Due Process at In-Prison Disciplinary Proceedings

George C. Sorensen
DUE PROCESS AT IN-PRISON DISCIPLINARY PROCEEDINGS

I. INTRODUCTION

The question as to the procedural requirements necessary to satisfy due process at in-prison disciplinary proceedings is a question that must be examined and resolved before penal institutions can effectively perform their rehabilitative and custodial functions. However, it must be kept in mind that there are no easy answers to this question. Those persons who would provide extensive procedural guarantees for prisoners, with no regard for the practical problems which those guarantees create for prison officials, perform as great a disservice as those who would provide prisoners with no protection against arbitrary action by prison officials. It is the purpose of this comment to outline the development of this area of the law and to examine the approaches taken by several federal courts as they have attempted to balance the rights of prisoners who have been charged with violations of prison regulations and the interests of prison officials who are charged with the discipline and security of penal institutions.

II. DEVELOPMENT

Federal courts have not attempted detailed analyses of procedural due process at prison disciplinary proceedings until relatively recently. Perhaps the primary reason for the federal courts' reluctance to become involved in this area has been their recognition that a wide discretion must be left in the hands of federal and state prison officials as they administer the day to day operations of penal institutions.\(^1\) Specifically, federal courts have recognized that prison discipline is an area which more properly remains within the competence of prison administrative officials.\(^2\) Moreover, since administrative officials of the executive branch of government are charged with the maintenance of the discipline and security of their respective institutions, federal courts have recognized that these officials must be provided with a wide discretion in order that discipline and security be maintained.\(^3\)

On the other hand, federal courts have noted that prisoners do not lose all of the rights and privileges that are enjoyed by members of a free society.\(^4\)

1. Abernathy v. Cunningham, 393 F.2d 775, 779 (4th Cir. 1968); Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967); Kostal v. Tinsley, 337 F.2d 845, 846 (10th Cir. 1964); Rentfrow v. Carter, 296 F. Supp. 301, 302 (N.D. Ga. 1968).
2. Douglas v. Sigler, 386 F.2d 684 (8th Cir. 1967); Stroud v. Swope, 187 F.2d 850, 851 (9th Cir. 1951).
3. Abernathy v. Cunningham, 393 F.2d 775, 779 (4th Cir. 1968); Childs v. Pegelow, 321 F.2d 487, 489 (4th Cir. 1963).
4. Sharp v. Sigler, 408 F.2d 966 (8th Cir. 1969); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).
Generally, it has been held that while incarceration necessitates the withdrawal of many rights and privileges, certain fundamental rights are retained by the prisoner, subject, of course, to appropriate limitations commensurate with his imprisonment.\(^6\)

These rather general statements of the conflicting interests of prison officials and the prisoners over whom they exercise authority are prevalent in many of the decisions which attempted to deal with the circumstances surrounding the discipline of inmates at federal and state penal institutions.\(^6\) These decisions, most of which were decided during the 1960’s, did not attempt to deal with the specific requirements which procedural due process imposed on the disciplinary action taken by prison officials. Rather, they spoke in general terms of the prison administrators’ need for discretion in maintaining discipline and the fundamental rights retained by prisoners.\(^7\)

The reluctance of the federal courts to become involved in the circumstances surrounding the disciplinary actions taken against federal and state prisoners manifested itself in a “hands off” doctrine\(^8\) being applied to such cases. This doctrine was to the effect that unless a court could find some clear violation of a retained fundamental right, the discretion of the prison administrator precluded judicial review of the prison disciplinary action and the circumstances surrounding it.\(^9\) Thus, federal courts usually reviewed prisoners’ complaints which alleged that disciplinary action violated constitutional rights only where it was shown that the action taken was violative of the Eighth Amendment guarantee against cruel and unusual punishment, or where the action was capriciously and arbitrarily imposed by prison administrators and was, therefore, an abuse of administrative discretion.\(^10\)

While the federal courts recognized that a capricious and arbitrary imposition of disciplinary action by prison officials was violative of due process,\(^11\) no federal court dealt specifically with the requirements of procedural due process at in-prison disciplinary proceedings until 1969. Consequently, all of the federal court decisions which dealt with due process at in-prison disciplinary proceedings prior to 1969 (and many which were decided after 1969) are characterized by the absence of any attempt to establish definite

