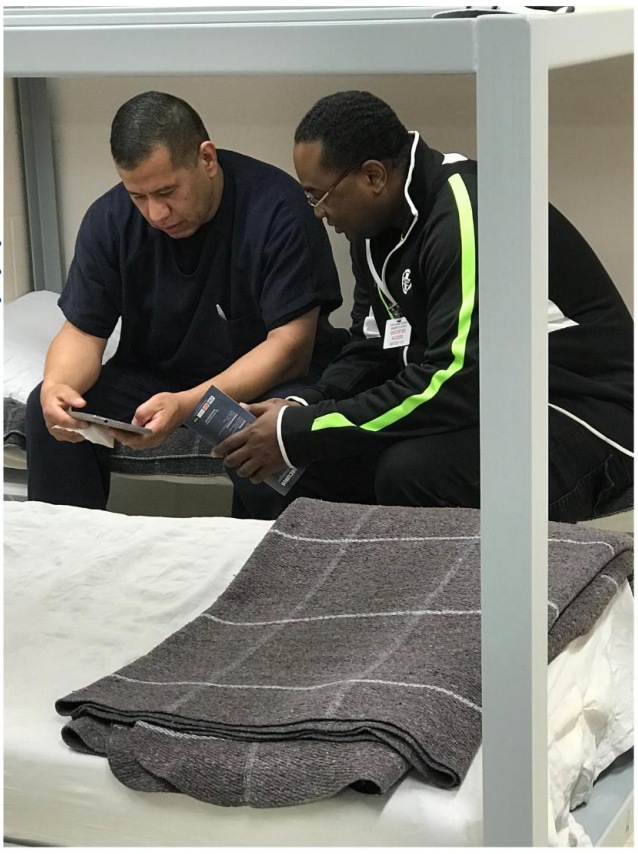
KNOW YOUR RIGHTS

CEDRIC DEAN

PRISON RIGHTS HANDBOOK



PRISONER RIGHTS ARE HUMAN RIGHTS

For more information, visit www.cedricdean.com

	RIGHTS		RESPONSIBILITIES
1.	You have the right to expect that you will be treated in a respectful, impartial, and fair manner by all staff.	1.	You are responsible for treating inmates and staff in the same manner.
2.	You have the right to be informed of the rules, procedures, and schedules concerning the operation of the institution.	2.	You have the responsibility to know and abide by them.
3.	You have the right to freedom of religious affiliation, and voluntary religious worship.	3.	You have the responsibility to recognize and respect the rights of others in this regard.
4.	You have the right to health care, which includes nutritious meals, proper bedding and clothing, and a laundry schedule for cleanliness of the same, an opportunity to shower regularly, proper ventilation for warmth and fresh air, a regular exercise period, toilet articles and medical and dental treatment.	4.	It is your responsibility not to waste food, to follow the laundry and shower schedule, maintain neat and clean living quarters, to keep your area free of contraband, and to seek medical and dental care as you may need it.
5.	You have the right to visit and correspond with family members and friends, and correspond with members of the news media in accordance with Bureau rules and institution guidelines.	5.	It is your responsibility to conduct yourself properly during visits. You will not engage in inappropriate conduct during visits to include sexual acts and introduction of contraband, and not to violate the law or Bureau guidelines through your correspondence.
6.	You have the right to unrestricted and confidential access to the courts by correspondence (on matters such as the legality of your conviction, civil matters, pending criminal cases, and conditions of your imprisonment.)	6.	You have the responsibility to present honestly and fairly your petitions, questions, and problems to the court.
7.	You have the right to legal counsel from an attorney of your choice by interviews and correspondence.	7.	It is your responsibility to use the services of an attorney honestly and fairly.

8.	You have the right to participate in the use of law library reference materials to assist you in resolving legal problems. You also have the right to receive help when it is available through a legal assistance program.	8.	It is your responsibility to use these resources in keeping with the procedures and schedule prescribed and to respect the rights of other inmates to the use of the materials and assistance.
9.	You have the right to a wide range of reading materials for materials for educational purposes and for your own enjoyment. These materials may include magazines and newspapers sent from the community, with certain restrictions.	9.	It is your responsibility to seek and utilize such materials for your personal benefit, without depriving others of their equal rights to the use of this material.
10.	You have the right to participate in educational, vocational training, counseling, and employment programs as resources permit, and in keeping with your interests, needs, and abilities.	10.	You have the responsibility to take advantage of activities which will aid you to live a successful and law-abiding life within the institution and in the community. You will be expected to abide by the regulations governing the participation in such activities.
11.	You have the right to use your funds for commissary and other purchases, consistent with institution security and good order, for opening bank and/or savings accounts, and for assisting your family, in accordance with Bureau rules.	11.	You have the responsibility to meet your financial and legal obligations, including, but not limited to, DHO and court imposed assessments, fines, and restitution. You also have the responsibility to make use of your funds in a manner consistent with your release plans, your family needs, and for other obligations that you may have.

INTRODUCTION

The purpose of this handbook is to provide returning citizens and their friends and family members with information regarding standard policies and procedures. It is not a specific guide to the detailed policies of the North Carolina Department of Adult Corrections. Rather, the material in this handbook will help returning citizens and their friends and family members more quickly understand what they will be encountering during an incarceration experience, and hopefully assist them in their adjustment to incarceration.

GRIEVANCES-ADMINISTRATIVE REMEDY PROCEDURE (ARP) GRIEVANCES

Returning Citizens with unresolved complaints about conditions of confinement, such as actions, conduct, incidents, or policies may file a formal grievance after they have sought assistance by talking with staff. Grievance Forms (DC-410) are available to Returning Citizens upon request, or in most facilities and living areas. To start the grievance process, Returning Citizens must complete items 1-7 on the DC-410 and either place the form in a designated collection point or give it to a staff member.

(1) **POSTING OF PROCEDURE**, The Administrative Remedy Procedure is posted in living areas and is available in the facility library.

(2) **REJECTION OF GRIEVANCES** Certain grievances will not be accepted. Grievances will be rejected whenever Returning Citizens seek to challenge: (a) State or Federal court decisions; (b) Parole Commission decisions; (c) Disciplinary actions; and (d) actions not yet taken. Grievances will also be rejected when they: (e) are filed more than 1 year after the event sought to be complained about; (f) seek a remedy for another Returning Citizens; (g) involve more than 1 incident; (h) do not follow the ARP; or (i) direct toward persons language that is generally considered profane, vulgar, abusive or threatening.

(3) **CONFIDENTIAL GRIEVANCES** If an Returning Citizens thinks that a grievance is of a confidential nature, his/her grievance may be filed directly with the Director of Prisons and mailed as legal mail. The Returning Citizens must explain in the letter to the Director the nature of the complaint and the reasons for not following the regular grievance procedure. If the Director determines that the grievance is not of confidential nature, the grievance shall be returned to the Returning Citizens with instructions to submit it in accordance with the procedures set forth in policy (through the normal channel).

(4) **EMERGENCY GRIEVANCES** (a) Any Returning Citizens who is in need of urgent medical care may present himself to a member of the medical or custodial staff, who shall handle the matter 24 according to emergency health care procedures set out in the Health Care Manual. If Returning Citizens fear for their personal safety, they may contact the officer-in-charge or any other custodial official. Any request for protective housing will be handled in accordance with policy. (b) Matters relating to administrative transfers, time computation disputes, and family illness or death are not to be treated as emergencies for purposes of this procedure, but shall be handled expeditiously and compassionately by the Superintendent or Institution Head or their designee where appropriate.

(5) **STEPS IN THE GRIEVANCE PROCESS** (a) Returning Citizens and staff seek to resolve problem through informal communication. (b) If informal resolution does not work, Returning Citizens submits a written grievance, which is screened under the rules. (c) If accepted, the facility seeks to resolve the grievance with the Returning Citizens consistent with Department of Correction policies. (d) If the Returning Citizens does not accept the resolution, the grievance goes to the Region Director/Institution Head. This is accomplished by Returning Citizens indicating their rejection and signing their name in the proper place (Line 26 (B) of Step One on Form DC-410A.) The Region Director/Institution Head will try to resolve the grievance. (e) If the Returning Citizens is not satisfied with the decision reached in Step Two the grievance may be appealed to an Returning Citizens Grievance Examiner by checking line 26 (B), dating line 27, and signing line 28. Following investigation by an Returning Citizens Grievance Examiner, the grievance may be resolved or dismissed. The Examiner and Division of Prisons staff may resolve the grievance or the Examiner may write an order to resolve the grievance. The Secretary of Correction accepts, modifies, or rejects the order and this action is the final step in the Administrative Remedy Procedure.

(6) **OTHER CONSIDERATIONS** (a) The total grievance process will take no longer than 180 days. Each step is to be completed in a set number of days, as set out in the Administrative Remedy Procedure. (b) Except for emergency grievances, Returning Citizens may submit only one (1) grievance at a time. When more than one is submitted, the second or subsequent grievances will be returned to the aggrieved Returning Citizens. Once the initial grievance has completed Step One or been resolved, Returning Citizens may submit a new grievance or resubmit a grievance previously returned to them DAILY.

