

LEGAL BULLETIN 6.1

Disciplinary Hearings

Set 6: Due Process in Prison
Bulletin 6.1.
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This bulletin introduces the due process rights of prisoners accused of committing disciplinary infractions while incarcerated. It will discuss the disciplinary hearing process, administrative appeals, and your right to sue in federal court if your rights are violated. This document is written for use by prisoners all over the United States. As such, it does not discuss the specific state laws, state prison regulations, or the specific rules in your prison. While these state laws, regulations, and rules cannot contradict the constitution or federal law, they may provide you with additional rights that you should be aware of. Furthermore, your prison regulations governing disciplinary proceedings will give you some more guidance as to what to expect from the process.

As with all legal work, you will need to do additional research. In addition to prison rules, state (or federal) regulations, and the state constitution, you will also need to review state and federal court decisions interpreting these documents. The law is constantly changing and you are going to have to research the law as it affects the issues in your case.

Please note that since the Prisoner Litigation Reform Act and *Sandin v. Connor*, it is now more difficult to bring a suit in federal court. Therefore you should focus on your disciplinary hearing first.

Additional resources can be found in your prison law library and in Lewisburg Prison Project Legal Bulletin 1.1 (Civil Actions). You may also wish to contact the Southern Center for Human Rights, 83 Poplar Street, N.W., Atlanta, GA 30303-2122. The SCHR provides Legal Self-Help Books for inmates for a low cost. Also available, although somewhat New York focused, is the Jailhouse Lawyers Manual, 5th edition, 2000, 1000p. \$70, \$31 for prisoners. Columbia Human Rights Law Review, ATTN: A JAILHOUSE LAWYER'S MANUAL, 435 West 116th Street, New York, NY 10027.

1. INTRODUCTION

You are probably reading this document because you have received a disciplinary report and are facing a hearing and some sanctions. If so, you have no time to waste. If you are reading this document without a pending disciplinary hearing, now would be a good time to familiarize yourself with the procedure in your state.

Disciplinary infractions are very serious matters because a guilty finding can be used to justify transferring you to higher security or can be used as evidence of bad behavior to deny you parole. If you have been charged with a serious offense where criminal charges are pending or possible, the situation requires even more care.¹

¹ It is constitutional to try you in a disciplinary proceeding and in a criminal court for the same act. It is likely that the prison disciplinary hearing would happen first. If the charge is serious, such as assaulting a

In many ways a prison disciplinary hearing will resemble a criminal trial. First, you receive notice that you are believed to have committed an offense, you are given a chance to request evidence, and a hearing is scheduled. At that hearing, a nominally neutral party serves as the judge to make rulings on procedure and what evidence to allow, and also to serve as a fact finder and render a verdict. If you are found guilty, in most jurisdictions you will have the right to file an administrative appeal with the warden or an official within the Department of Corrections/Bureau of Prisons.

The primary successful argument on an appeal would not be that you were *wrongly* found guilty, but that you were *improperly* found guilty. People reviewing appeals at the administrative level or in court are very unlikely to question the decisions made by the fact finder who saw the evidence first hand. However, they can be expected to review whether the decision of guilt was made *properly*, and whether you were fairly allowed to put on a defense. If the prison did not follow its own regulations or violated the constitution, you may be able to have the charges dismissed or the sentence reduced, or a new hearing could be granted.

If an administrative appeal of a guilty finding is denied, depending on the rights violated and the magnitude of the sanction, you may be able to sue in federal court. There are a number of restrictions on your ability to sue imposed by the Prison Litigation Reform Act and *Sandin v. Connor* which will be discussed below.

While there are some restrictions on your ability to sue in federal court, you should not let these restrictions keep you from making otherwise valid arguments at your disciplinary hearing or in an administrative appeal. Just because you may be unable to have a court force the administration to do something does not mean that the prison might not do it when placed with a clear argument why X, Y, or Z would be essential to a fair hearing. The first case to set out the due process requirements for prison disciplinary hearings is *Wolff v. McDonnell* 418 U.S. 539 (1974). Most prison disciplinary regulations are based on *Wolff* and its clarifying decisions. These are more favorable cases than the recent cases such as *Sandin*, which restrict your ability to seek federal review. Furthermore, you should expect that the prison will follow its own rules

