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Published on *Voice For The Defense Online* (http://www.voiceforthedefenseonline.com)

Recent TDCJ Discipline Abuse Issues & a Review of Basic Prison Discipline Procedures and Case Law

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Wednesday, January 30th, 2019

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This article is meant for the criminal lawyer who seldom does work in the area of prison law. Particularly the area of due process applied to prison discipline activity.1 I wrote this article as a respectful effort to show my appreciation to a journalist friend named Keri Blakinger with the *Houston Chronicle.* Because of her effort and the outstanding results achieved by her investigative effort and reporting skills, she recently exposed a series of long-going prison discipline abuses and published her findings in the *Houston Chronicle.* 2 Her outstanding work has caused me to want to refresh my awareness of the law of prison discipline actions where inmates stand little chance when the administrative law deck is stacked against them by guards using illegal and fraudulent means by which to gain administrative convictions. Her recent publications reflect what I believe to be the tip of the iceberg? when it comes to the all-too-frequent abuse inmates suffer when subject to fraudulent prison discipline activity.

Keri's good work exposing the fraudulent and illegal discipline activity at the Ramsey Unit near Angleton, Texas (and some other units), has resulted in the reversal of hundreds of defective discipline actions in selected Texas prison units. Keri's writing did more good in exposing these problems for the TDCJ inmate population than a team of civil rights lawyers might do with a federal court judgment.3 It has also led to the

reported termination of employment of several TDCJ unit employees. The violations by some TDCJ ex-employees are reported to have included the illegally setting quotas for prison guards to meet each day by requiring the filing of inmate discipline actions and include her discovering that some guards were planting evidence in some cases to secure inmate administrative convictions. Some terminated employees are reported to be subject to criminal investigation for their conduct while on the job. I understand a few indictments have issued against former prison employees.

While I certainly take no credit for the exceptional investigative reporting by Ms. Blakinger in her series of articles, I hope I contributed to her interest in pursuing these issues.

Shortly after Keri was hired by the *Chronicle,* we both learned of each other, and we met for dinner. She had been brought to Houston by the *Chronicle* to cover criminal justice, and that included prison issues. We met to get to know each other, and to discuss issues of mutual interest involving the world of Texas corrections. While my practice these days is generally limited to matters that relate to parole and I only limitedly get involved in litigation of prison issues, Keri is an experienced prison journalist, and she understood that discipline infractions by inmates can seriously affect their parole status and quality of prison life. We enjoyed a great evening discussing our past experiences and discussing how poorly enforced prison policy affects both inmates and their loved ones. I believe I can speak for both Keri and me when I state that abusing inmates in discipline matters by fraudulent allegations, fraudulent evidence, and unjustified and unearned punishment causes great disrespect by offenders for all those who administer the enforcement of prison rules. Such activity does nothing to enhance rehabilitation, and as Keri's article points out, there has been way too much of it ongoing in TDCJ prison units.

This article is just a *basic, brief, and very general* review of the limited Constitutional Rights and procedures available to inmates facing a prison discipline action. Limited Constitutional Due Process applies to protect what is known as an illegal *loss of a liberty interest.* As a practical matter stated in general terms, loss of a liberty interest means:

1) Loss or reduction of good-time earning capacity (loss of a liberty interest) afforded by prison state administrative policy reducing one's ability to retain a previously achieved level of good time,4

2) or a discipline action that creates the loss and/or reduction in good-time ability as punishment.

Since one can suffer the loss of good time earning capacity as punishment or can suffer a reduced class rank resulting in a reduced allotment of good time earning capacity as punishment, in either case this equals the loss of a liberty interest. The *wrongful taking* of even one day of prison time credit arising from a defective discipline procedure is subject to the protection of one's Due Process Constitutional protection (*see Wolff* and *Sandin* cases (*supra*)).

In *Teague v. Quarterman,* 482 F.3d 769 (5th Cir 2007), loss of good time, even a small amount of good time, arising from a discipline action is not de-minimus in nature. This decision also makes clear that it no longer makes a difference if the time-credit loss affects one subject to mandatory supervision5 (in effect from 1976 to 1996) or *discretionary* mandatory supervision (which began in 1996 to present). Both forms of mandatory relief now have limited protected liberty interests.