What Rights Do Returning Citizens Have During Disciplinary Hearings?

If the government charges you with a crime, you have many rights that protect you. You have the right to an attorney. You also have the right to a jury trial. And you have the right to confront the witnesses against. When someone accuses you of breaking the rules in prison, you don’t have these rights. This is because a disciplinary proceeding is different than a criminal trial. But it’s still important to know and understand the rights that Returning Citizens have during disciplinary hearings.

What rights do you have in a criminal prosecution that you don’t have in a disciplinary hearing?

In a criminal case, you have a lot of important rights. You have the right to an attorney. You may be unfamiliar with the laws and procedures that control your criminal case. So, having an attorney is very important.

You also have a right to confront the witnesses against you. This means that you (or your attorney) get to ask the people who say you committed a crime questions.

Another right you have is to a jury trial. This right requires that a group of people from your community agree that you are guilty. While the group may not be like you, you have a right to face a jury instead of just the judge.

In a disciplinary hearing, you don't have any of these rights.

What rights do you have in a disciplinary hearing?

In a disciplinary hearing, you won't have a right to an attorney, to confront witnesses or to a jury. But there are still rules that the prison must follow.

First, the prison must give you notice of the charges against you. This means that prison officials must explain each particular rule violation being alleged. And they must also tell you what the potential penalties are for each one.

Then the prison will hold a hearing on the charges. A hearing for small violations may be short and informal. A hearing on more significant charges could be longer and more formal. After the hearing, the fact finder will make a decision in writing and explain what evidence was relied on. The fact finder will also explain why it imposed a punishment (if it did). And the punishment must reflect the seriousness of the violation.

What kind of punishments can prison officials use?

The type of punishment depends on the type of violation. Prison officials can take away your privileges, including your access to visitors, a phone, commissary and even paid work. For more severe misconduct, they can also place you in solitary confinement. However, prison officials cannot deprive you of basic human needs.

What can you do to prepare for a disciplinary hearing?

If you're charged with misconduct in prison, there are several things you should keep in mind.

- Remain silent during most of the disciplinary hearing. During a disciplinary hearing, the prison officials are not there to be your friend. If you say something that amounts to a confession of a rule violation, the officials will use that to punish you.
- Ask for witnesses and evidence. A prison official may wrongly accuse you of committing misconduct. You can ask to present witnesses or evidence to challenge their version of events. Maybe another person saw what happened. Or maybe you know the interaction was recorded. These things can help you win your disciplinary hearing.
- Prepare a written statement. You have the right to make a statement to the fact finder. While most Returning Citizens make a verbal statement, there are benefits to using a written one. The hearing officials cannot misstate your words if they are in writing and in the record.
- Appeal unfavorable decisions. If you are found guilty of breaking a rule in prison, you have the right to appeal. You should use it. Going up against prison officials in an in-prison disciplinary hearing can feel like a no-win situation. But an appeal, especially with my help, might give you a fair shot.

Overview of Discipline Proceedings

Most returning citizens will be charged with a prison disciplinary infraction during their incarceration (informally called a "write-up, shot, or incident report" in prison). Even so, few understand the governing policies and procedures. Likewise, few returning citizens understand how to defend themselves when confronted with a incident report in prison.

Unfortunately, the chances of receiving an incident report during incarceration are high, especially if the returning citizen is serving any meaningful amount of time. This is because disciplinary codes are broad, and sometimes insignificant actions can result in disciplinary proceedings (e.g., having too many books in a cell, accidentally missing an appointment, etc.).

Any incarcerated individual in the criminal justice system is subject to prison disciplinary proceedings.

All incident reports are ordinarily handled by sergeants or lieutenants. A copy of the prison disciplinary infraction is issued to the Returning Citizens by the lieutenant on duty within 24 hours. At this time, the Returning Citizens will learn what the incident report is for.

The sergeant or lieutenant then calls the Returning Citizen to the administrative office, reads them the description of the alleged misconduct listed in the incident report, and asks if they would like to make a statement in their defense.

Initial Statement About the Incident Report

During this stage of the prison discipline proceedings, the Returning Citizen can make an initial statement and enter an initial pleading of innocence or guilt. This is their answer to what the shot in prison is for.

The Returning Citizens retains the right to remain silent but is told: "their silence may be used to draw an adverse inference against them at any stage of the process."

We generally counsel clients to remain silent at this stage unless there is a rational explanation for the misunderstanding. But be forewarned, anything said can and will be used against the Returning Citizens. The best option is to decline to make a statement about the shot in prison at that time.

Preparation for Prison Disciplinary Infraction Hearings

Returning Citizens should locate a knowledgeable prisoner rights advocate at their prison or an external consultant to prepare for a hearing. These advocates will help them prepare a written statement, compile any documentary evidence, and provide instruction on presenting each at prison discipline proceedings.

Through their research, and the statement the Returning Citizen presents, they will be on the best footing possible. Returning Citizens should prepare for hearings the same way as a criminal court. The Returning Citizens should always attempt to present a list of witnesses to appear on their behalf, and they should also request a staff representative to assist them.

Discipline Hearing Officer (DHO)

If the charges are referred to the DHO for prison discipline proceedings, the Returning Citizens has the right to request a staff representative to assist with their defense and to call witnesses. Returning Citizens are also advised of their right to be present at the hearing (as well as the right to waive appearance), their rights surrounding the hearing itself, and are provided with notice of the hearing.

This notice must be issued at least twenty-four hours before the disciplinary hearing officer's hearing. Those who remain in the general population will typically wait a few weeks before their hearing, while those housed in solitary confinement may wait a month or more. This is the most stressful period for many Returning Citizens when faced with a shot in prison.

DHO Hearing

Once in front of the DHO, the Returning Citizen can have their staff representative and witnesses present. The Returning Citizens can also present documentary evidence of innocence and make an official statement. Returning Citizens retain the right to remain silent, but silence can be used "to draw an adverse inference."

The DHO reads the description of the alleged misconduct, the Returning Citizen presents a statement and evidence, and the DHO makes a finding. This is the point when the Returning Citizens defends against the incident report in prison.

Witnesses can be called, a staff representative is present, and the DHO is usually better trained than sergeants and lieutenants.

The officer then makes one of four dispositions:

- The Returning Citizens committed the charged prohibited act(s);
- The Returning Citizens committed a similar prohibited act(s);
- The Returning Citizens did not commit the charged prohibited act(s); or
- The incident report requires further investigation/review.

DHO Report

If the Returning Citizens is found to have committed a prohibited act(s), the DHO will immediately impose sanctions. These may include loss of privileges (commissary, phone, visitation, email, etc.), monetary restitution, good time, and disciplinary segregation. Again, this significantly depends on the severity of the incident in prison.

Once the report is issued, the Returning Citizen can appeal through the Administrative Remedy Program.

If the Returning Citizens is found not to have committed the charged prohibited act(s), all charges and records thereof will be expunged. If the incident report is referred for further investigation/review, the investigating staff member will continue the investigation based on the disciplinary hearing officer's directives.

Class A Disciplinary Offenses

A1 - Seize or hold a hostage or in any manner unlawfully detain any person against his/her will.

A2 - Participate in a riot, insurrection, work stoppage or group demonstration, or incite/encourage others to riot, participate in an insurrection, work stoppage or other group demonstration.

A3 - Commit an assault on a staff member with a weapon or by any other means likely to produce injury, such as hitting, kicking, pushing, pulling, throwing objects.

A4 - Commit an assault on another with a weapon or any other means likely to produce injury.

A5 - Commit an assault on another inmate with intent to commit any sexual act.

A6 - Escaping or attempting to escape from any prison facility, community assignment, during transport, or from the supervision of DOC staff or its authorized agent. Attempt will include possession of escape plans, possession of any object that could aid in an escape, attempt to hide within the facility to affect an escape, or any other action that could result in escape if correctional staff did not intervene.

A7 - Possess, manufacture, and/or detonate an incendiary on explosive devise.

A8 - Set a fire that endangers the life of another person or damages state property.

A9 - Commit an assault on a staff member by throwing liquids, (including but not limited to urine and feces) or spitting on a staff member.

A10 - Fight or engage in a mutual physical confrontation involving

weapons (including but not limited to knives, locks and razors); or resulting in outside medical attention.

A11 - Commit an assault on a staff member with intent to commit any sexual act.

A12 - Manufacture, possess, introduce, sell or use any unauthorized controlled substance, unauthorized intoxicant or alcoholic beverage, or possess associated paraphernalia.

A13 - Refuse to submit to a drug test or breathalyzer test, or interfere with the taking of such test.

A14 - Participate in, or organize, whether individually or in concert with others, any gang or Security Threat Group (STG), or participate in any activity or behavior associated with a Security Threat Group.

A15 - Offer, give, solicit or accept a bribe or offer to give or withhold anything to persuade staff to neglect duties or perform favors.