5. Id.
7. Id.
10. Theriault v. Blackwell, 437 F.2d 76, 77 (5th Cir. 1971); Burns v. Swenson, 430 F.2d 771, 778 (8th Cir. 1970); Abernathy v. Cunningham, 393 F.2d 775 (4th Cir. 1968); Graham v. Willingham, 384 F.2d 367, 368 (10th Cir. 1967).
11. Id.
procedural guidelines which would be necessary to satisfy procedural due process at such proceedings. Rather, these pre-1969 decisions all contain the general substantive due process discussion of the discretion which is left in the hands of prison administrators and the need to balance this discretion against the substantive right allegedly violated by the circumstances of the disciplinary proceeding.

However, in December, 1969, the United States District Court for the District of Massachusetts decided Nolan v. Scafati. In so doing, the district court began by presenting the same general discussion of due process which characterized all of the earlier federal court decisions dealing with the question. However, the court went on to recognize that a procedural due process claim had also been presented and assumed, without deciding, that in order for procedural due process requirements to be satisfied at in-prison discipline proceedings, the prison officials must:

1. advise the prisoner of the charge of misconduct,
2. inform the prisoner of the nature of the evidence against him,
3. afford the prisoner an opportunity to be heard in his own defense, and
4. reach its determination upon the basis of substantial evidence.

The court then went on to discuss the prisoner’s claims that procedural due process also required that he had the right to have an attorney present and the right to cross-examine the complaining guard during the disciplinary hearing which found him guilty of the violation of a prison regulation and sentenced him to solitary confinement. The court held that procedural due process required neither. In so holding, the court noted that society has an important interest in maintaining the authority of prison officials. Thus, the court recognized that any discussion of procedural due process requirements at prison disciplinary proceedings must involve the same balancing of interests that characterized the earlier federal court decisions which had dealt in terms of substantive due process.

Many federal court decisions rendered after the Nolan decision continued to view prisoner complaints which alleged that disciplinary actions violated constitutional rights only in terms of substantive due process, and refused to review prison administrative action absent a showing that officials had acted arbitrarily or capriciously. However, several federal courts,

13. Id. at 2-3.
14. Id. at 3.
15. Id.
16. Id. at 4.
following the example that Nolan had set, began to focus on the disciplinary hearings conducted at state and federal prisons and examine the procedures available to prisoners by which they could defend against charges that they had violated prison regulations. For example, in Kritsky v. McGinnis, the United States District Court for the Northern District of New York cited Nolan and held that a prisoner had not been afforded procedural due process where he was not given an opportunity to be heard in his own defense at a prison disciplinary hearing.

While most of the decisions which followed Nolan did not expand the requirements necessary to satisfy procedural due process at prison disciplinary hearings, at least one federal court went further. In Sostre v. Rockefeller, the United States District Court for the Southern District of New York entered an order which perpetually restrained prison officials from:

2) Placing plaintiff (Sostre) in punitive segregation or subjecting him to any other punishment as a result of which he loses accrued good time credit or is unable to earn good time credit without:

   a. giving him, in advance of a hearing, a written copy of any charges made against him, citing the written rule or regulation which it is charged he has violated;
   b. granting him a recorded hearing before a disinterested official where he will be entitled to cross-examine his accusers and to call witnesses on his own behalf;
   c. granting him the right to retain counsel or to appoint a counsel substitute;
   d. giving him, in writing, the decision of the hearing officer in which is briefly set forth the evidence upon which it is based, the reasons for the decisions, and the legal basis for the punishment imposed.

The reaction to this order was not favorable. Winsby v. Walsh, flatly refused to follow it in so far as it required “that a prisoner ought to be given a full hearing on notice and with counsel present before he can be disciplined.” Other decisions, while favorably citing the holding that procedural due process requirements are applicable to prison disciplinary hearings, failed to require the presence of retained counsel or counsel substitute, advanced written notice of the regulation allegedly violated, the right to call witnesses or

21. Counsel substitute in this context generally refers to the assistance of another inmate at prison disciplinary hearings who is more familiar with the procedure than the inmate charged with the regulation violation.
22. 312 F. Supp. at 884.
24. Id. at 526.
the right to cross-examine adverse witnesses.25 Rather, these decisions enunciated more general statements as to the requirements necessary to satisfy procedural due process. For example in Carothers v. Follette,26 the United States District Court for the Southern District of New York held that "the essential elements of fundamental procedural fairness—advance notice of any serious charge and an opportunity to present evidence before a relatively objective tribunal"27 could not be denied to prisoners at disciplinary hearings.

