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**Procedural Due Process
In Prisoner Discipline Cases**

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❖ **Introduction**

Prisoner disciplinary charges and hearings, and punishments imposed following a finding that disciplinary rules have been violated are vital tools in maintaining order in correctional facilities. Because such punishments can include the loss of “good time credits” and a wide variety of privileges, as well as changes in the conditions of confinement, such as placement in disciplinary segregation, prisoner discipline has given rise to many prisoner lawsuits.

This two-part article examines some of the legal issues that arise in such cases, focusing on the requirements of constitutional procedural due process. It discusses legal requirements imposed by U.S. Supreme Court decisions, the evidentiary standard of supporting a finding of disciplinary rule violation by “some evidence,”

the requirements of notice and prisoner procedural rights, the grounds for imposing discipline, and the retaliatory filing of disciplinary charges. At the end of the second part of the article, there is a listing of useful and relevant resources and references.

❖ U.S. Supreme Court Requirements

Ever since [*Wolff v. McDonnell*](#), #72-679, 418 U.S. 593 (1974), it has been clear that serious disciplinary issues, which can result in the loss of work assignments or good time, require facilities to provide a degree of due process to the prisoner before the sanction is imposed.

The U.S. Supreme Court, in [*Superintendent, Massachusetts Correctional Institution at Walpole v. Hill*](#), #84-438, 472 U.S. 445 (1985), held that the federally mandated minimum due process constitutional evidentiary burden of proof in a prison disciplinary proceeding resulting in the loss of good time credits (which essentially results in the loss of an opportunity to shorten the period of incarceration) is “some evidence,” a standard far less stringent than the “beyond a reasonable doubt” utilized in criminal proceedings as well as actually less stringent than the “clear and convincing evidence” standard often used in proceedings involving important rights, such as parental status, or even the mere “preponderance of the evidence” standard utilized in civil lawsuits for money damages, which only requires that a successful plaintiff satisfy the burden of showing that their claims are more likely than not to be true.

The Court stated that the loss of good time credits threatens a prisoner’s prospective freedom from confinement, extending the length of his imprisonment. The prisoner therefore has a strong interest in seeing that he does not suffer such a loss arbitrarily. But at the same time, the Court was very concerned with accommodating that interest in an appropriate manner in the “distinctive setting of a prison, where disciplinary proceedings ‘take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so.’”

As a result of those concerns, the Court held that the requirements of constitutional due process are satisfied if “some evidence supports the decision by the prison disciplinary board to revoke good time credits.” The standard is deemed met if

“there was some evidence from which the conclusion of the administrative tribunal could be deduced.”

Determining whether this standard has been satisfied “does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board. We decline to adopt a more stringent evidentiary standard as a constitutional requirement. Prison disciplinary proceedings take place in a highly charged atmosphere, and prison administrators must often act swiftly on the basis of evidence that might be insufficient in less exigent circumstances.”

“The fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact. Revocation of good time credits is not comparable to a criminal conviction, and neither the amount of evidence necessary to support such a conviction, nor any other standard greater than some evidence applies in this context.”

In [*Sandin v. Conner*](#), #93-1911, 515 U.S. 472 (1995), the U.S. Supreme Court ruled that a prisoner placed in disciplinary segregation following charges of misconduct was not entitled to due process procedural protections. A state regulation simply requiring that disciplinary guilt be supported by substantial evidence did not result in a state-created constitutionally protected “liberty” interest for the prisoner. The focus in determining whether a state created a liberty interest shifted from a search for mandatory language in state laws or regulations to the nature of the deprivation imposed. Disciplinary segregation can violate due process only if the prisoner’s placement there imposed an “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”