A16 - Possess or use in any manner any type of unauthorized recording or image taking device or any type of unauthorized communication device whether audio, video, or any device that has direct outside communication capability; e.g. internet, email, instant message. Examples include but are not limited to smart phones, mobile cellular phones, desktops, laptop, personal digital assistants, cameras, tape recorders or digital recorders that can be used to send and/or receive any type of messages/images for any purpose.

A17 - Commit an assault on any person, other than an employee or inmate, with intent to commit any sexual act.

A18 - Knowingly make to any person a false oral or written allegation about a staff member, that, if true, could expose the staff member to criminal liability.

A19 - Commit an assault on another by throwing liquids (including but not limited to urine and feces) or spitting on another.

A20 - Wrongfully take, give away, or carry away, canteen inventory/cash, which results in a loss of more than one hundred dollars ($100.00).

A21 - Extortion, strong-arming, verbal, or physical intimidation for personal or financial gain.

A98 - Deliberately provide false and/or misleading information to staff during an investigation related to any offense in this class.

A99 - Attempt to commit any of the above-listed offenses, aid another person to commit any of the above-listed offenses, or make plans to commit any of the above-listed offenses. It shall be no defense that an individual was prevented from completing any of the above offenses by prison staff or intervening circumstances.

Class B Disciplinary Offenses

B1 - Possess or have under control any weapon or instrument to aid in an assault, insurrection or riot.

B2 - Flood cell(s).

B3 - Willfully tamper with, damage or block any locking device, fence, door, gate or window.

B4 - No longer in use; upgraded to A12.

B5 - Knowingly inhale, smell or breath any vapors, fumes or odors, or possess for the purpose of inducing or attempting to induce intoxication through inhalation; or possess, inject, or ingest any non-controlled substance for the purpose of altering mental or

physical capacity.

B6 - Commit, solicit or incite others to commit any sexual act or indecently expose oneself, or touch the sexual or other intimate parts of oneself or another person for the purpose of sexual gratification.

B7 -Instigate or provoke an assault on another.

B8 -Interfere with a staff member in the performance of his or her duties.

B9 - Violate any law of the State of North Carolina or the United States of America.

B10 - Commit or incite others to commit acts, which spread or may spread communicable diseases, or possess any instruments capable of spreading communicable diseases (including but not limited to tattooing instruments and needles).

B11- No longer in use; upgraded to A13.

B12 - Leave, quit without authorization, fail to report, or neglect to adhere to approved schedules for community based programs.

B13 -Instigate or provoke an assault on a staff member.

B14 - Willfully damage, destroy, alter, tamper with or lose state property or property belonging to another.

B15 - Communicating directly, indirectly, via a third party, or in any manner with victims, or family members of the victims, who have requested in writing to Department of Correction officials that such communication is unwanted.

B16 - Possess any tobacco products or paraphernalia; or possess unauthorized lighters or lighting devices; or use any tobacco products.

B17 - Causing a work stoppage, or delaying work while on

community work assignment in the community, causing the inmate to be returned to the facility due to inmate misconduct.

B18 - Threaten to harm or injure staff; (Upgrade from C12).

B19 - Sell, accumulate, give, misuse, or hide medication; (Upgrade from C1).

B20 - Commit an assault on a staff member in a manner unlikely to produce injury.

B21 - Commit an assault on another in a manner unlikely to produce injury.

B98 - Deliberately provide false and/or misleading information to staff during an investigation related to any offense in this class.

B99 - Attempt to commit any of the above-listed offenses, aid another person to commit any of the above-listed offenses, or make plans to commit any of the above-listed offenses. It shall be no defense that an individual was prevented from completing any of the above offenses by prison staff or intervening circumstances.

Class C Disciplinary Offenses

C1 - No longer in use. See Offense B19

C2 - Direct toward or use in the presence of any State official, any member of the prison staff, any inmate, or any member of the general public, oral or written language or specific gestures or acts that are generally considered disrespectful, profane, lewd, or defamatory.

C3 - Willfully disobey or fail to obey or cause another inmate to disobey or fail to obey any lawful order of a prison official or employee, or any other lawful order to which subject.

C4 - Fight or engage in mutual physical confrontation not involving weapons.

C5 - Offer, give, solicit or accept a bribe or offer to give or withhold anything to persuade another to neglect duties or perform favors.

C6 - Leave, quit without authorization, or fail to report to any facility job, work or program assignment, or scheduled appointment.

C7 - Threaten to harm or injure another or threaten to damage the property of any person.

C8 - Wrongfully take or carry away the personal property of another or State property or accept or buy such property with the knowledge it has been wrongfully taken.

C9 - Barter or trade; loan or borrow; solicit or engage in any business activity.

C10 -Intentionally inflict self-injury for any reason.

C11- Misuse or use without authorization, the telephone or mail.

C12 - No longer in use. See Offense B18.

C13 - Willfully create a hazardous or physically offensive condition or situation; (Formerly Offense D5)

C14 - Possess funds in a form other than authorized by Division of Prisons' Policy, in excess of the authorized amount, or from an unauthorized source, (Formerly Offense D10).

C15 - Possess stamps in excess of the authorized amount as specified in Division of Prisons' policies.

C99 - Attempt to commit any of the above-listed offenses, aid another person to commit any of the above-listed offenses, or make plans to commit any of the above-listed offenses. It shall be no defense that an individual was prevented from

completing any of the above offenses by prison staff or intervening circumstances.

Class D Disciplinary Offenses

D1 - Be in an unauthorized location.

D2 - Negligently fail to perform or complete assigned duties.

D3 - Possess contraband not constituting a threat of escape or a danger of violence.

D4 - Gamble or possess gambling paraphernalia.

D5 - No longer in use. See Offense C13.

D6 - Fail to go to bed when the lights are dimmed or get up during the night without securing permission of the correctional staff.

D7 - Exchange articles of clothing/linen/sheets, possess unauthorized or excess clothing/linen/sheets, or mutilate or alter State issued clothing/linen/sheets or wear or use same.

D8 - Counterfeit, forge, alter, or reproduce without authorization any document, article of identification, stamps, or other papers, or knowingly possess such falsified materials.

D9 - No longer in use. See Offense B14.

D10 - No longer in use. See Offense C14.

D11 - No longer in use. See Offense C14.

D12 - Fail to keep living quarters in a clean and/or proper condition.

D13 - Fail to observe basic standards of personal hygiene in bathing and grooming.

D14 - Feign physical or mental illness or disablement for any purpose.

D15 - Misuse prison supplies.

D16 - Assist another person with litigation or legal matters.

D99 - Attempt to commit any of the above-listed offenses, aid another person to commit any of the above-listed offenses, or make plans to commit any of the above-listed offenses. It shall be no defense that an individual was prevented from completing any of the above offenses by prison staff or intervening circumstances.

AUTHORIZED DISCIPLINARY PUNISHMENTS

Class A

Disciplinary Segregation: 60 days

Loss of Credit Time: 40 days

Extra Duty: 50 hours

Demotion: Minimum to Medium, or Medium to Close

Loss of Privileges: Loss of 3 not to exceed 6 months

Limited Draw: $10.00 not to exceed 6 months

Class B

Disciplinary Segregation: 45 days

Loss of Credit Time: 30 days

Extra Duty: 40 hours

Demotion: Minimum to Medium

Loss of Privileges: Loss of 2 not to exceed 4 months

Limited Draw: $10.00 not to exceed 4 months

Class C

Disciplinary Segregation: 30 days

Loss of Credit Time: 20 days

Extra Duty: 30 hours

Demotion: Minimum II or Minimum I

Loss of Privileges: Loss of 2 not to exceed 2 months

Limited Draw: $10.00 limited draw not to exceed 2 months

Class D

Disciplinary Segregation: 15 days

Loss of Credit Time: 10 days

Extra Duty: 20 hours

Loss of Privileges: Loss of 1 not to exceed 30 days

Limited Draw: $10.00 not to exceed 1 month

SAGE

ENCYCLOPEDIA OF CRIMINAL JUSTICE ETHICS

DUE PROCESS RIGHTS OF PRISONERS

Due process is mentioned twice in the United States Constitution. The Fifth Amendment states that no person should be deprived of life, liberty, or property by the federal government "without due process of law." Similarly, the Fourteenth Amendment states in part that "nor shall any State deprive any person of life, liberty, or property, without due process if law." In other words, Due Process Clause of the Fifth Amendment was reaffirmed in the Fourteenth Amendment, which explicitly applied it to the states.

Prisoners who allege that their constitutional rights have been violated can file a claim under Section 1983 of the United States Code. However, before prisoners can succeed in a Section 1983 claim, they must demonstrate two essential elements. First, prisoners must show a person acted under the color of state law, which means that officers derived their authority from their position as prison officials clothed with state power. Second, inmates must show that prison officials caused a violation of a clearly established constitutional or federal right.

Generally speaking, the phrase "due process" refers to one of two sets of rights: substantive and procedural due process. Substantive due process involves rights related to personhood, such as the right not to be discriminated against or the right to privacy. Procedural due process governs how legal (or disciplinary) proceedings must be carried out. Prisoners most commonly file due process claims that centered on procedural due process.

