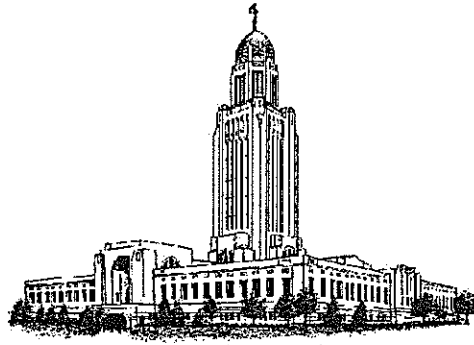


MARSHALL LUX
Public Counsel



State of Nebraska

OFFICE OF THE PUBLIC COUNSEL/OMBUDSMAN
PO Box 94604, State Capitol
Lincoln, Nebraska 68509
(402) 471-2035
Toll free - 800-742-7690
Fax (402) 471-4277
ombud@leg.ne.gov

August 26, 2016

Public Comments-Proposed Regulatory changes

Title 68, Chapter 6

Of the

Nebraska Administrative Code

"Inmate Disciplinary Procedures"

The Nebraska Ombudsman's Office is submitting this document, for consideration as our official comments relating to the proposed regulatory provisions drafted by the Department of Correctional Services on the subject of "Inmate Disciplinary Procedures."

Effective, fair, and consistent disciplinary procedures enhance the orderly operation of a facility, and reinforce appropriate behavior and responsibility to promote the orderly, safe and secure operation of a correctional facility. In Chapter 5, of Title 68, Department policy, in part, reads, "Any violation of the Code of Offenses may result in disciplinary action pursuant to Chapters 5 and 6. No conducts of an inmate constitutes an offense unless it is defined as such in the code of offenses." For this reason, we believe the review of Chapter 5 and 6 should occur at the same times and be updated, if necessary.

Review

In November of 2014, it was concluded by the Legislative Audit Office that the terms that describe the severity of misconduct that warrants disciplinary segregation and/or loss of good time are not defined in statute, and Nebraska Department of Correctional Services (NDCS) had no written guidelines for their application. The Department agreed to this fact and shared they have written policies governing the

imposition of disciplinary segregation which comply with the due process requirements laid out by the United States Supreme Court in the *Wolff v. McDonnell* case.

Recommendations

At this time, the Department proposes to define the terms “flagrant” and “serious,” for the purposes of distinguishing those offenses that are eligible for loss of good time as a sanction, through the State’s promulgation process. We support the Department’s approach to define the aforementioned terms for guidance of application and development of consistency. In terms of the proposed definition by NDCS, we would suggest a need to tighten the language in the proposed changes to the following:

A flagrant and/or serious offense is a violation of the Code of Offences that; (1) creates an immediate and specific threat to the Institution, public, visitors, staff and/or other inmates; (2) involves an assault on any person; (3) involves mutinous actions; (4) involves a substantial destruction of property; (5) involves an escape, as covered under class I(E) and I(I) of the code of offenses or; (6) involves repeated violations of the same provision of the Code of Offenses over a twelve month period.

Also, while we may agree with many of the provisions already in Chapter 6 of Title 68, we also have some concerns regarding the current language as published. Due to the wide variety of activities that may constitute a specific offense, we also do not think all rule violations are deserving of loss of good time or long periods of time in Disciplinary Segregation, so we would recommend that the Department of Correctional Services consider reviewing Chapter 5 and 6 on an annual basis for possible updates, and we would urge the Department to consider amending the regulations as summarized below:

1. Section 003- Pre-hearing Detention

The suggested language in this current section allows an inmate’s status on immediate segregation to be reviewed within seventy-two hours. In our opinion, there appears to be a conflict in terms of the timeline allowed in Title 72, Chapter 1. For instance, the language in Title 72, Chapter 1, and 004.04(B) of the Nebraska Administrative code on restrictive housing provides the review process for placement on immediate segregation. It reads in part, that the initial placement in immediate segregation must be approved by the facility warden within 24 hours. Continued retention in immediate segregation must be approved by the facility warden at 15 days. Requests for extensions of immediate segregation past thirty days shall require approval by the Deputy Director for Institutions. Requests for extensions of immediate segregation past 45 days shall require approval by the Director. The maximum length of stay on immediate segregation is 60 days. These duties are not to be permanently assigned to a designee, but can be performed by the acting warden, acting Deputy Director for Institutions, or acting Director.” We would encourage the Department to align the timelines in this section with Title 72, Chapter 1.