The fact that the Carothers holding is couched in such general terms is significant. The Nolan28 and Sostre29 district court holdings had specified those procedures which procedural due process required. This greater degree of specificity in such holdings operates to decrease the discretion which is left in the hands of prison administrative officials. As will be recalled, federal courts are not eager to interfere with this discretion. Thus, the Carothers decision seems to be an attempt to reconcile the new proposition that procedural due process guarantees are applicable to prison disciplinary hearings with the well established proposition that prison officials must retain a wide discretion in the day to day operation of prisons in order to maintain discipline and security. This attempt to reconcile these propositions with a general statement of what procedures satisfied procedural due process reached its zenith in Sostre v. McGinnis.30

In Sostre, the United States Court of Appeals for the Second Circuit reversed that portion of the order entered by the district court in Sostre v. Rockefeller31 which specified the procedure necessary to satisfy procedural due process at prison disciplinary hearings. In so doing, the court of appeals held that:

In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions.32

Similarly, in the court's conclusion it noted that:

We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts—at least in the cases of substantial discipline.33

27. Id. at 1028.
28. See note 12 supra.
29. See note 20 supra.
30. 442 F.2d 178 (2nd Cir. 1971).
31. See note 20 supra.
32. 442 F.2d at 198.
33. Id. at 203.
This general statement of the procedures required at prison disciplinary hearings by procedural due process served three purposes. First, it reasserted the proposition that procedural due process was applicable to prison disciplinary hearings. Secondly, it set down a broad general statement as to what requirements were mandated by procedural due process. Thirdly, it still left much discretion in the hands of prison officials to determine how these requirements were to be implemented and the extent to which they were to be implemented.

The fact that the federal courts were still very reluctant to limit the discretion of prison officials was also made apparent in *Sostre* by the Second Circuit. In addition, the decision set forth an explanation of this reluctance which had been noticeably absent in the decisions which had preceded it. The Court of Appeals for the Second Circuit explained that since there was a paucity of objective information dealing with the question as to whether formal procedural due process requirements at prison disciplinary proceedings would be detrimental or beneficial to prison officials in the maintenance of discipline and security it was inappropriate for federal courts to limit these officials. In amplification, the Second Circuit noted:

> We would not presume to fashion a constitutional harness of nothing more than our guesses. It would be mere speculation for us to decree that the effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities would be more soothing to the prison atmosphere and rehabilitative of the prisoner or, on the other hand, more disquieting and destructive of remedial ends. This is a judgment entrusted to state officials, not federal judges.

Despite the now well-settled proposition that procedural due process was applicable to prison disciplinary proceedings and the attempt of one lower federal court to define procedural guarantees with specificity, the “hands off” doctrine was still alive and well in the Second Circuit.

### III. The Seventh Circuit

The Second Circuit’s decision in *Sostre v. McGinnis* was adopted by the United States Court of Appeals for the Seventh Circuit in *Adams v. Pate*. However, in 1973, the United States Supreme Court decided *Morrissey v. Brewer*. That decision was to have a profound effect on the Seventh Circuit’s view as to the requirements of procedural due process at in-prison disciplinary hearings. In *Morrissey*, the Supreme Court had held that procedural due process required that parolees, at parole revocation proceedings, were entitled to:

34. *Id.* at 197.
35. *Id.*
36. 445 F.2d 105 (7th Cir. 1971).
37. 408 U.S. 471 (1972).
a. written notice of the claimed violations of parole;
b. disclosure to the parolee of evidence against him;
c. (an) opportunity to be heard in person and to present wit-
nesses and documentary evidence;
d. the right to confront and cross-examine adverse witnesses (un-
less the hearing officer specifically finds good cause for not
allowing confrontation);
e. a 'neutral and detached' hearing body such as a traditional
parole board, members of which need not be judicial officers
or lawyers; and
f. a written statement by the factfinders as to the evidence relied
on and reasons for revoking parole.\(^{38}\)