When inmates violate institutional rules, they may be subjected to various disciplinary actions, and efforts are commonly made to match the seriousness of the action to the seriousness of the violation. Some of the more serious disciplinary actions can affect inmates' sentences

(e.g., a reduction of good time credits) and/or temporarily alter their living conditions (e.g., movement from the general population to segregation). As such, disciplinary actions are perhaps the most frequently contested and litigated area in prison.

One of the most of noteworthy cases on due process is Wolff v. McDonnell (1974), which involved inmate disciplinary hearings. Respondents, prison inmates within the Nebraska Department of Corrections, brought suit alleging that Nebraska prison disciplinary procedures involving the loss of inmate good time violated the due process clause of the Fourteenth Amendment and that inmate legal assistance during disciplinary hearings did not meet constitutional standards. The Court ruled that inmates are entitled to due process in prison disciplinary proceedings that can result in the loss of good time or in punitive segregation and inmates are entitled to legal counsel in such proceedings including the use of inmate legal advocates. The Court set the following guidelines for disciplinary proceedings:

1. Advanced written notice of the charges must be given to the inmate within twenty-four hours before appearing in front the disciplinary board.
2. There must be a written statement by the fact finders as to the evidence relied on and the reason for the disciplinary action.
3. The inmates must be allowed to call witnesses and present evidence in their defense, as long as it does not jeopardize the safety and security or goals of the institution.

4. Counsel substitute (either a fellow inmate or staff) will be allowed when the inmate is illiterate or when the complexity of the issues makes it unlikely that the inmate will be able to collect and present evidence for an adequate comprehension of the case.
5. The prison disciplinary board must be impartial.

In Hewitt v. Helms (1983), the United States Supreme Court examined whether the Fourteenth Amendment's Due Process Clause was violated when a prisoner was placed in

administrative segregation. Helms was a prisoner at the State Correctional Institute at Huntingdon, Pennsylvania. On December 3, 1978 a riot broke out in the correctional facility. Prison officials removed Helms from general population and placed him in administrative segregation pending an investigation into his role in the riot. On January 19, 1979, while in administrative segregation, Helms allegedly assaulted a correctional officer. He was found guilty by a prison disciplinary board and sentenced to six months in administrative segregation. Helms sued in federal district court claiming that his due process rights had been violated as a result of being confined in administrative segregation. Helms argued that since Pennsylvania created a law that specified a procedure to regulate the use of administrative segregation, that they had essentially created a liberty interest for prisoners. Some argue this case is an expansion of the Wolff decision because the Court held that when states require (through laws or regulations) that inmates be placed in administrative segregation for certain violations, a liberty interest is created and due process is required. However, the Court concluded that the discretionary (as opposed to mandatory) use of administrative segregation with inmates does not create a liberty interest, even though such segregation may entail many more restrictions on inmate freedoms.

The U. S. Supreme Court overruled the position it had taken in Hewitt in 1995 in Sandin v. Conner. DeMont Conner was charged with violating prison rules when he allegedly directed foul and abusive language toward a correctional officer during a strip search. Conner was found guilty and sentenced to 30 days in administrative segregation. He filed suit in District Court of Hawaii claiming that prison officials deprived him of his Fourteenth Amendment procedural due process rights in connection with the disciplinary hearing. The Ninth Circuit Court of Appeals ruled that Conner had a liberty interest to be free from disciplinary segregation and he had not received all of his due process rights at his disciplinary hearing. The U.S. Supreme Court reversed the Ninth Circuit Court. The majority reasoned that due process no longer depends on whether there is language mandating a particular disciplinary action for a particular violation; the nature of the discipline is what counts. Moreover, only if discipline constitutes an “atypical, significant deprivation” and is not “within the range of confinement to be normally expected” is

a liberty interest created and the due process of Wolff required. In other words, if the punishment imposed for misconduct does not entail a significant departure from the basic conditions of a prisoner's sentence, a prisoner has no liberty interest in avoiding that particular punishment.

In Marion v. Columbia Correctional Institution (2009), United States Court of Appeals for the Seventh Circuit revisited the Sandin standard. Marion and his cellmate, Snipes were involved in a physical altercation and had to be separated by correctional officers. Marion was placed in disciplinary segregation. He was subsequently found guilty of violating institutional rules and received 240 days in the segregated housing unit. The court concluded that his confinement did not implicate a due process right because the discipline he received did not

increase the duration of his confinement or subject him to an "atypical and significant" hardship, which is consistent with the ruling in Sandin.

The classification of inmates is based on assessments of the risks and problems posed by an inmate as well as the inmate's rehabilitative needs. It involves making decisions about what an inmate's custody level should be, at which particular facility the inmate should be placed, where the person will live within the facility, what programs he or she needs to participate in, and other decisions impacting the inmate. Inmates undergo classification shortly after being sentenced to prison and then are reclassified periodically throughout their sentences. Because decisions to transfer inmates between institutions are incidental to classification decisions, court rulings in transfer cases have been applied to classification cases.

In Meachum v. Fano (1976), the Supreme Court ruled that the Fourteenth Amendment does not entitle an inmate to a due process hearing when the inmate is transferred from one prison to another, even if the conditions at the receiving prison are substantially less favorable to the prisoner. The Court reasoned that the Constitution does not require prisoners to be placed in a

particular prison. Therefore, inmates are not entitled to due process protections in matters regarding inter-prison transfers. In Vitek v. Jones (1980), however, the Court ruled that involuntary transfer from a prison to a mental hospital setting involves a liberty interest and therefore necessitates a due process hearing. As the Court reasoned that a criminal conviction and sentence of imprisonment does not authorize the State to classify inmates as mentally ill and to subject inmates to involuntary psychiatric treatment without additional due process protections. Vitek gave inmates facing transfer to a mental hospital essentially the same due process protections spelled out in Wolff v. McDonnell, plus an opportunity to cross-examine witnesses provided there is no compelling rationale for disallowing cross-examination.

It is also necessary for correctional personnel to search routinely cells for contraband to uncover any potential safety or security risks to staff, other inmates, and/or the facility. If contraband is discovered, inmates are subjected to disciplinary action. In Denny v. Schultz (2013), the U.S. Court of Appeals for the Third Circuit whether the disallowance of good time credits after the plaintiff was found to be in possession of weapons in violation of institutional rules violated his due process rights under the Fourteenth Amendment. Denny argued that the weapons belonged to his cellmate and he was unaware there were weapons in the cell. The disciplinary hearing officer found him guilty of weapons possession and sanctioned him with the forfeiture of 40 days of good time credit and imposed 60 days of disciplinary segregation. The Court ruled the recovery of the weapons from Denny's cell constituted "some evidence" that he was, at a minimum, in constructive possession of the weapons. As a result, the Court concluded that disciplinary hearing officer did not violate Denny's due process rights he found him in violation of weapons possession and sanctioned him with forfeiture of his good time.

Correctional staff also is responsible for ensuring that they address the "serious medical needs" on prisoners in their care. A failure to do so may result in a 1983 Action and such is the case of Meier v. County of Presque Isle. Paul Meier was arrested for driving under the influence of alcohol and taken to jail. His blood alcohol content (BAC) was .31 (almost four times the

legal limit). On intake, he did not appear to be in need of medical attention but the officer on duty contacted the facility's on-call doctor. The doctor advised the officer to "keep an eye on him," which she did. The following day he was found unconscious in his holding cell and had suffered from an apparent seizure. She immediately notified her supervisors and an ambulance was summoned to the jail. Meier remained in a coma for six months before ultimately dying. His wife filed suit claiming that her husband's due process rights to medical care were violated. The Court held that (1) although the deputy knew that the husband's BAC was over .30, such intoxication by itself was insufficient to put the officer on notice that Meier needed medical attention; (2) the officer called a doctor, who told her to monitor Meier, and the record log of her activity demonstrated that she complied with the doctor's orders and that during her shift, no signs of medical need manifested; (3) officer two did not act with deliberate indifference but immediately sought medical assistance Meier when she found him unconscious and the undersheriff and the detective responded to the call for help, rendering first aid in the way that seemed appropriate at the time; and (4) because the individual defendants were not liable, the county could not be held liable under § 1983.

Although the legal outcome was favorable to the correctional officers in the Meier cases, the courts sometime rule in favor of the plaintiff. Norman Smith was arrested for possession of a controlled substance and taken into custody at the Cook County Department of Correction (CCDOC). He was subjected to routine medical screens that revealed he had elevated blood pressure. He was given a week's supply of medication. According to Smith's cellmate, Carlos Matias, Smith exhibited symptoms of illness on the first day. Matias testified that Smith was dizzy, vomiting, and asked Matias to initiate a medical request, which Matias did. Cermak provides additional medical services to inmates as needed. Each day, a Cermak med tech is required to visit the tiers and dispense medication, respond to inmate complaints, and collect medical request forms. However, the officers admitted that request forms were not always picked up. Smith's condition continued to deteriorate and he subsequently died. His mother filed suit claiming his due process rights to medical care had been violated. The Court ruled that Cook

County did violate Smith's due process rights and Smith's mother was awarded $4,450,000.