2. Section 006-Filing and Logging of Misconduct Reports

The word "misconduct" should be inserted so the Section will read as follows: "If an employee witnesses or has a reasonable belief that an infraction of the Code of Offenses has been committed by an inmate, the employee shall prepare a written **misconduct** report."

3. **Section 007.04** states that the Institutional disciplinary committee (IDC) may transfer cases to a unit disciplinary committee and a unit disciplinary committee (UDC) may transfer cases to the institutional disciplinary committee. We believe further clarification addressing what types of offenses would be allowed to move between IDC and UDC is needed. Improved guidelines in this area would ensure consistency.
4. **Section 008- Institutional Disciplinary Committee or Hearing Officer.** IDC's consist of a committee of staff assigned at the Warden's discretion or a hearing officer who works closely with the NDCS legal staff. Currently the Tecumseh State Correctional Institute, Nebraska State Penitentiary, Lincoln Correctional Center and the Diagnostic and Evaluation Center, all have employees who serve as full-time hearing officers. We support the use of Hearing Officers that have a sole purpose of reviewing all the evidence for referred disciplinary cases, including both direct and circumstantial evidence, as well as determining guilt or innocence, and determination of the appropriate punishment, consistent with Departmental policy. We think that this is especially important in larger facilities where the committee assignments are those individuals that have other operational duties and responsibilities that at times lead to a lower level of knowledge concerning the disciplinary process guidelines. We also believe that those facilities without hearing officers should examine the need for dedicated personnel in this area.
5. **Section 009.10-Change of Work, Education or Program Assignment.** We are concerned about the practical interpretation of this section. Our experience in this area shows us a much different practice from what the regulation contemplates. Whereas the disciplinary process may not be used to reassign an inmate from work, education or other program assignments, we see that the practice is to reassign inmates based on a misconduct report. We believe this area should be reexamined to include language that does not allow the circumvention of the intent of this section. For example, Change provision to read, "A change in work, education or other program assignment shall not be used for disciplinary purposes or through classification action."

6. **Section 015-Appeals Process.** This section describes the process that an inmate must follow in order to appeal a disciplinary committee's decision. One element of an effective due process system is its time lines. We support the time lines within the appeals process. However, we remain concerned about cases to our office involving lost appeals paperwork. We believe that it is important that the protocol in place ensures that the Department has received an inmate appeal is essential in maintaining the integrity of the appeals process. We would suggest that a protocol as to who is the designated person(s) and how that individual receives and logs appeals be reviewed.

7. **Section 016-Disciplinary Segregation.** Effective July 11, 2016, a policy change occurred regarding the use of Disciplinary Segregation. At that time, Director Scott Frakes no longer authorized Disciplinary Segregation as a sanction for rule violations. It appears that as this policy shift has already occurred, it should be captured under this section.

Finally, in regards to the Department's Inpatient Mental Health services, we would propose that the following provision be added to Chapter 6: "When a serious mentally ill inmate is being investigated for a disciplinary offense, the treatment team or treatment leader should make a report as to; (1) Whether the inmate's current mental illness precludes participation in the disciplinary process; (2) Whether the inmates' mental illness contributed significantly to the alleged disciplinary offense; and/or(3) whether the inmate's mental status contraindicates any particular form of punishment. The evaluation's findings and recommendations of the mental health staff shall be forwarded to the investigating officer, be filed as a part of the disciplinary record, and be filed in the inmates' inpatient mental health records. The treatment team leader/designee shall sign the report." Because the serious mentally ill are not capable of collecting and presenting evidence effectively on their own behalf, the agency should provide staff assistance at all disciplinary hearings for those inmates who are seriously mentally ill.

Respectfully Submitted,

Jerall Moreland 

Deputy Ombudsman for Institutions


Marshall Lux

State Ombudsman

CC: Members, LR 34 Committee

Mr. Scott Frakes