In [*Heck v. Humphrey*](#), #93-6188, 512 U.S. 477 (1994), the U.S. Supreme Court held that courts should dismiss federal civil rights suits seeking damages when a judgment in favor of the plaintiff necessarily implies the invalidity of the plaintiff’s criminal sentence, but that sentence has not already been overturned. Many courts have applied the same principle to prisoner disciplinary cases, requiring that the prisoner first succeed in having the imposition of discipline be set aside before pursuing a federal civil rights lawsuit. The U.S. Supreme Court itself extended the principles in Heck to prison disciplinary hearing in [*Edwards v. Balisok*](#), #95-1352,

520 U.S. 641 (1997) ruling that a prisoner's federal civil rights lawsuit challenging procedures used to discipline him was barred when the disciplinary result had not previously been invalidated, if a judgment in the prisoner's favor would necessarily imply invalidity of the discipline.

In [*Muhammad aka Mease v. Close*](#), # 02-9065, 540 U.S. 749 (2004), however, the U.S. Supreme Court ruled that prisoners may pursue federal civil rights lawsuits for damages over prisoner discipline despite the fact that the disciplinary conviction has not been set aside, so long as the lawsuit challenges only the conditions of confinement, rather than the fact or duration of the confinement.

The parameters of constitutional due process in prisoner discipline are threefold: the prisoner must be provided notice that they have been accused of violating inmate rules, a hearing in front of an impartial hearing officer, and an opportunity to present their version of the incident at issue.

❖ “Some Evidence”

An example of the application of the “some evidence” standard is provided by [*Denny v. Schultz*](#), # 11-1450, 708 F.3d 140 (3rd Cir. 2013). In the case, a prisoner was disciplined and sanctioned with the forfeiture of 40 days of good time credit and 60 days in disciplinary segregation when a shank was found in his two-inmate cell. He claimed that the weapon was not his. Because each prisoner in the cell was responsible for keeping the cell free of contraband, he could properly be found to have been in constructive possession of the weapon. The mere discovery of the shank in the cell constituted “some evidence” that both prisoners in the cell possessed it, and that was sufficient to uphold the discipline.

While the burden of showing “some evidence” for a disciplinary violation may sound easy, “some evidence” cannot literally be satisfied by “none.” In [*Bryant v. State*](#), #CR-02-1556, 884 So.2d 929 (Ala. Crim. App. 2003), for example, the court found that mere testimony by a correctional officer in a prison disciplinary proceeding that a plastic bag with a green leafy substance found during another officer's pat down search of the prisoner contained marijuana was insufficient to support a determination of guilt. While scientific testing of the substance was not required to meet the “some evidence” standard applicable in a prison disciplinary proceeding, the officer's “mere conclusion” that the substance was drugs was

inadequate, and there was no evidence about the qualifications of either officer to identify marijuana.

In another case, the court found that imposing sanctions on a prisoner, including the loss of 151 days of good conduct time, for a charge of possession of a controlled substance was improper when there was no evidence that he possessed or even constructively possessed the heroin in question. [*In re Rothwell*](#), #D051584, 164 Cal. App. 4th 160, 78 Cal Rptr. 3d 723, 2008 Cal. App. Lexis 943 (4th Dist.).

In [*Sanders v. Page*](#), #13-3237, 773 F.3d 186 (8th Cir. 2014), cert denied, 136 S. Ct. 232 (2015), a federal appeals court found that the prisoner received adequate notice of the disciplinary charges against him, did not show that there were any witnesses or evidence that he was barred from presenting at the disciplinary hearing, and received a copy of the decision of the disciplinary hearing. The defendant officer was entitled to summary judgment as a matter of law because there was “some evidence” to support the discipline imposed against the plaintiff and “some evidence” that he committed the charged infraction.

The “some evidence” standard is a federal constitutional minimum. An individual state is free, as a matter of state law, to impose a greater burden than that if they choose, and some have.

New York, for instance, appears to apply a requirement that prison disciplinary convictions be supported by “substantial evidence,” which is more than “some,” but still far less than that required in criminal proceedings. See [*Callender v. Goord*](#), #98045, 24 A.D. 3d 1145, 809 N.Y.S.2d 218 (A.D. 3rd Dept. 2005) and [*Herring v. Goord*](#), #91647, 200 A.D. 2d 724, 750 N.Y.S.2d 373 (A.D. 2002).