guard, you can expect criminal prosecution. You should remember that anything you say in a disciplinary hearing can be used against you in court. If you think criminal prosecution is likely, you should NEVER plead guilty and should be extremely careful about what you say at the hearing. Remember, only some evidence is necessary to convict you at a disciplinary hearing, but at a criminal trial, you must be convicted "beyond a reasonable doubt," a much higher standard than for disciplinary hearings. Because disciplinary hearings are harder to win than criminal trials, you should be aware of the risks you take when you face both. You do not want to make it any easier to convict you criminally by using an ill-advised defense in a disciplinary proceeding. You would not want to say anything that could make things worse for criminal charges and an additional sentence. However, it is possible to use a defense at a disciplinary hearing in such circumstances. For example, you would need to challenge the sufficiency of the evidence against you without giving your own side of the story. In a practical sense, given that you will be shackled and under a great deal of stress as you face well-practiced opponents, this is extremely difficult. In addition, the prison would look foolish to recommend you for criminal prosecution and then find you not guilty in its own proceeding. If you think there is no chance of being acquitted at the disciplinary hearing, and you are or may be facing criminal charges for the acts in your disciplinary report, the easiest way to not make anything worse is to plead not guilty and remain silent throughout the proceedings.

even if you are restricted from seeking federal review. Finally, prison officials have a tremendous amount of discretion, and you may be able to have this discretion utilized in your favor. You should not seriously consider the *Sandin* restrictions until after the administrative appeal level and when you are considering a federal suit.

From a practical perspective, to protect your rights you need to do the following four things:

1. Familiarize yourself with the regulations in your state and prison, cases that interpret those regulations, as well as the general common practice in your prison.
2. Look for procedural errors on all documents received (the disciplinary ticket, evidence, the hearing officer's determination, etc.).
3. Establish a clear record for appeal by making all motions in writing. Make all motions as soon as possible. Always keep a copy of everything you do.
4. Always prepare yourself for the next step in the process. For example, you will often have very little time to write appeals, so start early whenever possible.

2. DUE PROCESS REQUIREMENTS FOR PRISON DISCIPLINARY HEARINGS

The Supreme Court has stated that due process safeguards must be observed when prison officials deprive inmates of statutorily authorized "good time," the Court also indicated that the same safeguards apply to "solitary confinement." The loss of lesser privileges such as the deprivation of honor grade status and access to visitors, schooling, recreation and institutional employment may not necessarily be within the scope of the due process protections. *Wolff v. McDonnell*, 418 U.S. 539, 571). However, due process safeguards are necessary when due process rights that are created by statute, state regulation, or express constitutional provision are threatened.

The phrase "due process of law" is found in both the Fifth and Fourteenth Amendments to the United States Constitution. The Fifth Amendment applies to the federal government and federal officials (including federal prisons). The Fourteenth Amendment applies to the states. The Supreme Court indicates that "due process" has two aspects: substantive and procedural. The substantive aspect of "due process" involves the fundamental rights of an individual, such as life and liberty, which are protected from government action. The procedural aspect of "due process" deals with the means by which a government action can affect the fundamental rights of an individual. Only after certain "fair procedures" are followed can the government act to deprive an individual of a fundamental right. However, the exact procedural rights guaranteed depend upon the status of the individual (free citizen or prisoner), the type of action contemplated, the liberty rights at issue, and the nature of the forum (parole hearing/disciplinary hearing, etc.) Your due process rights will depend on which "liberty interest" is at stake. Keep in mind that prisoners have less due process rights than non-prisoners.

Prior to the recent restrictions, *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963 (1974), was the most important case for outlining what the Supreme Court said was required for prison disciplinary hearings. The most significant restriction on *Wolff* is *Sandin v. Connor*, 515 U.S. 472, 115 S.Ct. 2293 (1995). *Sandin* sets a high standard for when due process rights must be respected, making it harder to sue. (Specifically, *Sandin* restricted the number of situations where prisoners can claim that a protected liberty interest was violated. In the view of *Sandin*,

the prison can do many negative things that are not important enough to trigger due process protections.) However, don't let this discourage you. *Sandin* does not directly overrule any specific requirements in *Wolff*. Because your prison regulations are likely based on *Wolff* and related cases, you can use *Wolff* to:

1. Argue for specific protections at the hearing and on administrative appeal.
2. Provide clarity to any vague portions of your prison disciplinary policy.

Wolff v McDonnell involved a Nebraska state prisoner who had filed a civil rights claim alleging a violation of his due process rights during a prison disciplinary hearing. As a result, *Wolff* established the most widely cited due process standards for a prison disciplinary hearing.