Due Process and Prison Discipline

The two major U.S. Supreme Court cases that speak to the aspects of the basic Fifth and Fourteenth Amendment Due Process rights of inmates facing discipline actions are found in *Wolff v. McDonnell,* 94 S.Ct. 2963 (1974), and *Sandin v. Conner,* 115 S. Ct. 2293 (1995). (Many other cases apply to how prison due process applies to discipline activity, but for purposes of this article I refer the reader to the above two primary cases as good starting points. However, before undertaking litigation representing a client in a

prison discipline case, any defense lawyer should carefully study all the twists and turns discipline cases have created. It is my opinion this area of law is not one affording the offender an even balance of current due process.)

In *Wolff* the USSC determined the following due process applies:

1) A 24-hour advance notice of allegations must be given prior to any hearing.

2) Written statements are required by the fact finder of evidence relied upon and reasons for the ultimate decision.

3) The prisoner may be allowed to call witnesses and present documentary evidence in his/her defense, providing there is no undue hazard to institutional safety or correctional goals. (*Note there is no absolute right to confront and cross-examine a witness as that is discretionary with the prison disciplinary board.* See Sandin v. Conner, *515 US 472 (1995).*)

4) Counsel substitute should be allowed when the prisoner is illiterate or when the complexity of the issues make it unlikely that the prisoner will be able to collect and present the evidence necessary for an adequate comprehension of the case.

5) The prison disciplinary board must be impartial.

(Note there is NO provision that the offender has a right to licensed counsel).

The provisions of *Wolff* left many legal authorities with concern that the due process afforded was insufficient to provide fairness in a prison setting. What defense lawyers should keep in mind is that while not all Constitutional Rights disappear when the prison gates slam, still many due process rights are at times greatly impaired. After *Wollf,* certain circuit courts began to fill in the due process gaps *Wolff* failed to install. For example, in one case6 in Wisconsin the Court expanded the Notice provision to include that the offender must have the right to respond to the notice when faced with suspension of privileges. A circuit court also determined that where the offender is facing not only a prison discipline action but also a state criminal action, legal counsel must be afforded. Yet another decision suggested:

> When denied the right to confront and cross examine a witness, the inmate must receive written reasons for the denial, and if this requirement fails, then it will be deemed a prima facie evidence of an abuse of discretion.

It is likely that these expanded rights afforded by Federal District Judge decisions after *Wolff* were caused by trial judges looking back to the *Wolff* case. Judges may have incorrectly presumed they could fill in the blanks? where they felt a lack existed in discipline due process upon reading what Justice White had expressed in the *Wolff* decision:

> Our conclusion at some, but not all, of the procedures specified in Morrissey and Scarpelli7 must accompany the deprivation of time by state prison authorities is not graven in stone. As the nature of the prison disciplinary process changes in future years, circumstances may then exist which require further consideration and reflection by this court.

Later the Supreme Court corrected those lower decisions, making additions to the due process of the *Wolff* case. In *Baxter v. Palmigiano,* 425 US 308 (1976), expanded due process added by district courts like those above noted from the likes of the *Taylor* decision were removed. In *Baxter* the court added that due process from the *Wolff* decision was the standard to be used. In addition, *Baxter* indicated that:

> . . . adverse inference may be drawn from an inmate's silence at his or her disciplinary hearing.

Baxter also noted, Federal courts have no authority to expand the *Wolff* requirements, which have the extent of cross examination and confrontation of witnesses (left) to the sound discretion of prison officials.?

Finally, the *Baxter* court noted (referring to the likes of the circuit decisions such as the *Taylor* case):

> The Court of Appeals acted prematurely when it required procedures such as notice an opportunity to respond even when an inmate is faced with a temporary suspension of privileges as distinguished from a serious penalty.

Low Burden of Proof in a Prison Discipline Case

There are several frustrating issues that can result when dealing with a discipline hearing. For example, the extremely low burden of proof the prison must meet. All the prison must prove to make a discipline case against an inmate is that they introduce *some evidence*? to support a discipline allegation. Some evidence means almost any minimal evidence at all. (*See Clarke v. Stalder,* 154 F3d 186 (5th Cir. 1998).) This is the lowest burden of proof that exists in our legal system. This fact alone gives the prison a huge benefit and makes winning discipline cases extremely hard for the prisoner.