Although *Morrissey* did not deal specifically with the requirements of proce-
dural due process at in-prison disciplinary hearings, the Court of Appeals for
the Seventh Circuit relied on it heavily when they handed down *United States
ex rel. Miller v. Twomey*,\(^ {39}\) on May 16, 1973. At present, that decision is
the controlling authority on the requirements of procedural due process in
the Seventh Circuit and is the most extensive analysis of the subject to date

In *Miller*, the Seventh Circuit recognized that the *Morrissey* decision
had gone far to limit the discretion of prison officials in regard to parole
revocations.\(^ {40}\) With that in mind the court felt it “appropriate to reexamine
the extent to which the wide discretion of prison officials remains unreview-
able.”\(^ {41}\) Thus, rather than a statement of the reluctance to limit the discre-
tion of prison officials which had characterized so many of the federal court
decisions which had gone before, the Seventh Circuit, armed with *Morrissey*,
set out to examine the limits of that discretion in so far as it related to in-pris-
on disciplinary hearings. However, the court did note that while they
would examine this area of the discretion of prison officials, “a myriad of
problems of prison administration must remain beyond the scope of proper
judicial concern.”\(^ {42}\)

Since the Court of Appeals for the Seventh Circuit read *Morrissey* to re-
quire that due process is required before any “substantial deprivation” of
the liberty retained by prisoners in custody,\(^ {43}\) its first step in deciding *Miller*
was to determine whether a substantial deprivation of retained liberty had
been visited upon the prisoners whose cases were being considered.\(^ {44}\) The
prisoners complaining of the absence of due process had seen their statutory
good time revoked and/or had been sent to punitive segregation units after

\(^{38}\) *Id.* at 489.

\(^{39}\) 479 F.2d 701 (7th Cir. 1973).

\(^{40}\) *Id.* at 712.

\(^{41}\) *Id.*

\(^{42}\) *Id.* at 713 and n.25.

\(^{43}\) *Id.* at 713.

\(^{44}\) *Miller* was a consolidation of six prisoner complaints brought pursuant to
in-prison disciplinary hearings had determined that they had violated prison regulations.

The revocation of statutory good time credits operates to lengthen the time before a prisoner is released, therefore the court analogized this revocation with the revocation of parole.\textsuperscript{45} Since \textit{Morrissey} had held that the revocation of parole was a substantial deprivation of liberty which must be preceded by due process, it followed that the revocation of statutory good time credits also required due process.\textsuperscript{46} Consequently, the Seventh Circuit held that before statutory good time credits could be revoked as a result of an in-prison disciplinary hearing, procedural due process required that:

1. the prisoner must receive adequate advance written notice of the charges against him,
2. he must be afforded a fair opportunity to explain his version of the incident,\textsuperscript{47} and,
3. to insure a degree of impartiality, the factual determination must be made by a person or persons other than the officer who reported the infraction.\textsuperscript{48}

Similarly, the court of appeals held that the conditions of punitive segregation were sufficiently more restrictive than the conditions prevailing in the prison's general population so as to constitute a grievous loss of retained liberty where the periods of segregation were prolonged. Therefore, the court held that before a prisoner could be sentenced to prolonged periods of punitive segregation, the same minimal due process requirements applicable to the revocation of statutory good time were required.\textsuperscript{49}

The question of the Seventh Circuit's position on the requirement of counsel is somewhat confusing. The court noted two reasons why the right to counsel or lay substitute at in-prison disciplinary hearings was doubtful.\textsuperscript{50} First, it was noted that \textit{Morrissey} had not held that the right to counsel was required at parole revocation hearings.\textsuperscript{51} However, just two days before the Seventh Circuit handed down \textit{Miller}, the United States Supreme Court in \textit{Gagnon v. Scarpelli}\textsuperscript{52} had held that the question of right to counsel should be considered on a case by case basis even though counsel would "probably be undesirable and unnecessary in most . . ."\textsuperscript{53} parole revocation hearings. Secondly, the court noted that even if the right to counsel had been required

