding the centrality of maintaining order and the presumed manipulative character of prison inmates as opposed to what really matters –

The courts cannot effectively impose a ‘rule of law’ in the form of due process administrative procedure . . . Where due process can reasonably be required without making a prison administratively inoperable, it will ultimately make little difference in how the prison is treated. An occasional prisoner may escape the most serious punishment if prison officials decide he does not merit the time and expense of a full hearing. When prison officials consider a disciplinary case worth the effort, however, they will be able to use the new procedure to impose the same punishment. Wolff, 418 U.S. at 556.

²³⁸ Jacobs alludes to this in commenting that:

[while] the courts might be able to impose a form of decision-making on the prison, they are not in a position to overturn substantive decisions . . . By necessity the courts must assume the good faith of the administration. . . . unless the administration itself acts in good faith and assume responsibility to supervise the fairness of the process inmates are essentially little better off than before, and without a remedy, unless, of course, the administration completely fails to follow the required procedures.

See, also, U.C.L.A. Program in Corrections Law, *Judicial Intervention in Corrections: the California Experience – An Empirical Study*, 20 U.C.L.A. L. REV. 452 (1973).

²³⁹ See G. Sykes, *THE SOCIETY OF CAPTIVES* (1956) for a classic sociological study of the ways in which the power of prison officials is corrupted by the inmates they control.

that prisoners have legal rights guaranteed in law.²⁴⁰

Various commentators have constantly reminded us that the fundamental feature of the prison's social structure is the caste-like distinction that is maintained between prisoners on the one hand, and prison officials on the other.²⁴¹ Although there is to be found some occasional bantering between prisoners and prison guards, there is also a good deal of open hostility, antagonism, and mutual mistrust. Moreover, prison officials take it for granted that becoming too close to the inmates they control will inevitably result in the "corruption of authority."²⁴² Thus, social distance between keeper and kept is not only considered desirable, it is enforced in view of the stereotyped character of the prison population.

But, inmates are on the receiving end of this "authority" – whether it be law or official power. They occupy a role regarded as highly manipulative and exploitive. They are viewed as predatory and ever willing, if given an opportunity, to break institutional rules for personal gain, or simply to "beat the system."²⁴³ The consequence is that the inmate's word is almost always open to serious question. When these assumptions creep into the subjective part of the disciplinary process (i.e. advocate assistance, witness testimony, alibi evidence), it become apparent that the law cannot and will not "work" for

²⁴⁰ David Fogel, "Legal Rights of Prisoners," in Norman Johnson and Leonard D. Savitz, *Legal Process and Corrections* 180-191 (John Wiley & Sons 1982), Norman Johnson and Leonard D. Savitz, "Inmate Social Worlds," in Leonard D. Savitz, *Legal Process and Corrections* 191-193 (John Wiley & Sons 1982).

²⁴¹ *Supra*, note 4, at 38 (1991).

²⁴² *Supra*, note 239.

²⁴³ C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 406 (1978).

inmates.

Another issue knocking at the door of how law “works”, reflects both institutional experience and common-sense. When an inmate receives a disciplinary charge, he faces the possibility of punishment. Thereby, he has a strong vested interest in seeking subversive means to avoid this outcome – including, but not limited to, being dishonest. But, the charging officer has a similar interest although rooted in possibly other ideals and norms. He, too, can subvert law’s operation by charging an inmate with a violation in order to “teach him a lesson.”²⁴⁴ Which occurrence is the case at the hearing is sometimes the inmate’s theory for the charges waged against him. This theory becomes particularly influential when the hearing reduces to a swearing contest between the reporting staff member and the accused inmate. In such cases, the theory, unfortunately, dictates that credibility resides with the former.

Clearly, inmates who receive disciplinary reports confront a serious credibility problem in attempting to prove their innocence. Not only does the accused inmate’s role within the prison community undermine the value of his testimony, it also places limits on the value of calling inmate witnesses whose word is similarly suspect. Add to that an advocate assistant whose is completely ineffectual in performing his duties, and the entire due process hearing is called into question. At Fox Lake, and probably elsewhere, the

²⁴⁴ Interview with Warden Tom Borgen , Fox Lake Correctional Insitution, Wisconsin (Sept. 2004). Tape recording. Typically, the Warden at Fox Lake employs means to safeguard against this possibility. According to Warden Borgen, “staff members, especially prison guards, who knowingly and volitionally lie on an inmate and consequently subjects said inmate to disciplinary punishment would lose his job and his pension if discovered. Therefore, in this sense it makes no good sense for a prison staff member to lie on inmate.” Lying on an inmate, however, was one of the reasons that Officer Beckley was attacked as noted in the opening scenes of this paper.

testimony of the inmate witness is of dubious value because prison officials believe that informal pressures are exerted on such witnesses to support the accused. This seeming lack of credibility is also prevalent at Fox Lake. No cases produced a not guilty verdict based on another inmate's witness testimony.

That fact that assumptions exert influence over the inmate disciplinary process is not surprising. Other studies have reported similar findings.²⁴⁵ However, what these other studies fail to mark relevant is that within the prison setting these assumptions make sense. And it is because they make sense that the mediating value of law behind prison walls is sometimes compromised. As a consequence of these assumptions, the burden of responsibility shifts to the accused inmate to show that he is not guilty of violating institutional law. A task, in both my opinion and experience, that is insurmountable. Further, since the significance of guilty assumptions are so deeply rooted in the functioning of the penal institutions, the very question regarding the validity of law's capability to mediate that tension is not only raised, but also answered. As I said in an earlier pronouncement, law "works" – sometimes.

²⁴⁵ See Harvard Center for Criminal Justice, *supra* note 208; L. Carrol, HACKS, BLACKS AND CONS (1979), E. Wright, THE POLITICS OF PUNISHMENT (1983);