Although most of the prison litigation cases involving Fourteenth Amendment center on issues of procedural due process, inmates have filed cases alleging that their substantive due process rights have been violated. For example, in Woods v. White (1988) the U.S. District Court for the Western District of Wisconsin whether the plaintiff's constitutional right to privacy had been violated when prison medical staff, White and Smith, had discussed the plaintiff's HIV status with other nonmedical staff and inmates. White and Smith urged the District Court to find that they were entitled to qualified immunity because they could not have known that disclosure violated the plaintiff's right to privacy. The District Court held that Woods retained his constitutional right to privacy in his medical records. In addition, White and Smith were not entitled to qualified immunity because their unjustified dissemination of confidential medical records to nonmedical staff and other inmates did not fall within their sphere of discretionary functions.

Prisoners can file Section 1983 claims when correctional personnel cause a violation of a clearly established constitutional or federal right. Correctional officers and administrators should receive proper training to avoid Section 1983 claims.

Sage
Encyclopedia of Criminal Justice Ethics
Kimberly D. Dodson
Western Illinois University-Quad Cities

See Also: Cruel and Unusual Punishment (Prohibitions Against), Human Rights, Prison Overcrowding, Prisoner Rights, Rights (Under the Law), and The Rule of Law

Further Readings

Anderson, James F., Nancie J. Mangels, and Laronistine Dyson. Significant Prisoner Rights Cases. Durham, NC: Carolina Academic Press.

Babcock, William. “Due Process in Prison Disciplinary Proceedings.” Boston College Law Review, v. 22 (1981).

CONSTITUTIONAL LAW-PRISON DISCIPLINARY PROCEEDINGS AND THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION

Constitutional Law-Prison Disciplinary Proceedings and the Fifth Amendment Privilege Against Self-Incrimination Any determination of the rights retained by prison inmates is complex because of the conflict between the interest in maintaining the basic fair treatment assured all individuals by constitutionally guaranteed freedoms and protections and the competing interest of the state in allowing prison officials sufficient discretion to administer a safe and effective prison system.'

Prison disciplinary proceedings, in which officials can impose removal of good time credits,2 punitive segregation' or other lesser punishments4 for infractions of prison regulations, bring this problem into still sharper focus. The prisoner is in danger of a substantial loss of liberty in a procedure in which he is unprotected by the rights guaranteed to a defendant outside prison walls. Prison authorities, on the other hand, confront an individual suspected of rejecting their regulations and controls and therefore posing a serious threat to order and security within the institution. In a 1974 case, Wolff v. McDonnell,5 the United States Supreme Court examined prison disciplinary hearings for the first time and' held that the due process rights of inmates are limited to those that pose little or no threat to the prison administration or the state's interest." In Baxter v. Palmigiano7 the Court was presented with the issue whether the 1. Discretion is necessary primarily to allow prison officials to act quickly to preserve control and to provide effective rehabilitation, security and a safe environment for prison employees as well as inmates. Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974). 2. Good time credits are granted in many prison systems for time served in prison without disciplinary sanctions, and reduce the length of sentence remaining to be served. Notte, Constitutional Law-Procedural Due Process in Prison Disciplinary ProceedingsThe Supreme Court Responds, 53 N.C.L. REv. 793, 793-94 (1975). See generally McGinnis v. Royster, 410 U.S. 263 (1973). 3. Punitive segregation or solitary confinement generally consists of restriction to a cell either full time or for most of each day, without opportunities for recreation or exercise and sometimes with a reduced diet -and reduced access to reading matter. U.S. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 50 (1967). 4. The lesser punishment most commonly used is loss of privileges for a given period of time. Id. See also Proposed Regulations Governing Procedures at the Adult Correctional Institutions, Rhode Island, reprinted in Morris v. Travisono, 310 F. Supp. 857, 874 app. (D.R.I. 1970). 5. 418 U.S. 539 (1974). 6. See text accompanying notes 40-44 infra. 7.

96 S. Ct. 1551 (1976). [Vol. 55 DISCIPLINARY PROCEEDINGS fifth amendment privilege against self-incrimination" forbids the taking of a negative inference from the silence of a prisoner at a disciplinary hearing to which the privilege against self-incrimination applies.9 lit holding that such an inference is permissible,'0 the Court decreased the protection provided by -the fifth amendment in the prison context, and in so doing took a further step in the process of limiting the rights of imprisoned individuals. In Baxter the Court jointly considered two United States Court of Appeals cases challenging the constitutionality of prison disciplinary proceedings under 42 U.S.C. section 1983." The first, Clutchette v. Procunier,'2 was an action brought by inmates of the California penal institution at San Quentin. The United States District Court for the Northern District of California found that the disciplinary proceedings violated the due process clause of the fourteenth amendment because they denied counsel to prisoners. Because of this denial the prisoners were forced to give up their constitutional privilege against self-incrimination in order to present a defense that could otherwise have been presented for them by a lawyer while they remained silent.' 3 In its final consideration of the case,' 4 -the Court of Appeals for the Ninth Circuit affirmed, holding that -an inmate faced with any form of discipline was entitled to notice of claimed violations, an opportunity to be heard and present witnesses, a hearing before a detached and neutral body, and a decision based on evidence introduced at the hearing.' 5 The court also held that prison officials could, in their discretion, refuse 8. U.S. CONST. amend. V in pertinent part provides: "[Nior shall [any person] be compelled in any &riminal case to be a witness against himself ... 9. 96 S. Ct. at 1556. 10. Id. at 1558-59. Justice White wrote the opinion for the majority, with Justices Brennan and Marshall concurring in part and dissenting in part. Justice Stevens did not take part in the decision. 11. 42 U.S.C. § 1983 (1970) states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. 12. 328 F. Supp. 767 (N.D. Cal. 1971). 13. Id. at 777-78. 14. The Court of Appeals for the Ninth Circuit originally held that the minimum due process requirements for parole and probation revocations applied to disciplinary proceedings as well. 497 F.2d 809 (9th Cir. 1974). After the Supreme Court decision in Wolff v. McDonnell, 418 U.S. 539 (1974), rehearing was granted and the court of appeals' final decision was reported at 510 F.2d 613 (9th Cir. 1975). 15. 510 F.2d at

614, aff'g in part 497 F.2d 809 (9th Cir. 1974). 1977] 255 NORTH CAROLINA LAW REVIEW to provide an opportunity for confrontation and cross-examination, but written reasons for that denial were to be given to the prisoner or the denial would act as "prima facie evidence of abuse of discretion."'0 Finally, the court affirmed the district court's holding that Miranda v. Arizona7 secured a prisoner's right to counsel in a disciplinary proceeding for activity violating state criminal laws as well as prison regulations.' 8 In the second case, Nicolas A. Palmigiano, an inmate of the Rhode Island Correction Institution, faced a disciplinary hearing for inciting a disturbance within the prison.' 9 Prior to the hearing Palmigiano was informed that he might be prosecuted for a violation of Rhode Island criminal law, and -that he could consult with his attorney but that the attorney could not be present during the hearing itself. He was also advisedithat he had a right to remain silent 'but that his silence would be held against him in the proceeding. Following the disciplinary hearing at which he remained silent, Palmigiano was placed in solitary confinement for thirty days and had his classification status downgraded. Palmigiano sued, claiming the proceeding violated his rights under the due process clause of the fourteenth amendment to the Constitution.2" The United States District Court denied relief.2 The original decision of the Court of Appeals for the First Circuit,2 " a reversal of the district court, was vacated by the Supreme Court in view of its decision in Wolff.28 On remand, the First Circuit reaffirmed its initial holding, 4 finding that Palmigiano's fourteenth amendment due process rights were violated by the disciplinary procedure.2 5 Furthermore it held that the protections required by Miranda and Mathis v. United States0 to safeguard the privilege against self-incrimination in a custodial interrogation, 16. 510 F.2d at 616. 17. 384 U.S. 436 (1966). 18. 510 F.2d at 616. 19. Palmigiano, an inmate serving a life sentence for murder, was charged with urging other prisoners not to return to their cells for lock-up in the evening in order to register protest for the failure of the prison administration to provide medical assist- ance for a fellovi prisoner who was violently ill. Palmigiano v. Baxter, 487 F.2d 1280, 1281 (lst Cir. 1973). 20. 96 S.'Ct. at 1555. 21. Id. The district court decision is unreported. 22. Palnigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973). 23. 418 U.S. 908 (1974). 24. 510 F.2d 534 (1st Cir. 1974) (per curiam). 25. Id. at 537. 26. 391 U.S. 1 (1968). See text accompanying note 69 infra. 256 [Vol. 55. DISCIPLINARY PROCEEDINGS including the presence of counsel, should have been provided to Palmigiano in light of the possibilities of future criminal 'prosecution.2 7 The Supreme Court reversed in both cases,28 stating that Wolffs limitation of the right to counsel at prison disciplinary hearings encompassed all such hearings, regardless of .the possibility of