New Jersey adopted a similar standard. In one case, a New Jersey prisoner was found guilty of disciplinary infractions of tattooing or self-mutilation, and of refusing to accept a housing assignment. He was about to be transferred from a “special needs” unit into the general population of the prison, which he did not want, as there had been publicity about him inheriting money because of the death of a relative. Fearing he would be subject to extortion in the general population, he straightened a paper clip and used it to cut his arms until they bled. While the prisoner claimed that the evidence used against him at the hearing was not “substantial” as required under state correctional rules, he did not deny doing the charged acts, so the court found no basis to overturn the discipline. [*Reldan v. N.J.*](#)

[*Dept. of Corrections*](#), #A-6348-08T3, 2010 N.J. Super. Unpub. Lexis 1854, 2011 WL 10118.

As noted before, however, in [*Sandin v. Conner*](#), #93-1911, 515 U.S. 472 (1995), the U.S. Supreme Court found that the mere fact that a state regulation required that disciplinary guilt be supported by substantial evidence, as opposed to “some evidence” did not result in a state-created constitutionally protected “liberty” interest for a prisoner.

❖ **Notice and Procedural Rights**

The notice that prisoners must receive before being disciplined must inform them of what specific rules they are accused of having violated, as well as sufficient facts, including time, date, and place of the incident, to enable the prisoner to prepare their defense. That should include a copy of any incident report filed. Sensitive information, however, such as the name of a confidential informant, much be redacted. The prisoner is also entitled to have any exculpatory evidence revealed.

The accused prisoner is entitled to a hearing before an impartial hearing officer if they wish, and the right to provide their side of the story through their own testimony or documents, and in many cases the testimony of witnesses. A witness may, in some instances, however, be denied, for security or other specific legitimate reasons, including unavailability, but the prisoner should be allowed to call witnesses “when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals.” Reasons for refusing to call a witness must be specified.

Prisoners do not have the right to be represented at disciplinary hearings by a lawyer nor to cross examine witnesses at the hearing. They may be entitled to assistance, however, to cope with language difficulties, illiteracy, or disabilities interfering with their ability to present a defense at the hearing. They must be informed of the time and place of the hearing.

The hearing must result in a written decision, but there is no requirement that it be formal or lengthy. Every state currently provides for some kind of administrative

appeal from prisoner disciplinary decisions, and the prisoner should receive notice of how to appeal.

Under the Prison Litigation Reform Act (PLRA), [42 U.S.C. Sec 1997e](#), a prisoner must exhaust available administrative remedies, such as any appeals procedure, before attempt to pursue a federal civil rights lawsuit under 42 U.S.C. Sec. 1983. For a detailed discussion of this exhaustion requirement, see [Prison Litigation Reform Act: Exhaustion of Remedies - Part One](#), 2011 (4) AELE Mo. L. J. 301 and [Prison Litigation Reform Act: Exhaustion of Remedies - Part Two](#), 2011 (5) AELE Mo. L. J. 301.

Unjustified violation of the right to present witnesses or other evidence can constitute a violation of due process. In [Ellison v. Zatecky](#), #15-1884, 820 F.3d 271 (7th Cir. 2016), an inmate was notified the he was facing a disciplinary proceeding based on his possession of heroin that was confiscated by a named officer during a cell search. He stated that this was not the officer who had searched his cell, which had been searched by two different officers, who found nothing. While the named officer’s report stated that he found heroin in cell 10-D, the inmate’s cell, a photo of the heroin was labeled “Cell 10-6D.”