In *Wolff v. McDonnell* the court held that due process in a prison disciplinary setting requires:

- 1) Advance written notice of the charges against the prisoner must be given at least 24 hours prior to this appearance before the prison disciplinary officer/committee.
- 2) There must be a written statement by the factfinders as to the evidence relied upon and reasons for the disciplinary action.
- 3) The prisoner should be allowed to call witnesses and present documentary evidence in his defense providing there is no undue hazard to institutional safety or correctional goals.
- 4) Counsel substitute (either a fellow prisoner, if permitted, or staff) should be allowed where the prisoner is illiterate or when the complexity of the issues makes it unlikely that the prisoner will be able to collect and present the evidence necessary for an adequate comprehension of the case.
- 5) The prison disciplinary board must be impartial.

The Court also specified what was NOT required:

- (1) The prisoner has no constitutional right to confrontation and cross-examination of adverse witnesses. The decision to permit confrontation and cross-examination is left to the discretion of the prison disciplinary board.
- (2) The prisoner has no constitutional right to retained or appointed counsel.
- (3) There is no right of a prisoner to have his prison record or prior disciplinary proceedings expunged absent a showing of malicious action or bad faith on the part of officials or a complete absence of evidence to support the charges.

Wolff established the minimum constitutional requirements for due process in prison disciplinary hearings. To better understand the exact rights a prisoner has available to him, a brief examination of each requirement follows.

2A. DUE PROCESS REQUIRES NOTICE OF CHARGES

First, a prisoner must be notified of the charges against him. Notice is required because it enables the inmate to prepare information to explain the alleged offense or defend himself against it. *Wolff* requires that there be a minimum of 24 hours between receipt by the inmate of written notice of the charges and the inmate's appearance before the prison disciplinary board.

However, where an inmate MAY desire to expedite his hearing, he may waive his right to 24-hour notice. If waivers are used, the waiver must be in writing and signed by the inmate under such circumstances that the inmate is made fully aware of his right to the 24-hour notice and voluntarily waives it. Whenever waivers are used, the written waiver should be witnessed. Oral waivers may also be used, but care should be taken to document the waiver, as a question of proof may arise at a later date.

Inmates in disciplinary hearings are entitled to disclosure of the details concerning the charges against them. However, informant information may be restricted. (See Section 2H.)

The requirements for written notice of the charges are strict. Constructive notice is not acceptable. *Speller v. Lane*, 509 F. Supp. 796 (1981) ordered a rehearing when the prisoner was given only a half hour notice of a hearing and was denied a written statement of the charges. The rehearing took place 90 days after the court order, but written notice of the charges was again not provided. This rehearing was thrown out by the Speller court for failure to provide written notice.

Related to the due process requirement that you must be notified of the charges against you, you must have been notified of the existence of specific rules prior to the charge of violating them. The policy behind prison rules is to prohibit observable behavior that can be shown clearly to have a direct, adverse effect on an inmate or on good order in the institution. By putting you on notice of rules (including broad ones like "obey officers") the prison attempts to lay out what it expects so it can hold you accountable for violations.

A rule or regulation, the violation of which can result in disciplinary proceedings must apprise inmates of the proscribed conduct. The usual rule is that a statute or regulation must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *Laaman v Helgemoe* 437 F.Supp. 269, 321-322 (D. N.H. 1977), citing *United States v. Harriss*, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989 (1954). The *Laaman* Court also refers to *Parker v. Levy*, 417 U.S. 733, 757, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974).

2B. DUE PROCESS REQUIRES A HEARING

Second, an accused inmate is entitled to an opportunity to be heard. The courts have generally recognized that a hearing is fundamental to the concept of due process. It is one of the procedural safeguards to which an inmate is entitled when action is taken against him. The Supreme Court in *Wolff v. McDonnell* 418 US 539 (1974) did not attempt to set forth comprehensive guidelines for the conduct of disciplinary hearings, but only addressed those elements that are constitutionally required.

The Supreme Court recognized that a prison disciplinary hearing is an effort at "an orderly attempt to arrive at the truth." It is not a formal court proceeding. A disciplinary hearing combines two functions in the proceeding; the fact finding process and the correctional process. The fact-finding process involves a determination of the truth of the allegation that a specified institutional rule had been violated, that is, did the inmate violate the rule?