\textsuperscript{45} 479 F.2d at 715.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} A subsequent restatement of these minimal requirements on p.716 reveals that this requirement included the opportunity "to request that witnesses be called or interviewed." (Emphasis added.)
\textsuperscript{48} 479 F.2d at 716.
\textsuperscript{49} \textit{Id}. at 718.
\textsuperscript{50} \textit{Id}. at 715, n.31.
\textsuperscript{51} \textit{Id}.
\textsuperscript{52} 93 S. Ct. 1756 (1973).
\textsuperscript{53} \textit{Id}. at 1763.
by Morissette, that was no authority for the proposition that due process required the presence of counsel at in-prison disciplinary proceedings.\textsuperscript{54} Therefore, it would seem that even if the Seventh Circuit had known of the Supreme Court's decision in Gagnon, it would not have held that the presence of counsel at in-prison disciplinary proceedings was mandated by due process.

It is significant that the Court of Appeals for the Seventh Circuit repeatedly emphasized that the three requirements it listed were the "bare minimum"\textsuperscript{55} which was required by procedural due process. The court held that the maximum requirements mandated by procedural due process for in-prison disciplinary hearings were the six requirements which had been set down in Morissette as applicable to parole revocation proceedings.\textsuperscript{56} This emphasis is significant in that it indicates that the court of appeals was not quite satisfied with the "bare minimum" which it had set down but was reluctant to go further for fear of taking too much discretion from prison officials, thereby endangering prison discipline and security. That the court of appeals wanted the assistance of prison officials in determining to what extent the Morissette requirements should be made applicable to in-prison disciplinary proceedings was obvious when it stated:

\begin{quote}
We do not think it appropriate for us to try to define the constitutional requirements with greater specificity at this time. Rather, we defer in the first instance to the expertise of the state officials to specify the appropriate time and form of written notice for various offenses; the extent to which evidence must be disclosed; the method for enabling a prisoner to explain or rebut the charges, including, if appropriate, an indication of the situations in which he may insist that witnesses be called or at least interviewed; and the extent to which a written statement of the disposition of the charge should be made. Unquestionably, if the Morissette standards are met, due process will have been afforded . . . \textsuperscript{57}
\end{quote}

Thus, while the Seventh Circuit went further in establishing due process requirements at in-prison disciplinary hearings than did the Second Circuit in Sostre v. McGinnis, the Seventh Circuit appears to have recognized the same limitations on its judgment that was so bothersome to the Second Circuit in Sostre. That limitation is the fact that federal courts do not know what the ultimate effect of requiring more procedural requirements at in-prison disciplinary hearings will be. It is possible that specific and far reaching procedural requirements will help ease the tension which naturally exists between prisoners and their keepers. On the other hand, the placing of more procedural requirements on in-prison disciplinary hearings, and defining those requirements with great specificity, necessarily undermines the power of prison officials to maintain prison discipline and security. The result of going

\textsuperscript{54} 479 F.2d at 715, n.31.
\textsuperscript{55} Id. at 715, 718.
\textsuperscript{56} Id. at 716, 718. For the Morissette requirements see text at note 38 supra.
\textsuperscript{57} Id. at 716.
too far in undermining that power could be chaos. The Court of Appeals for the Second Circuit, after recognizing this limitation, decided that it was a question for prison officials. The Court of Appeals for the Seventh Circuit, after recognizing the same limitation, decided that the question was one for the federal courts to decide with the benefit of the expertise of prison officials. The dissent in Miller felt that the question should be determined solely by the courts.

If the majority in Miller felt restrained by the limitation outlined above, it is clear that the lone dissenter, Chief Judge Swygert, felt none. In his dissent, Judge Swygert argued that all six of the due process requirements which Morrissey had set down for parole revocation hearings should have been made applicable to in-prison disciplinary proceedings as well. He argued that the deprivation of retained liberty suffered by prisoners upon the revocation of statutory good time credits or confinement in punitive segregation was analogous to the deprivation suffered upon the revocation of parole. He reasoned that this was sufficient to hold that all six of the Morrissey requirements were applicable to in-prison disciplinary proceedings. As for the limitation that had restrained the majority, Chief Judge Swygert argued that:

The state has a legitimate interest in expedited discipline only when procedure by hearing raises a risk of danger to inmates or to the prison institution as a whole by widespread violence or riot.