Suffering a Major Discipline Time Loss and Parole Eligibility

Other frustrating realities include the fact that the loss of good time or line class good-time earning ability can set back one's parole consideration for some time as long as a year to 18 months. (Unless it is the first parole vote, as one's initial parole vote is determined by statute. However, a major discipline action prior to the initial parole vote can result in a negative outcome in a first parole hearing.) One can also be punished by loss of a job assignment, can be transferred, and can even lose certain privileges such as visitation, commissary, and other similar privileges as a sanction punishment for violating prison regulations.

Lawyers Are Not Allowed During These Administrative Procedures

During a prison discipline hearing, there are only minimal Due Process rights afforded inmates. (*See Murphy v. Collins,* 26 F.3d 541 (5th Cir 1994).) This does not include the right to legal counsel. However, where the inmate is illiterate or suffers from disabilities that affect one's ability to represent him/her self, then in certain cases, the offender may be entitled to a counsel substitute.?8

Note, there is only a limited right to a Counsel Substitute.? These are usually prison employees who are not lawyers and serve when the offender appears to need assistance. *There is no right to have a lawyer when facing an administrative prison discipline action.* The Supreme Court has determined that a prison discipline action has to do with the administrative functions of a prison. The courts have indicated that lawyers have no business involved in prison administration discipline matters.9

Who Is Exempt from Litigating a Wrongful Discipline Case?

Note that if one has a 3(g) offense, or a conviction where the benefit of good time credit is not applicable, then there is no right to later challenge a discipline finding in a court of law even if one alleges a violation of Due Process rights during that hearing. (*See* Art. 508.149 Tx. Govt. Code.)

On the other hand, if the offender qualified for good-time credit and is punished by loss of time credit or class standing, thus causing a decline in good-time earning capacity, these rules of due process do apply. Once the hearing is over, the offender, most usually on his/her own, must exhaust all administrative appeal procedures. Then there are circumstances where litigation over any constitutional error that is alleged during the hearing may be litigated. To reach the prospect of litigation when challenging constitutional violations

that have occurred in a discipline hearing in a court, one may use a lawyer, but first there are steps the qualifying offender must take before seeking the protections of the court. First, the offender (without legal assistance) must follow each step in the administrative appeals process to exhaust administrative remedies.? Again, lawyers can afford little to no assistance during the administrative appeal process. However, once exhaustion of administrative remedies is completed, and if no relief has been granted the offender, then a trip to federal court may be considered where a lawyer can be brought into the game.

Challenging in Court the Loss of Good Time or Classification Standing (Ya Gotta Stay Out of State Court)

First, to pursue litigation there must be the loss of good time or time-credit classification. (This loss amounts to the loss of a Liberty Interest.?) This means that the offender must be convicted of an offense which affects the earning of good-time credit. Otherwise, litigation has no meaning since no good time? has been lost, and there is no loss of a liberty interest. The offender must be convicted of an offense that affords one the right to good-time credit to benefit parole eligibility. If one so qualifies, then after all administrative remedies have been exhausted, and, if there are constitutional due process violations within the discipline proceedings leading to the taking of one's time credit (even if it was only one day of lost time credit), the inmate may file a writ of habeas corpus to challenge the alleged constitutional violation(s) and seek restoration of the lost time credit. However, there are several serious barriers such litigator must overcome.

The first barrier is the fact that one cannot file for relief in a Texas State Court. Texas courts have indicated they will hear no more writs challenging prison discipline actions. (*See Ex parte Brager,* 704 SW2d 46-A (1986).) The appropriate remedy is to file in federal court. Jurisdiction issues are discussed in *Brager* (infra), *Preiser v. Rodriquez,* 411 U.S. 475 (1973), and *Wilkinson v. Dotson,* 125 S.Ct. 1242 (2005).10 Since time credit is involved, one files a writ, and not a civil rights action. (*See Wilkinson [infra],* which overrules *Heck v. Humphrey,* 512 US 477 (1994), and clears some of the procedural smog from *Edwards v. Balisok,* 117 S.Ct. 584 (1997).)