2C. DUE PROCESS IN DISCIPLINARY HEARINGS DOES NOT GIVE A RIGHT TO REPRESENTATION, EXCEPT FOR ILLITERATE PRISONERS AND WHERE THE ISSUES ARE COMPLEX

The Supreme Court held in *Wolff* that an inmate had no constitutional right to either retained or appointed legal counsel at the disciplinary proceedings.

Where an illiterate inmate is involved, however, or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case, he should be free to seek the aid of a fellow inmate, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent inmate designated by the staff. *Wolff v. McDonnell*, 418 U.S. 539 (1974)

The assistant should be someone who is capable of offering helpful advice, but does not have to be a witness or someone connected with the incident in question. The implementation of this requirement will vary greatly between the states, as some states allow other prisoners to assist you, allow you to utilize law students for this purpose, or provide a staff member to assist you in this circumstances. But in no state that we are aware of are attorneys appointed to represent prisoners in disciplinary hearings.

Generally, the burden will be on you to show that the issues are too complex for you to proceed without assistance. Your argument would likely address the amount of information that is available to you, your access to witnesses, and the complexity of the facts and legal issues. Of course, your argument for assistance would have to explain how assistance would help you get better access to witnesses (for example, you are in segregation and the assistant could interview your witnesses in population).

Some prison regulations require that assistance be appointed for prisoners unable to defend themselves even where the prisoner did not request it. Because this seems to be required under the general due process requirements of *Wolff*, it would be an excellent avenue of appeal of guilty findings (i.e.: where mentally disabled prisoners were charged with a disciplinary offense, found guilty, and did not know to request assistance). Of course, assistance may be necessary for complex issues with a prisoner who is not disabled, but it would be slightly harder to argue that the prisoner didn't know that assistance could be requested. Where assistance in complex cases is requested and denied, like in all cases, this decision can be argued on administrative appeal. One would argue that by denying you the ability to prepare for a hearing, the prison violated your due process rights and hence denied you a fair hearing itself.

2D. DUE PROCESS GIVES PRISONERS THE RIGHT TO CALL WITNESSES

As stated in *Wolff*, the inmate should be allowed to call witnesses and present documentary evidence in his defense, provided there exists no undue hazard to institutional safety or correctional goals. It is also implicit in *Wolff* that official discretion may be used to avoid redundant and irrelevant testimony. The charged inmate is usually required to provide a written request for witnesses prior to the hearing describing what he expects them to say if they are called. If the requested witness is in another institution a written statement can be submitted instead of testimony at the discretion of the disciplinary board. The decision to grant or deny a

witness request should be made in the record. But, while the *Wolff* court suggested that the reasons for a denial be in the record, a reason is not constitutionally required at that time. (Your state regulations may make this a requirement, although in no event is a defective reason a defense for improperly denying a witness). While the reason for denying a witness need not be a part of the hearing record, if you later challenge the denial in court, prison officials must provide a written or oral explanation of the denial “logically related to preventing undue hazards to ‘institutional safety or correctional goals.’” *Ponte v. Real*, 471 U.S. 491, 497 (1985).

On appeal, the burden is on the prisoner to show that the prison denied the witnesses for improper reasons. *Hurney v. Carvey*, 602 F.2d 993 (1st Cir. 1979) set out the requirements for a suit challenging a decision to not call a witness. In order to state a valid claim in this area, the prisoner must show:

1. That the request to call a witness was refused for reasons not having to do with institutional security or correctional goals; and
2. That the prison officials, in ruling, clearly abused their discretion.

Among the specific reasons that have been upheld for denying witness requests are; the witnesses would be cumulative, the witnesses would take too much time or the witnesses would only have dealt with a side issue. *Ward v. Johnson*, 690 F.2d 1098 (4th Cir. 1982).

While *Wolff* gives you the right to call and question witnesses, the Court was careful to not use the word “cross examine,” implying that you have somewhat less of a right to control an adverse witness than you would in court. At the disciplinary hearing level, this is not a distinction to be concerned about, although it would affect any appeal of a guilty finding on the basis of a disciplinary officer’s restriction of your questions.

Be aware that if you admit to committing the prohibited act, you have waived your rights under *Wolff*. In that circumstance, the prison is required to carefully document the factual basis for your plea and make certain the plea was knowingly made.