future criminal prosecutions, and that neither Miranda nor Mathis was applicable since disciplinary proceedings are "not part of a criminal prosecution. ' 29 The Court further held that the practice of informing a prisoner of his rig ht to remain silent but stating also that his silence would be used against him is invalid neither per se nor as applied in a civil proceeding of this sort."° The Court first reasoned that the fifth amendment does not apply to prevent the taking of adverse inferences from silence in civil actions, although it does forbid such an inference in a criminal case." The Court then rejected the argument that Baxter fit within a group of civil cases32 in which an inference of guilt taken from defendants' fifth amendment silence in the'face of official questions had been invalidated, differentiating between those civil cases and the instant case on the ground that Palmigiano's silence alone did not automatically subject him to discipline.3 3 Finally, the Court reiterated that "[m]utual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application" is necessary, and that this - accommodation will limit the standard of rights necessary to constitute due process in all prison disciplinary hearings.34 The Supreme Court first utilized the "mutual accommodation" balancing process in the area of prison-related discipline in Morrissey v. 27. 510 F.2d at 536-37. 28. 96 S. Ct. at 1560-61. 29. Id. at 1556, citing Wolff v. McDonnell, 418 U.S. 539, 566 (1974). 30. 96 S. Ct. at 1558-59. 31. Id. at 1557-58. 32. Lefkowitz v. Turley, 414 U.S. 70 (1973); Gardner v. Broderick, 392 U.S. 273 (1968); Sanitation Men v. Sanitatioh Comm'r, 392 U.S. 280 (1968); Garrity v. New Jersey, 385 U.S. 493 (1967). See text accompanying notes 55-59 infra. 33. 96 S. Ct. at 1556-57. The majority opinion also'reexamined the due process issue presented in Wolff in this changed context and reaffirmed the denial of cross-ex- amination and confrontation to prisoners, refusing to require prison officials to provide written explanation of their discretionary decisions to forbid such actions. Id. at 1559. Further, the Court held unanimously that any holding regarding minimum due process standards when inmates are threatened with loss of privileges rather than the more seri- ous forms of discipline would be premature on these facts. Id. at 1560. The Court also held that the district court inappropriately treated Clutchette v. Procunier.as a class action within the contemplation of rules 23(c)(1) and 23(c)(3) of the Federal Rules of Civil Procedure without certifying it as such and identifying the class. Id. at 1554 n.1. 34. Id. at 1559, citing Wolff v. McDonnell, 418 U.S. 539, 556 (1974). .1977] 257 258 NORTH CAROLINA LAW REVIEW [Vol. 55 Brewer." The Court found in that case that due process applies to parole revocation hearings. After weighing and balancing governmental interests in efficient, inexpensive proceedings, as well

as in the parolee's rehabilitation,36 with the parolee's private interest, the parolee's due process rights were found to include: (1) preliminary and final hearings before neutral and detached bodies, (2) written notice of alleged violations, (3) the opportunity to be heard in person and to present witnesses and documents, (4) the opportunity to confront and cross-examine adverse witnesses, and (5) a written statement of the evidentiary basis and reasons for revocation.37 Gagnon v. Scarpelli8 applied similar due process requirements to probation revocation actions.39 In Wolff v. McDonnell"° the Court declined to extend the full range of Gagnon-Morrissey due process requirements to disciplinary procedures for acts occurring within the prison that could lead to confinement in disciplinary cells and deprivation of good-time credits. 41 In view of the state's strong interest in maintaining order within the prison and in the rehabilitation of prisoners4 2 the process of mutual accommodation in such instances creates less stringent due process requirements: (1) notice of the charges in sufficient time to prepare a defense, (2) opportunity to present witnesses and documentary evidence if it will not be hazardous to the safety or correctional goals of the prison, and (3) a written statement of findings of fact and reasons for the imposition of discipline.4 3 The right of confrontation and cross-examination and the 35. 408 U.S. 41 (1972). 36. The government interest in rehabilitation can be used not only to cut down on the absolute right to counsel in order to make disciplinary hearings more adversary and less corrective, but also to support a great many other due process rights on the grounds that unfair treatment will have a negative effect on a parolee's attitudes and greatly decrease his chances of successful rehabilitation. 408 U.S. at 484. See also U.S. PRESIDENT'S COMm'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 83 (1967); Hirschkop & Millemann, The Unconstitutionality of Prison Life, 55 VA. L. REV. 795, 830 (1969). 37. 408 U.S. at 489. 38. 411 U.S. 778 (1973). 39. Gagnon also added a requirement of counsel when the state authorities found a trained advocate would be necessary to present fairly the probationer's side of the case. Right to counsel is presumed in a number of situations. Id. at 783-91. 40. 418 U.S. 539 (1974). 41. Id. at 563-72. 42. In Baxter the state goal of rehabilitation was used by the Court solely as a rationale for cutting back the due process requirements. The arguments of note 36 supra seem to have been abandoned on the ground that rehabilitation is best promoted by a rapid, non-adversary hearing, even though the prisoner's belief in the fairness of the proceeding may be decreased. 43. 418 U.S. at 564-67. For criticism of this view see Millemann, Prison Disciplinary Hearings and Procedural Due Process, 31 MD. L. Rv. 27, 42 (1971). DISCIPLINARY

PROCEEDINGS right to-counsel were found not to be required by due process on the grounds that these rights would produce delay, put an adversary cast on the proceeding that would reduce its rehabilitative value, and limit the discretion of the prison administration in such a way as to compromise the security of the institution." Although the rights of prisoners have only been considered by the Supreme Court in the recent past,48 the fifth amendment privilege against self-incrimination has a long history of protection by the federal courts.46 According to its language, the fifth amendment applies only to criminal trials. One of its primary purposes is to protect against inquisitorial abuses of widespread government interrogation and investigation. 48 If the criminal limitation were strictly applied, however, the fifth amendment would be robbed of its effectiveness since incriminatory answers could be demanded in non-criminal "investigatory" procedures and then utilized in a criminal trial with the very effect that the amendment is designed to avoid. 49 Theoretically, the privilege against selfincrimination should protect any person who is being coerced by governmental authorities to testify to matters that might tend to incriminate him. 50 The protection extends not only to questions whose answers are incriminating per se, but to those whose answers would contain information that could either constitute a "link in the chain" of evidence that might incriminate defendant or give the authorities information that could reasonably be expected to lead to the discovery of such evidence.' 44. 418 U.S. at 567-70. 45. The federal courts have traditionally been reluctant to respond to inmate com- plaints and interfere with prison administration. See generally Comment, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 YALE L.J. 506 (1963); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. PA. L. REv. 985 (1962). 46. See, e.g., Arndstein v. McCarthy; 254 U.S. 71 (1920); Counselman v. Hitchcock, 142 U.S. 547 (1892); United States v. Burr, 25 F. Cas. 38 (C.C.D. Va. 1807). 47. See note 8 supra for the relevant text. The fifth amendment protection against self-incrimination was made applicable to the states through the fourteenth amendment in Malloy v. Hogan, 378 U.S. 1 (1964). 48. Ratner, Consequences of Exercising the Privilege Against Self-Incrimination, 24 U. CHm. L. REv. 472, 484 (1957). The privilege originated in England as a response to the procedures of the Star Chamber, which not only demanded that defendants give testimony that would lead to their convictions, but which tortured those who refused to speak under oath. E. GRISWOLD, THE FIFm AMENDMENT TODAY 2-4 (1955). 49. Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 VA. L. REv. 322, 323 (1966). 50. Counselman v. Hitchcock, 142 U.S. 547 (1892). See also Ratner, supra

note 48, at 493. 51. Maness v. Meyers, 419 U.S. 449 (1975); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Blau v. United States, 340 U.S. 159 (1950); Counselman v. Hitchcock, 142 U.S. 547 (1892). 1977] 259 NORTH CAROLINA LAW REVIEW The protection does not extend to prevent a defendant who remains silent from being damaged by the presence of unrefuted evidence tending to show his guilt. The natural inference arising out of the presence of such evidence 52 creates a dilemma for the defendant who must choose between presenting a defense and exercising his self-incrimination privilege. However, the inference taken from unrefuted evidence has generally been considered to be insufficiently coercive to create a threat to the fifth amendment privilege. Commentators have suggested that the inference is constitutionally acceptable because it arises out of the strength of the evidence presented and not out of defendant's exercise of his constitutional right.53 The fifth amendment does not forbid self-incrimination altogether. Rather, it forbids any governmental action that would coerce a citizen to incriminate himself involuntarily.5 4 The Supreme Court has recently invalidated two types of behavior that impermissibly threatened the free use of the fifth amendment privilege. In Griffin v. California" the Court held it to be unconstitutionally coercive to advise juries that they can draw an unfavorable inference from defendant's silence at his criminal trial. Such an inference would not only be a coercive penalty making the "assertion of the Fifth Amendment privilege 'costly,' "60 but would effectively negate the application of the privilege as a protection both for the innocent who fear that ambiguous answers to selected questions or their nervous appearance on the witness stand would tend to incriminate them and for the guilty who want to leave the full burden of 52. Some states allow comment on the use of the privilege in civil litigation. See, e.g., Morris v. McClellan, 154 Ala. 639, "45 So. 641 (1908), cited, with approval in Hinton & Sons v. Strahan, 266 Ala. 307, 96 So. 2d 426 (1957). The majority do not permit comment, but do allow the jury to draw an inference from a party's silence. See, e.g., Ikeda v. Curtis, 43 Wash. 2d 449, 261 P.2d 684 (1953). 53. See, e.g., Ratner, supra note 48, at 476; Comment, The Privilege Against SelfIncrimination in Civil Litigation, 1968 U. ILL. L.F. 75, 79. 54. In Boyd v. United States, 116 U.S. 616 (1886), the Court stated its policy as follows: rIllegitimate and unconstitutional practices get their first footing . . .by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more. in sound than in substance. It is