Moreover, he argued that since the Seventh Circuit had held that parolees were entitled to counsel at parole revocation hearings, the right to counsel should also be made applicable to in-prison disciplinary proceedings. Thus, unlike the majority opinion and the Second Circuit's Sostre decision, the dissent of Chief Judge Swygert showed absolutely no reluctance to limit the discretion of prison officials.

IV. WORKMAN v. KLEINDIENST

At least one other federal court has read Morrissey in substantially the same manner as Chief Judge Swygert read it. In Workman v. Kleindienst, the District Court for the Western District of Washington, relying on Morrissey and Gagnon, held that before a federal prisoner's good time credit can be revoked, due process requires two separate hearings. First, a preliminary

58. 442 F.2d at 197.
59. 479 F.2d 718, 719.
60. Id. at 721.
61. Id.
62. Id.
63. Id. at 723.
66. Id.
hearing must be held to determine whether there is probable cause to believe the inmate has committed an infraction of the prison regulations. The court held that the minimum requirements necessary to satisfy due process at this preliminary hearing are:

1. that the hearing be before a person or persons not directly involved in the case;
2. that the prisoner be given advance notice that the purpose of the hearing is to determine whether there is probable cause to believe that he has violated a prison rule or regulation;
3. that the notice state what prison violations have been alleged;
4. that the prisoner may appear and speak in his own behalf;
5. that the prisoner may bring letters, documents or individuals who can give relevant information to the hearing officer;
6. that on request of the prisoner, persons who have given adverse information may be cross-examined or questioned, unless, in the opinion of the hearing officer, there is good cause for non-disclosure of their identities;
7. that a record be made of the proceeding.

Based on the information given before this hearing, the hearing officer is required to determine whether the charges should be dismissed or order a Good Time Forfeiture Board.

The Good Time Forfeiture Board is the second hearing required by Workman. At this hearing, the final determination of contested facts is to be made and the Board is to consider whether forfeiture of good time is warranted. The court held that the minimum requirements mandated by due process at this hearing are:

(1) Written prior notice of claimed violations of prison conduct;
(2) Disclosure to inmate of evidence against him;
(3) The right to confront and cross-examine witnesses (unless the board specifically finds good cause for not allowing confrontation);
(4) The opportunity for the inmate to be heard in person and to present witnesses and documentary evidence;
(5) A "neutral and detached" hearing body such as a traditional parole board;
(6) A written statement by the factfinders as to the evidence relied on and reasons for any forfeiture of good time, delivered to the prisoner with appropriate notice of right to appeal.

The court went on to hold that, although there was no right to appointed counsel, the prisoner did have the right to retained counsel. While this de-
cision is by far the most far reaching in terms of extending procedural due process to prisoners at in-prison disciplinary proceedings, the court did make some small concessions to the discretion of prison officials. The court noted that "the presence of counsel shall in no way inhibit the respective hearing bodies from exercising great latitude as to evidence to be considered in reaching a decision," and that the hearings were to "be distinguished by their flexibility, balancing always the needs of the institution with the rights of the inmates."73

CONCLUSION

As will be recalled, federal courts have traditionally been reluctant to interfere with the internal discipline of prisons. The Court of Appeals for the Second Circuit, in Sostre v. McGinnis, remarked that a federal court determination as to the "effect of equipping prisoners with more elaborate constitutional weapons against the administration of discipline by prison authorities . . . " would be mere guesswork. In United States ex. rel. Miller v. Twomey, the Court of Appeals for the Seventh Circuit recognized this limitation and deferred to the expertise of prison officials in determining the extent to which new procedural due process guarantees should be adopted in the Seventh Circuit.75 Unless Workman v. Kleindienst is overruled or the well-intentioned guesswork of the District Court for the Western District of Washington is correct, the penal institutions affected by that decision should expect trouble.

GEORGE C. SORENSEN

72. Id.
73. Id.
74. 442 F.2d at 197.
75. 479 F.2d at 716, 718, 719.