Finally, be aware that if you do not request the presence of the reporting officers, the disciplinary officer is allowed to take their written statements as true without the benefit of you questioning them. As the presence of the reporting officers is likely to be an essential part of your defense, if you request them and they are not produced, you may have a strong argument to make at the hearing that the charges should be dismissed. Likewise, such a failure to provide a requested reporting officer may be a strong argument for reversal on administrative appeal after a guilty finding.

2E. DUE PROCESS REQUIRES AN IMPARTIAL DISCIPLINARY BOARD

Wolff v. McDonnell requires that the prison disciplinary board be impartial. Impartiality means that the decision-maker is not directly involved in the incident in question or the investigation. This helps assure that the decision will be based strictly on the facts addressed at the hearing and not on personal knowledge or impressions which a decision-maker brings with him or her to a hearing. Object if this procedure is not followed and request a new hearing officer. If the hearing officer shows extreme bias during the hearing, request that a new hearing officer be

appointed. (Be aware that unless you are successful in asking the hearing officer to step down, this request is likely to anger the hearing officer and may make things worse for you.)

Note that institutional staff are not disqualified, by their position alone, from serving on a disciplinary board. Specific court requirements include:

1. The prison officer who invokes the disciplinary process should not sit on the committee;
2. The classification officer responsible for designating whether an offense was major, serious or minor should not sit on the committee; and
3. Investigating officers, witnesses to the incident and individuals having personal knowledge of material facts or personal interests in the outcome should not sit on the committee. *Gates v. Collier*, 454 F.Supp. 579 (N.D. Miss. 1978); *Collins v. Vitek*, 375 F. Supp. 856 (D. N.H. 1974).

If your guilty finding is reversed on administrative appeal, it is not required that the disciplinary board be different than the original one. (Although, based on the nature of the reversal, you could argue that it is necessary for a fair hearing.)

2F. STANDARD OF PROOF

The standard of proof is only that “some evidence” must be shown for each charge. (*Superintendent v. Hill*, 472 U.S. 445 (1985). This is a very low standard, lower than for criminal charges which must be “beyond a reasonable doubt.”

2G. DUE PROCESS REQUIRES THE HEARING OFFICER TO PRODUCE A WRITTEN STATEMENT OF FINDINGS AND INCLUDE THE EVIDENCE RELIED UPON FOR THAT FINDING

Wolff v. McDonnell requires that the findings of the disciplinary board be in writing, that they include the evidence relied upon and reasons for the disciplinary action. Your state regulations likely provide the time that the hearing officer is required to produce these findings. Read this report carefully for errors. If you are convicted of charges, but the report does not describe the evidence relied upon, you should appeal. The report will not be a transcript or even a summary of the hearing. Rather, the report will show that enough evidence was presented to support the guilty finding. (If the report simply says that enough evidence was presented, but fails to provide what evidence led to that conclusion, you should appeal). Note that the disciplinary committee's decision must be based on the evidence in the record, thereby excluding rumor or personal, unrelated knowledge about a particular inmate.

For example, saying that all the prisoners in the mess hall were part of a disturbance without describing their specific misbehavior, is insufficient. *Bryant v. Coughlin*, 77 N.Y.2d 642, 649-50 (1991) (interpreting NY State regulations).

2H. DUE PROCESS IN THE PRISON SETTING GIVES ONLY A LIMITED RIGHT TO CONFRONT INFORMANTS

If the disciplinary officer believes disclosing the identity of informants would compromise institutional security, s/he may refuse to disclose that information to you. However, you cannot be found guilty solely on informant testimony unless the record contains:

- (1) some underlying factual information from which the tribunal can reasonably conclude that the informant was credible or his information was reliable;
- (2) the informant's statement in language that is factual rather than conclusionary and must establish by its specificity that the informant spoke with personal knowledge of the matters contained in such statement. *Helms v. Hewitt*, 655 F.2d 487 (3rd Cir. 1981). (Note, this case was reversed on another issue at 459 U.S. 460 (1983). The 3rd Circuit ruled on the informant issue *and* on the requirements of a hearing before administrative segregation. The Supreme Court addressed *only* the administrative segregation ruling, leaving the informant ruling intact. See the order on remand 712 F.2d 48 (1983)).