the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Id. at 635. This statement was quoted with approval in Spevack v. Klein, 385 U.S. 511, 515 (1967). 55. 380 U.S. 609 (1965). 56. Spevack v. Klein, 385 U.S. 511, 515 (1967), citing Griffin v. California, 380 U.S. 609, 614 (1965). 260 [Vol. 55 DISCIPLINARY PROCEEDINGS proving their criminal activity on the state.57 Any inference taken from silence amounts to an assumption that those who avail themselves of the privilege are either guilty or are perjurors who are using the privilege to block investigations and protect others although they have no personal fear of incrimination.5" The second form of coercion was discussed in a group of civil cases, two of which were Garrity v. New Jersey59 and Lefkowitz v. Turley."0 These cases concerned economically oriented civil sanctions that were automatically imposed on those claiming the privilege against self-incrimination before a government investigation. 6 " Such penalties were not actual inferences of guilt taken at the hearings where defendants' testimony was desired, but rather cousins to such inferences-assumptions that any person who could not testify freely and fully was guilty of something and therefore an unsuitable employee who should be removed from his or her job. The Supreme Court held that these collateral inferences were coercive in their non-rebuttable, automatic nature, and that the privilege may not be "condition[ed] by the exaction of a price. 62 Arguably the common factor in these cases is that the government acted in all of them both as interrogator and imposer of penalties.6" Protection against such a use of governmental power harks back to the fifth amendment's original purpose of protection from government inquisition 57. Slochower v. Board of Higher Educ., 350 U.S. 551, 557-58 (1956), modified, 351 U.S. 944 (1956) (per curiam). 58. Id. at 557. 59. 385 U.S. 493 (1967). 60. 414 U.S. 70 (1973). The other cases in the group are: Gardner v. Broderick, 392 U.S. 273 (1968); Spevack v. Klein, 385 U.S. 511 (1967); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956). 61. In Slochower, a statute required termination of employment of any city em- ployee who did not answer questions related to official conduct. Garrity involved police who were forced to answer questions or lose their jobs. Spevack involved an attempt at automatic disbarment of a lawyer who claimed the privilege. In Gardner, discharge of policemen was threatened if they failed to sign waivers of immunity before appearing before a grand jury. Finally, the New York contracts in issue in Lefkowitz required contractors to waive immunity and answer questions concerning state contracts or lose the right to contract with the state for five years. 62. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). This line of cases had two related holdings: first, that such coerced testimony could not

be used at a subsequent criminal trial, and second, that it was not permissible to penalize someone for remaining silent despite coercion to talk. Compare id. at 497-98, with Slochower v. Board of Higher Educ., 350 U.S. 551, 557-58 (1956). 63. Comment, The Privilege Against Self-Incrimination in Civil Litigation, 1968 U. ILL. L.F. 75; cf. Comment, Constitutionality of Administrative or Statutory Sanctions Upon the Exercise of the Privilege Against Self-Incrimination, 36 FoRD. L. Rv. 593 (1968). 19773 NORTH CAROLINA LAW REVIEW and abuse of governmental power to punish those who failed to cooperate. 64 The fifth amendment right was extended to situations of custodial interrogation by the Supreme Court's decision in Miranda v. Arizona." Because of the inherently coercive nature of custodial interrogation, Miranda required that the individual subject to such questioning be first informed of his right to remain silent and the fact that any statement made can be used against him in a criminal trial.m To ensure that defendant is aware of his fifth amendment right and is not coerced intb giving up his opportunity to exercise it, he was granted the right to consult a lawyer and to have him present at any time during questioning. 67 Mathis v. United States"" applied the Miranda procedures to custodial interrogation when the reason, for custody was unrelated to the investigation taking place and when the investigation itself was routine rather than accusatory. 69 Failure to give Miranda warnings produces the immediate result of barring any self-incriminating evidence from use at a future criminal trial unless the government can prove a voluntary waiver of fifth amendment rights.70 In Baxter the Supreme Court looked for the first time at the relationship between the fifth amendment privilege against self-incrimination and prison disciplinary hearings. In reconsidering the due process issue of confrontation and cross-examination, the Court rejected the argument that the accommodation reached in Wolff 71 should be modified because .64. Ratner, supra note 48, at 484-87. 65. 384 U.S. 436 (1966). 66. Id. at 467-69. 67. Id. at 469. 68. 391 U.S. 1 (1968). 69. Id. at 4-5. Mathis was in prison serving a state sentence when subjected to a routine federal tax.investigation. Although he was incarcerated on a different charge, aid it was possible that no criminal charges would arise out of the investigation, the Court found that the protective rights of Miranda applied and that any information given in that investigation was barred from future prosecution. Id. at 5. 70. Miranda v. Arizona, 384 U.S. 436, 476 (1966). The theory behind this action is that the coercive nature of the situation itself endangers the fifth amendment privilege. Barring the use of coercively obtained evidence is only a partial solution in view of the intention of Miranda to protect the fifth amendment privilege. It is arguable that exclusion of tainted evidence is

insufficient and that any jurisdiction failing to utilize the Miranda procedures or their equivalent to protect the fifth amendment could be directed to extend immunity to those who had been coerced into incriminating themselves. The idea of deliberate defiance of Miranda on the assumption that the evidence would be inadmissible at a crminal trial but might be of other value presents an entirely different set of problems. See generally Turner & Daniel; Miranda in Prison: The Dilemma of Prison Discipllline and Intramural Crime, 21 ButrALo L. REn'. 759, 770-71 (1972). 71. For a discussion of Wolff, see text accompanying notes 40-44 supra. 262 [Vol. 55 DISCIPLINARY PROCEEDINGS an inmate's interest is weightier when he is faced with possible criminal prosecution. The Court found instead that the interest of the state still outbalanced individual interests, and that prison officials must be left with full discretion in these areas.7 2 Although recognizing that the fifth amendment privilege was applicable to the Baxter interrogation despite its civil nature because of the possibility .f future criminal proceedings,73 the Court found that the disciplinary proceeding was neither criminal in itself nor as a stage of a pending criminal prosecution. The type of coercive inference forbidden from criminal trials by the strict holding of Griffinwas therefore correctly found to be inapplicable in this circumstance. 74 In addition, Justice White, writing for the majority, saw Baxter and the Garrity-Lefkowitz line of decisions as analytically separable.75 In those cases the refusal to testify alone resulted in a governmental sanction. In Baxter, by contrast, silence was assumed to have a connotation but would not result in discipline in the absence of other evidence.78 Justice Brennan, in the dissenting portion of his opinion, asserted that Baxter demonstrates the same use of an impermissible government sanction as a penalty for the use of the fifth amendment found in the earlier cases. 77 Neither of these arguments is lacking in logic. Baxter is indeed a very different type of case from Garrity, and is not only distinguishable but should be distinguished on the grounds mentioned by White. There is a difference between a statute or contract that invalidly provides a set penalty for constitutionally protected action and an administrative hearing, similar in many ways to a trial, in which some inference taken from an inmate's silence will become part of the evidence that might result in disciplinary action. This difference prevents Garrity and the cases following it from serving as adequate precedent for a decision striking down the Baxter procedures. The analysis of Justice Brennan, although it erroneously attempts to tie Baxter into this group, shows a deeper insight into the problem 72. 96 S. Ct. at 1559-60. 73. Both the majority opinion and the dissent agree that the fifth amendment applied to Palmigiano. Compare 96 S. Ct. at 1557 (majority opinion), with 96 S.