He was not permitted to view a video that existed of the search. No witnesses appeared at the hearing, although he requested that the officers that he claimed had actually searched his cell appear. The hearing officer ruled that he should lose 90 days of good time credit. A federal appeals court reversed, noting that the inmate was entitled to present evidence refuting the report that heroin was found in his cell. Given the conflict between the report and the label on the photo, the refusal to allow him to exercise that right was “particularly troubling.”

An issue concerning the right to call witnesses was also raised in [Fillmore v. Taylor](#), #122626, 2019 IL 122626, 2019 Ill. Lexis 451. In that case, an Illinois inmate claimed that three corrections officers failed to follow mandatory legal procedures before imposing discipline upon him for violating prison rules relating to “unauthorized organizational activity” by “intimidation or threats” on behalf of the Latin Kings gang. He asserted that the process violated Illinois Administrative Code provisions relating to the appointment of hearing investigators to review all major disciplinary reports, service of the report no more than eight days after the commission of an offense or its discovery, provision of a written reason for the

denial of his request for in-person testimony at his hearing, not placing him under investigation, failing to independently review notes, telephone logs, and recordings, denial of his requests to see the notes he had allegedly written, and lack of impartiality and improper refusal of the hearing officer to recuse himself. He asserted that he had made a timely objection to the committee members' lack of impartiality, but the committee failed to document that objection.

The Illinois Supreme Court affirmed that the inmate failed to state a claim for mandamus or common-law writ of certiorari for alleged violations of department regulations. Department regulations, the court stated, create no more rights for inmates than those that are constitutionally required. The prison officials did not, however, give reasons for denying the inmate's witnesses and evidence during the disciplinary proceedings, nor did they explain that decision later. The court reversed with regard to the prisoner's claim that the defendants violated his right to due process in revoking his good conduct credits.

Similarly, in [*Cortoreal v. Annucci*](#), # 519317, 28 N.Y.3d 54, 64 N.E.3d 952, 41 N.Y.S.3d 723 (2016), the highest court in New York overturned a disciplinary hearing finding a prisoner guilty of violating two disciplinary rules. A violation of the prisoner's right to call witnesses occurred at the administrative hearing because the hearing officer did not make a "meaningful inquiry" into a requested witness's claim that he had been intimidated or coerced into refusing to testify.

In [*Donelson v. Pfister*](#), #14-3395, 811 F.3d 911 (7th Cir. 2016), an Illinois prisoner was sanctioned with the loss of a year of accumulated good time credits as a result of two incidents involving interaction with the same guard. He claimed that he was improperly denied access to recordings of the incident, denied an opportunity to call witnesses in support of his version of the facts, and denied the opportunity to present certain evidence. A state appellate court denied relief without reaching the merits of these claims because the prisoner had failed to follow instructions to tear off the top part of a form requesting witnesses. A federal trial court denied habeas relief, partially on the merits and partially on a procedural ground concerning the form.

The federal appeals court upheld the portion of the ruling on the merits, but found that the state court's "novel ruling carried bureaucratic concerns about paperwork

to an unreasonable extreme and does not bar federal consideration of the prisoner's constitutional claim on the merits.”

In [*Teixeira v. Fischer*](#), #142, 26 N.Y.3d 230, 43 N.E.3d 358, 22 N.Y.S.3d 148 (2015), a disciplinary hearing for a misbehavior report, a prisoner pled not guilty and requested that another inmate be called as a witness, asking the hearing officer to contact the witness. When the hearing reconvened, the hearing officer did not state whether the witness had been contacted, but found the prisoner guilty. On a claim that the hearing officer violated his constitutional rights by failing to make reasonable efforts to contact the witness, the trial judge ordered a new disciplinary hearing. The inmate appealed, arguing that an expungement of the discipline was instead the proper remedy. The appeals court disagreed, ruling that the granting of a new hearing was the appropriate remedy for failing to provide written notice of whether the prisoners request to call the witness was denied, and if so, why, as required by state regulations.