If the case against you relies only in part on informants, you may be able to use the *Helms* test to argue that the informant testimony should be excluded from consideration. While the arguments from *Helms* may help you, you will need to check in the law in your circuit and state. The Third Circuit wrote of other circuits:

Other courts of appeals, faced with claims similar to those pressed here, have read *Wolff* to command almost complete deference to the judgment of prison officials on the need, if any, for administrative inquiry into the credibility and reliability of an informant. *Walker v. Hughes*, 558 F.2d 1247, 1259 (6th Cir. 1977); *McLaughlin v. Hall*, 520 F.2d 382, 384-85 (1st Cir. 1975); *Willis v. Ciccone*, 506 F.2d 1011, 1018 (8th Cir. 1974). *Helms v. Hewitt* 655 F.2d 487, 501 (1981).

Finding such decisions unsupportable, the Third Circuit wrote:

We believe, however, that in entrusting to prison officials responsibility for promulgating procedures for arriving at an adequate basis for decision, *Wolff* intended a genuine, even if single, factfinding hearing and not a charade. Although the HC [Hearing Committee] has the discretion to foreclose the presence of witnesses and cross-examination, *Wolff* abjures [to renounce formally] arbitrary determinations. It therefore commands "a written statement by the factfinder as to the evidence relied on and reasons" for the disciplinary action. If this statement is intended to withstand scrutiny and win respect for prison disciplinary procedures, it must disclose more than a mere "reliance on speculation and facts not in the record." *Gomes v. Trivisono*, 510 F.2d 537, 540 (1st Cir. 1974); *Helms v. Hewitt*, 655 F.2d 487, 502 (1981).

2I. YOU HAVE A RIGHT TO REMAIN SILENT, BUT IT CAN BE USED AGAINST YOU

Accused prisoners have a constitutional right to relate their version of the incident leading to the disciplinary charges. You also have a 5th Amendment right to remain silent. However, in light of *Baxter v. Palmigiano*, 425 U.S. 308 (1976), an adverse inference can be drawn from an inmate's silence at disciplinary proceedings and self-incriminating testimony can be used in a

subsequent criminal trial. However, the inmate's silence alone may not be used to support a finding that the inmate has committed a prohibited act.

Inmates who believe that irrelevant, immaterial, prejudicial or other inappropriate evidence has been introduced at their disciplinary proceedings are left with two basic approaches. First, they may contend that the introduction of the challenged evidence rendered the proceeding so fundamentally unfair so as to violate the due process clause. Second, they may claim that, discounting the improperly introduced evidence, there was not sufficient, substantial evidence to support the disciplinary committee's findings. You should be particularly careful here if criminal charges are pending against you for the same act, as it is difficult to argue about the sufficiency of the evidence or other procedural points without providing your side of the story. (See footnote 1)

3. APPEAL OF A GUILTY FINDING

Two avenues of appeal may be available to an inmate found to have violated a prison rule. The first is internal, through the prison system itself. The second is external, through the state or federal judiciary.

Note that where you have a limited right to judicial review of disciplinary proceedings, most courts are reluctant to substitute their judgment on the merits of a case since prison officials involved in the hearing presumably have more expertise in correctional matters and were exposed to the live testimony of witnesses which enable them to better judge their credibility. Courts will see if an inmate's procedural and constitutional rights were violated, but will not review the actual decision to see if it is right or wrong. *Flythe v. Davis*, 407 F.Supp. 137 (E.D. Va. 1976); *Cummings v. Dunn*, 630 F.2d 649 (8th Cir. 1980). There are further restrictions on litigation discussed below.

3A. ADMINISTRATIVE APPEALS

The federal constitution does not give you a right to appeal a guilty finding, but your state constitution or prison regulations may. Typically, this is a written appeal to the warden and possibly to a higher level after that. There are generally strict time requirements that must be followed.

This would be a time for you to argue that the disciplinary board:

1. Did not substantially comply with the regulations on inmate discipline;
2. Did not base its decision on enough evidence; and/or
3. Imposed an inappropriate sanction according to the severity level of the prohibited act.

As a result, the prison appellate authority may approve, modify, reverse or send back with directions any disciplinary action. This will be your quickest and easiest, not to mention first, avenue to reverse or reduce a guilty finding. If this option is available to you, you should begin drafting an appeal of a guilty finding as soon as your hearing is over. Figure out what the report is most likely to say if you are found guilty, and start doing your research and writing. When the

report comes out, hopefully you will have been found not guilty. If the report resembles what you have anticipated, you have saved some valuable time before the approaching deadline.

3B. STATE REVIEW

This document was written for use by prisoners throughout the United States. As such, it does not address your state constitution or state laws and any remedy you may have in state courts.