Ct. at 1561 (dissenting opinion). 74. 96 S. Ct. at 1557. For a discussion of the philosophy behind the Griffin holding, see text accompanying notes 52-58 supra. 75. 96 S. Ct. at 1557. 76. Id. 77. Id. at 1562-65 (Brennan, J., dissenting in part). 1977] .263 NORTH CAROLINA LAW REVIEW presented. The question before the Court was not whether the situation presented in Baxter involves the Garrity-Lekowitz type of coercion, 78 but rather whether the procedure used there was impermissibly coercive in itself. The majority made no comment on the relationship of the facts of Baxter to the philosophy espoused in Griffin,70 which forbade any action that will make the exercise of the fifth amendment "costly." Nor did the Court recognize the apparent inequity of considering constitutionally protected silence to be an inference of guilt when it was intended to benefit the innocent. Moreover, the Court failed to distinguish between an inference of guilt arising. out of the silence itself-an inference that would be in apparent conflict with the history of the fifth amendment privilege and with its purpose and philosophy as expressed in Griffin-and an inference arisihg out of unrefuted evidence.80 If the inference was taken from defendant's silence,. the majority did not adequately explain its approval. The assumption was made that the fifth amendment permits the taking of an inference against a party in a civil action who refuses to testify,8 1 although the Supreme Court had never previously approved this practice. No recognition was given to the idea that such inferences are permissible only because they are taken from unrefuted evidence, which is not protected by the fifth amendment, and not from the silence itself.'" -Furthermore, the knowledge that Rhode Island disciplinary decisions "must be based on substantial evidence manifested in the record of the disciplinary proceeding" s3 did not settle the question since it is unclear whether silence was or was not evidence manifested in the record. If the Baxter inference was an inference solely from the weight of the unrefuted evidence and therefore permissible, the facts of the case demand an investigation both of the sufficiency of the other evidence to support the decision of the disciplinary board 4 and of the coercive 78. For a discussion of the coercion involved in those cases, see text accompanying notes 59-64 supra. 79. 380 U.S. at 614. 80. See text accompanying notes 53-58 supra. 81. 96 S. Ct. at 1558. 82. See Comment, Penalizing the Civil Litigant Who Invokes the Privilege Against Self-Incrimination, 24 V. FLA. L. REv. 541, 549 (1972); Comment, The Privilege Against Self-Incrimination in Civil Litigation, 1968 U. ILL. L.F. 75, 79 (1968). Cf. Note, Use of the Privilege Against Self-Incrimination in Civil Litigation, 52 VA. L. REv. 322, 340-41 (1966). 83. 96 S. Ct. at 1557, quoting Morris v. Travisono, 310 F. Supp. 857, 873 (D.R.I. 1970).84. The disciplinary board's decision was based on reports of

prison officials and Palmigiano's silence. The majority speaks as if the silence did carry some independent 264 [VCol. 55 DISCIPLINARY PROCEEDINGS and misleading nature of the statement that Palmigiano's silence "would be held against him."- The Court's decision was apparently made without consideration of any of these problems. The application of Miranda and Mathis6 to prison disciplinary proceedings was summarily dismissed in the Court's consideration of the availability of counsel. The assurance of counsel was not considered a fifth amendment protection at all, although both the First and Ninth Circuits had based their decisions on the theory and rule of Miranda and Mathis.8 7 As the courts of appeals found, the situation in Baxter approximated that found inherently coercive in Mathis. In both cases officials questioned a man in prison whose custody was based on a charge other than that involved in the questioning. In both cases the questions were part of an investigation that could conceivably lead to criminal charges, but no criminal charges had yet been brought in either, and there was a possibility in each that no prosecution would ever begin. In Mathis, the Court found that the possibility that criminal prosecutions might result was sufficient to require full Miranda protections, including the presence of counsel to guard against erosion of the fifth amendment privilege.8 8 In Baxter, on the other hand, the Court held that the interrogations were not part of a criminal proceeding. 89 This analysis is insufficient to distinguish Baxter from Mathis, which applied full Miranda protections to a custodial interrogation although the investigation was a routine one unrelated to the reason for defendants imprisonment. Further, it ignores the fact that the essence of Mathis and Miranda was the protection of the fifth amendment privilege against self-incrimination, not the assurance of the right to counsel under the sixth and fourteenth amendments. 90 The Court had previously held that custodial interrogation is inherently coercive and produces a clear threat to the fifth amendment weight, although they assume that it would be insufficient in itself for a decision to discipline. See 96 S. Ct. at 1559 n.4, 1564-65 n.6. 85. Id. at 1555. Some indication of the Court's inattention to the power of this phrase is that the decision initially described the pronouncement as being that the inmate's silence would be held against him, and later said that Palmigiano was told that his silence could be held against him-a considerably weaker, less intimidating, less coercive warning. Compare id. at 1555 with id. at 1556. 86. See text accompanying notes 65-70 supra for a discussion of these cases. 87. 96 S. Ct. at 1556. 88. 391 U.S. at 4-5. 89. 96 S. Ct. at 1556. 90. See Mathis v. United States, 391 U.S. 1, 4-5 (1968); Miranda v. Arizona, 384 U.S. 436, 458-66 (1966). 265 NORTH CAROLINA LAW REVIEW privilege any time an individual faces the possibility of self-

incrimination at future criminal proceedings. Baxter was a case of custodial interro-" gation, and the consensus of the Court was that the fifth amendment applied. 1 It therefore defies logic to decide that the Miranda rights, set up as protections against threats to the privilege ahd affirmed in a similar situation in Mathis, do not apply in Baxter. When the Court eliminated the requirement of counsel in Wolff, it did so through the ise of a balancing test appropriate to limit the reach of the sixth amendment through the due process clause. In Baxter the Court erroneously extended the sixth amendment/due process balancing test to a situation where -the presence of counsel was required as a protection for the fifth amendment privilege against self-incrimination. Utilization of a valid limitation of the due process clause to remove any portion of the privilege against self-incrimination tarnishes the respected position of broad construction and expansive application it has occupied throughout its history. The privilege against self-incrimination has always been liberally construed because a strict construction limits its effectivness. 2 In its treatment of prison disciplinary hearings, the Supreme Court cut sharply into the philosophic underpinnings of the privilege by yielding to the assumption that a party claiming that privilege is guilty or is committing perjury. 93 Baxter affects a small class of people, but for those prisoners the Court has taken action that could reduce the privilege to "a hollow mockery."' 4 Moreover, the area in which the Court has chosen to limit severely both the absolute application and the effectiveness of the fifth amendment is one in which the privilege is probably the most necessary: Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.95 The Court held in Wolff that prisoners faced with disciplinary hearings were denied the instrumentalities of confrontation, cross-examination, and counsel necessary to present a defense. After Baxter, an inmate is 91. See note 73 and accompanying text supra. 92. Garrity v. New Jersey, 385 U.S. 493, 515 (1967), quoting Boyd v. United States, 116 U.S. 616, 635 (1886). 93. Slochower v. Board of Higher Educ., 350 U.S. 551, 557-59 (1956). 94. Id. at 557. 95. Grunewald v. United States, 353 U.S. 391, 422-23 (1957). 266 [Vol. 55 1977] EQUAL CREDIT 267 forced to speak and risk incriminating himself both at the disciplinary hearing and possibly in future criminal proceedings 6 or to keep silent and accept the burden of giving up his defense while preseriting an admission of his guilt to the disciplinry board.9 7 The combined effect of the two decisions is to place the prisoner in a procedural vise

from which there is no foreseeable release. ELLEN KABCENELL WAYNE Equal Credit Opportunity Act Amendments of 1976-An Overview of the New Law As the American consumer credit industry has grown, lawmakers repeatedly have turned to legislation and regulation in an effort to control abuse and discourage the development of unfair credit policies.' Part of this effort is represented by the Equal Credit Opportunity Act Amendments of 1976,2 passed in March, 1976, only five months after the original legislation became effective.' The most ambitious and controversial amendments expand the existing ban on discriminatory credit-granting procedures, impose new disclosure requirements on lending institutions and increase the statutory limits on creditor liability. Creditors insist that these amendments and the corresponding regu96. In light of the Court's view that Miranda is completely inapplicable to this situation, it is unclear whether the absence of protection for the fifth amendment privilege would cause self-incriminatory testimony given at a disciplinary procedure to be excluded from a later criminal trial. 97. 328 F. Supp. at 778. 1. Legislation in this area includes the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 1730f, 1831b, 2601-2617 (Supp. V 1975), and the Consumer Credit Protection Act, 15 U.S.C.A. 55 1601-1691f (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976). The latter encompasses the Truth in Lending Act, 15 U.S.C.A. §§ 1"601-1667e (West 1974, Cum. Supp. 1976, Supp. Pamphlet No. 1 1976, & Supp. Pamphlet No. 2, pt. 1 1976), the Fair Credit Billing Act, 15 U.S.C.A. 55 1666-1666j (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976), and the Equal Credit Opportunity Act, 15 U.S.C.A. 1691-1691f (West Cum. Supp. 1976 & Supp. Pamphlet No. 2, pt. 1 1976). 2. Pub. L. No. 94-239, 90 Stat. 251 (codified at 15 U.S.C.A. § 1691-1691f (West Supp. Pamphlet No. 2, pt. 1 1976)) (amending Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-1691e (Supp. V 1975)) [hereinafter cited as amendments]. 3. The original Equal Credit Opportunity Act, 15 U.S.C. § 1691-1691e (Supp. V 1975), became effective Oct. 28, 1975. Pub. L. No. 90-321, § 707, 88 Stat. 1525 (1974)