There sometimes may be a legitimate reason to not have a witness testify. In [*Burns v. PA Dept. of Corrections*](#), #09-2872, 642 F.3d 163 (3rd Cir. 2011), a prisoner's due process rights were violated during a disciplinary hearing when the hearing officer failed to watch security videotapes of the time at issue to resolve the conflict between a security captain's statement that the assault at issue had not been recorded, and the accused prisoner's testimony that the captain had previously told him that it was captured on videotape. It did not violate due process, however, to allow the victim of the assault not to testify, as “institutional concerns, including the possibility of retaliation, may make it wholly impractical to compel an inmate's testimony at a disciplinary hearing.”

Prisoners have a right to attend their disciplinary hearing, but need not do so. In [*Smith v. Fischer*](#), #14-3857, 803 F.3d 124 (2nd Cir. 2015), a federal appeals court rejected a prisoner's claim that his procedural due process rights were violated in connection with a disciplinary hearing conducted without his presence. The court found that the prisoner could implicitly waive the right to attend such a hearing by refusing to attend it after receiving notice and being afforded an opportunity to attend.

A number of lawsuits over alleged due process defects in prisoner discipline cases have grappled with the rule in [*Heck v. Humphrey*](#), #93-6188, 512 U.S. 477

(1994), concerning the need to set aside a finding of guilt before pursuing a lawsuit for money damages for federal civil rights violations.

In one such case, a disciplinary report was issued charging an Illinois prisoner with offenses stemming from a violent assault on fellow prisoners. He disputed the charges and asked to call a witness to testify at his Adjustment Committee hearing. The committee never called his witness. He was found guilty, and a punishment of one year of segregation, status and access restrictions, and revocation of three months of good-time credits was imposed. He filed a grievance and appealed its subsequent denial to an Administrative Review Board, which adjusted the revocation of good-time credits but rejected a due-process claim, concluding that his witness request did not comply with prison rules. He sued three officers for damages.

The officers cited the rule in [*Heck v. Humphrey*](#), #93-6188, 512 U.S. 477 (1994). Under that rule, when a prisoner seeks damages in a section 1983 suit, the trial court must consider whether a judgment in his favor would necessarily imply the invalidity of his conviction or sentence. “Where a favorable judgment would have that effect, no §1983 claim has accrued and the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” A federal appeals court affirmed that the due-process claim was not viable under section 1983. Prisoners cannot make an “end run” around [*Heck*](#) by filing an affidavit waiving challenges to the portion of their punishment that revokes good-time credits. Judgment in the plaintiff’s favor would necessarily imply the invalidity of his prison discipline. The suit was premature, therefore, as his guilt of the offenses had not been overturned. [*Morgan v. Schott*](#), #16-2384, 914 F.3d 1115 (7th Cir. 2019).

In [*Dixon v. Pollock*](#), #16-15040, 887 F.3d 1235 (11th Cir. 2018), a prisoner challenged a trial court’s dismissal of his lawsuit arising out of the incident that led to his disciplinary hearing as barred for lack of subject matter jurisdiction under [*Heck v. Humphrey*](#), #93-6188, 512 U.S. 477 (1994), which as extended by [*Edwards v. Balisok*](#), #95-1352, 520 U.S. 641 (1997) strips a district court of jurisdiction in a § 1983 suit brought by an imprisoned plaintiff “if ‘a judgment in favor of the plaintiff would necessarily imply the invalidity’” of a punishment that “deprive[d] him of good-time credits,” also referred to as gain time.

A federal appeals court vacated the judgment, ruling that the lawsuit was not barred by *Heck*. In this case, the plaintiff was punished and lost good time, but his 42 U.S.C. 1983 suit, if successful, would not necessarily imply that his punishment was invalid. The court explained that, because success in this section 1983 suit would not necessarily be “logically contradictory” with the underlying punishment, the suit was not barred by *Heck*. The essence of the prisoner’s claim was that an officer used excessive force against him, and that could be true even if the prisoner did lunge at the officer, which was the basis of his punishment,

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