Once all administrative law procedures are exhausted, one can then litigate any discipline constitutional violation believed to exist within that proceeding, but one must file a writ of habeas corpus in the Federal courts. Normally, jurisdiction is where the alleged violation took place see *28 U.S.C. Sec 2254 (this is the statute to use when challenging the fact or duration of one's confinement).* This procedure can be complicated, it can potentially take several years of litigation before the issue is resolved, and if a lawyer is employed, the cost and time involved can be prohibitive to most inmates. If the inmate prevails in a litigated matter, it is normal for Texas to appeal till no more appeal exists.

Many inmates make the mistake of challenging the results of discipline actions by filing a federal civil rights suit under 42 USC Sec. 1983. That path is the wrong way. A review of *Wilkinson v. Dotson,* 125 S.Ct. 1242 (2005), will show where the issue in question relates to the loss of time credit or is an attack on the validity of one's conviction, *Wilkinson* requires the filing of a writ of habeas corpus (28 USC 2241).11 Civil rights litigation is reserved for challenging constitutional issues arising from the conditions or procedures within the policies by which a prison or parole agency operates.

There Are a Few Cases Where Litigation Does Pay Off

There are those few efforts at litigation of a discipline case where the inmate wins. For example, *Broussard v. Johnson,* 918 F. Supp 1040 (D. Texas 1996), where the only evidence presented amounted to a conclusion given by the investigating officer who got his evidence (and conclusions) from the warden's personal opinion. Thus, a hearsay problem presented itself. There must be REAL EVIDENCE to support an adverse decision.

Morgan v. Dretke, 433 F3d 455 (5th Cir. 2005), where the offender was charged with assaulting a guard. Turns out that there was no discipline action listed as assaulting a guard, so the case had to be reversed to find an offense for which discipline could be administered.

In *Berenguel v. Bell et.al.,* No. 07-10066 (5th Cir. 6-27-08 unpublished), where the inmate's First Amendment rights were violated when the mail room interfered with his communication with his lawyer, letters to his mother, and his filing of a grievance to appeal the discipline action.

Adams v. Gunnell, 729 F.2e 362 (5th Cir 1984), where the inmate prevailed as the notice of violation pointed to a rule violation that did not exist in the prison discipline rulebook.

Cassels v. Stalder, 342 F. Supp 555 (M.D. La 2004), where the offender was disciplined for spreading rumors? because his mother put an internet message up that her son in a Louisiana prison was not being afforded proper medical care. The case was reversed, and the alleged rule was removed from the prison publications of inmate rules.

In Summary

Prison discipline proceedings are intended to enforce compliance with legitimate penal social structure and safety. The problem is that the administrative rules of discipline are administered by prison employees who too frequently abuse the intended purpose of the intent of discipline procedures, often resulting in segregation or loss of access to commissary or parole eligibility.

We hear of way too many incidents where, just as a parole date approaches, an offender is charged with a highly questionable discipline action, the offender is found guilty and loses his parole date. Or, where parole has just been granted, some guard or inmate with a dislike of said inmate will create a discipline action, causing the offender to lose his parole.

Recently we have seen that guards can, and do, set up inmates by planting illegal evidence in a cell or by creating fraudulent allegations leading to a wrongful conviction of a discipline rule. The damage that visits the inmate and his/her loved ones over intended or fraudulent discipline abuses by TDCJ employees occurs far too often and causes far too much unnecessary emotional pain and frustration for the offender and loved ones. Such action by institutional TDCJ employees does not further inmate respect or rehabilitation. Thank God for Keri Blakinger and the *Houston Chronicle* for her exposing the reality of this damage.

One thing I have learned in my 40-plus years of representing inmates with prison and parole issues is that our prison does not do a very good job of policing its own operations. As to the future and relying upon the many years I have observed those dealing with inmate life in the Texas prison system, I expect little will change. It is my observation that the administration of TDCJ does not pursue or get overly active when it investigates inmate claims of abuse of any kind until some journalist or judge takes the time to publicly expose what will be ongoing abuses in discipline actions. TDCJ's attitude in disregarding inmate abuse is what brought Judge William Wayne Justice to call the infamous *Ruiz v. Estelle* case12 to the bar. During the period from the middle-to-late 1960s into the early 1970s, many states faced major constitutional issues with their prison systems, resulting in major litigation facing the Civil Rights Section of the Federal government. It strikes me as no surprise that to my knowledge, all such litigation was resolved with consent decrees EXCEPT TEXAS, where Ruiz went to trial and created the most expensive civil rights litigation that the Federal Civil Rights Section ever engaged. What a waste of taxpayers' money.