3C. FEDERAL REVIEW

There are two significant hurdles to federal court review of disciplinary hearings. The first is the Prison Litigation Reform Act, and the second is *Sandin v. Connor*.

The Prison Litigation Reform Act (PLRA) was enacted by Congress in April 1996. As a controversial new law, the courts are still defining it, so you will need to research local court interpretations as well as any significant federal updates to this paragraph. The PLRA restricts your access to the courts by requiring you to grieve disputes internally (or in this case utilize the entire administrative appeal procedure) before filing suit in federal court. Under the PLRA, you are required to pay the filing fees even if you proceed *in forma pauperis*, although you may pay in installments. However, under the PLRA “three strikes” rule, if you are found to have filed three suits later dismissed for being frivolous, malicious or failing to state a valid legal claim, you will be denied future access to proceeding *in forma pauperis*. Filing suit without first exhausting your state administrative appeal procedure is cause for dismissal and counting as a strike. While you are required to exhaust administrative remedies before filing a federal suit, you are not required to exhaust state suits before filing in federal court. (See Chapter 15 in *A Jailhouse Lawyers Manual, 5th Edition from Columbia Human Rights Law Review*, available for a price and from an address listed on the first page of this bulletin. The chapter was written by John Boston of the Legal Aid Society Prisoners Rights Project. Prior to the World Trade Center disaster the Legal Aid Society address was 90 Church Street, New York, NY 10007. They are currently (March 2002) using the address 49 Thomas Street, New York, NY 10013).

The second major bar to federal review of a disciplinary conviction is *Sandin v. Connor*, 515 U.S. 472 (1995), which narrowed the number of situations where a prisoner may claim a liberty interest protected by due process. Due process rights apply only when a “recognized liberty interest” is at stake, meaning where the government is attempting to deny you “life liberty or property.” *Sandin* reverses the previous trend of expanding the rights that prisoners may assert in federal court.

The *Sandin* Court found that liberty interests may be created. These liberty interests were limited to “freedom from restraint which ... imposes atypical [abnormal or uncommon] and significant [major] hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin* at 484.

Normally, a state’s mandatory regulation would create an expectation -- a liberty interest -- that the state will not do Y bad thing to you without first doing X due process. *Sandin* guts the assumption that a state’s own rules automatically create a liberty interest. Rather, post-*Sandin*, a liberty interest can be pursued in federal court only where the punishment received is “atypical and is a significant hardship.”

In *Sandin*, 30 days confinement was not “atypical or significant.” (*Sandin*, 515 U.S. at 486, holding that the conditions of disciplinary confinement were similar to that of the general population). *Sandin* is a two-part test, first looking at the length of the sentence and then the conditions of confinement. Citing from the *Jailhouse Lawyers Manual*, Chapter 25, p. 624:

Courts have found that sentences of ... 191 days (*Jones v. Kelly*, 937 F.Supp. 200 (W.D. N.Y. 1996)); 270 days (*Carter v. Carriero*, 905 F.Supp. 99, 104 (W.D. N.Y. 1995)); eleven months (*Frazier v. Coughlin*, 81 F.3d 313 (2d Cir. 1996); and 18 months (*Vasques v. Coughlin*, 2 F.Supp.2d 255 (N.D. N.Y. 1998)) are not “atypical and significant hardship” giving rise to a due process analysis. ... [However] the Second Circuit recently held that as little as 90 days confinement in SHU might be “atypical and significant.” (*Welch v. Bartlett*, 196 F.3d 389 (2d Cir. 1999)).

As the above implies, the most important part of the *Sandin* test is not the length of confinement but the degree to which confinement differs from that of other general population prisoners. *Sandin* makes it considerably harder to get federal review of a prison disciplinary proceeding that violated its own regulations. But if you can meet the above burden of showing atypical and significant hardship, federal review is not foreclosed. (Note however, that a dismissal of your suit as frivolous under *Sandin* can count against you as a PLRA strike). Of course, *Sandin*'s power is only to prevent federal review of a violation of your federal constitutional rights to due process. You may be able to assert state claims in state court depending on your state constitution and laws.

4. CONCLUSION

The state's interest in orderly running of a prison requires the courts to give some discretion to prison officials in curtailing your due process rights compared to those of people not incarcerated. In many of the cases cited above you will see that your due process rights are directly balanced against the State's interest in running the prison. However, despite claims to the contrary, prison officials are prohibited from “doing whatever they want.” The due process rights that remain for prisoners are powerful rights.