I suggest the U.S. Supreme Court might revisit the limited disciplinary due process rules currently in effect, and if so, maybe an independent Administrative Judge not employed by the prison or associated with TDCJ in any way, acting as the hearing officer, might make the system work more as intended by the Supreme Court justices.13 But I am not holding my breath.

Notes

1. One can Google Texas Department of Criminal Justice Discipline Rules and Procedures for Offenders,? February 2015 edition, and print off a copy of those rules

2. Particularly see articles published in the *Chronicle* on May 5th, June 4th, June 11th, June 14th, July 20th, and Aug. 30th of 2018.

3. It has long been my opinion that one good journalistic exposure of a Texas Prison scandal is a faster way to correct an ongoing prison abuse than a federal court judgment.

4. Good time only acts to benefit reduction of the time one must serve before being scheduled for one's next parole or discretionary mandatory supervision date. It does not deduct any time credit from one's sentence expiration. In Texas, one sentenced to ten years in prison does not more promptly expire a sentence due to good time. One must serve every day of that ten-year sentence either in prison or on parole or discretionary mandatory supervision. (*See* Sec. 508.149 Tx. Gov't Code for a list of those offenses that are exempt from good-time benefits.)

5. Mandatory Supervision is a legislatively mandated release of a prisoner to parole supervision when the combination of actual calendar time and good-time conduct time equal the total balance of the sentence. Good conduct time is credited to an offender for participating in work and self-improvement programs.

Not all offenders are eligible to litigate final administrative discipline actions. Offenders convicted of offenses listed under Sec 508.149(a), Texas Government Code, are not eligible. Also, the Board may deny mandatory release on a case-by-case basis for offenders whose offense date was on or after September 1, 1996. This is known as DISCRETIONARY mandatory supervision. For greater details and policy, one can review Parole Division Policy Statement #PD/POP-2.2.26.

6. *Taylor v. Schmidt,* 380 F. Supp 1222 (W.D. Wis. 1974).

7. *Morrissey* and *Scarpelli* refer to the two U.S. Supreme Court cases dealing with Constitutional rights of those facing parole or probation revocation. *Morrissey v. Brewer,* 408 US 471 (1972), *Gagnon v. Scarpelli,* 411 US 778 (1973).

8. *Wolff v. McDonnell,* 418 US 539 (1974): Substitute Counsel is generally a prison employee who assists inmates who lack the intellectual ability or have some other valid reason to be entitled to such assistance. These persons rarely have much legal training.

9. If a violation of constitutional rights takes place during an administrative hearing, once the offender exhausts all administrative remedies, a lawyer may then agree to represent that offender in a Federal writ of habeas corpus to challenge any Constitutional violation arising in that discipline action. Texas Courts no longer entertain state writs regarding discipline actions. (*See Ex parte Brager,* 704 SW2d 46-A (1986).)

10. *Wilkinson* is a very important case as it tries to clear up when one should file a writ vs a civil rights action (42 USC Sec 1983) when attempting litigation in a prison matter involving Constitutional rights of an offender. Most importantly, *Wilkinson* clears up the procedural issues that arose as a result of the *Heck* and *Edwards* cases above cited.

11. Prisoners may file post-conviction habeas corpus petitions under 28 USC 2241 in two circumstances:

1) Where the prisoner does not challenge the validity of his conviction and sentence, but rather its execution, such as times when the calculation of time credit is in dispute.

2) In exceptional cases where the prisoner can show that his remedy under Section 2255 is inadequate or ineffective under 28 USC 2255.

Some suggest the writ should be joined by alleging both 28 USC 2241 and 28 USC 2254.

12. *Ruiz v. Estelle,* 679 F2e 1115 (5th Cir) opinion amended in part and vacated in part, 688 F2d 266 (5th Cir 1982), cert denied 460 US 1042 (1983)

13. In closing, any reader interested in the history of the Texas prisons, it is my strong suggestion that such party purchase a copy of *Texas Tough* by Dr. Robert Perkinson, published by Metropolitan Books (2010). It is the most complete history of the Texas prisons yet published.
