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Revisor of Statutes Bureau

CERTIFICATE

STATE OF WISCONSIN)
) SS
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

TO ALL TO WHOM THESE PRESENTS SHALL COME, GREETINGS:

I, Linda Reivitz, Secretary of the Department of Health and Social Services and custodian of the official records of said Department, do hereby certify that the annexed rules relating to prohibited conduct, discipline, disciplinary hearings, administrative confinement, voluntary confinement and complaints of inmates at adult correctional institutions were duly approved and adopted by this Department on March 6, 1985.

I further certify that this copy has been compared by me with the original on file in this Department and that the same is a true copy thereof, and of the whole of such original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 6th day of March A.D. 1985.

SEAL:

Linda Reivitz, Secretary
Department of Health and Social Services

5-1-85

ORDER OF THE
DEPARTMENT OF HEALTH AND SOCIAL SERVICES
REPEALING, RENUMBERING, AMENDING AND CREATING RULES

To repeal HSS 303.53, 303.63(3), 303.77, 303.78, and 303.80; to renumber HSS 303.02(14) to (16) and 303.68(2) to (5); to renumber and amend HSS 303.15 (intro.) and (1) to (5) and 303.79 and Note; to amend HSS 303.03(4), 303.11(3) and (3) Note, 303.12 Note, 303.13 to 303.14, 303.25 and Note, 303.28 and Note, 303.37 Note, 303.43 Note, 303.63 (title) and (1)(d), 303.68(1)(d), 303.68 (4)(intro.), as renumbered, 303.68 Note, 303.71(1), 303.72(3) and (4), 303.81(1), (2), (3), (4) and (8) and Note, 303.82(1) and (2) and Note, 303.84(1) (intro.) and (h), (2)(a) (table), (am) and (b) and Note, 303.85(1)(b), 303.86(5) Note, 303.86(6), 306.01, 306.07(6) and (4) Note to (6) Note, 306.16(3) and (3) Note, 308.04(5), (6), (7), (11) and (3) Note, (5) Note, (10) to (11) Notes, and 310.13 and Note; to repeal and recreate HSS 303.36, 303.49 Note and 303.50 Note to 303.52 Note, 303.75 and 303.76 and Notes, and 308.04(2) and (4) and (2) and (4) Notes; and to create HSS 303.02(14) and (15), 303.15(2), 303.17 Note (3rd paragraph), 303.26(5), 303.271 and Note, 303.40 Note (6th paragraph), 303.47 Note (4th paragraph), 303.511, 303.57 Note (3rd paragraph), 303.631 and Note, 303.68(2), 303.87 and Note, and 306.045 and Note, relating to prohibited conduct, discipline, disciplinary hearings, administrative confinement, voluntary confinement and complaints of inmates at adult correctional institutions.

Analysis by the Department of Health and Social Services

Several changes are made in rules governing the conduct, discipline, statuses of inmates, and complaints of inmates at adult correctional institutions based on the Department's experience with the original rules, which went into effect in September 1980 and May 1981.

In the revised rules, procedures are established for the voluntary confinement of an inmate in maximum close custody when the inmate requests this confinement out of fear for his or her safety; elements of certain offenses are clarified, as are hearing procedures for both major and minor offenses, the use of administrative confinement, and policies governing strip searches and use of firearms by staff; maximum penalties for certain offenses are increased; the restriction that confinement to room or cell cannot be ordered during school or work program hours is removed; the limit on use of controlled segregation is extended beyond the normal 72 hours if the inmate exhibits uncontrollable behavior, but extensions are made subject to review every 24 hours; the requirement that at least one member of the adjustment committee be from the treatment staff is deleted; the standard barring a person from serving on the adjustment committee is changed from having had "direct personal involvement" with the inmate to having had "substantial involvement" with the inmate; and measures are taken to discourage inmates from deliberately making false accusations about staff through the inmate complaint system.

In regard to disciplinary hearings, the revised rules clarify the process by consolidating the rules relating to hearing procedures by type of violation, major or minor. They also include a provision that for each type of hearing, if the inmate refuses to appear, the hearing examiner(s) may conduct the hearing without the inmate being present. The notice will inform the inmate of this possibility. The revised rules make clear that the inmate may waive either type of hearing and that the inmate may waive the time limits for either type of hearing.

The standard for use of administrative confinement, a non-punitive status, is changed. The current rule requires a showing of dangerousness. The new rule establishes conditions under which administrative confinement may be used. The standard is similar, but not identical, to the involuntary commitment standard under s.51.20(1) Stats. The new rule also resolves an internal contradiction in the provision governing the calling of witnesses by making the right to call witnesses in administrative confinement hearings the same as the right to call witnesses in due process hearings for major violations.

Pursuant to the authority vested in the Department of Health and Social Services by s.227.014(2), Stats., the Department of Health and Social Services hereby repeals, renumbers, amends, and creates rules interpreting ss.46.03(6)(b) and 53.07, Stats., as follows:

SECTION 1. HSS 303.02(14) to (16) are renumbered 303.02(16) to (18).

SECTION 2. HSS 303.02 (14) and (15) are created to read:

HSS 303.02 (14) "Sexual contact" means:

(a) Kissing;

(b) Handholding;

(c) Touching by the intimate parts of one person to any part of another person. In this subsection, "intimate part" means breast, penis, buttocks, scrotum, or vaginal area, whether clothed or unclothed; or

(d) Any touching by any part of one person or with any object or device of the intimate parts of another person.

(15) "Sexual intercourse" means any penetration, however slight, by the penis into the mouth, vagina, or anus of another person, or any penetration by any part of the body or an object into the anus or vagina of another person.

SECTION 3. HSS 303.03(4) is amended to read:

HSS 303.03(4) No offense ~~shall~~ may be considered a lesser included offense of another unless it is so listed in the following table:

Greater offense	Lesser included offense
303.07 Aiding and abetting	303.06 Attempt 303.21 Conspiracy
303.12 Battery	303.17 Fighting 303.28 Disruptive conduct
303.13 Sexual assault--intercourse	303.14 Sexual assault--contact 303.15 Sexual conduct
303.14 Sexual assault--contact	303.15 Sexual conduct
303.17 Fighting	303.28 Disruptive conduct
303.18 Inciting a riot	303.19 Participating in a riot 303.20 Group resistance and petitions 303.28 Disruptive conduct
303.19 Participating in a riot	303.20 Group resistance and petitions 303.28 Disruptive conduct
303.22 Escape	303.51 Leaving assigned area
303.28 Disruptive conduct	303.29 Talking
303.34 Theft	303.40 Unauthorized transfer of property
303.37 Arson	303.38 Causing an explosion or fire 303.39 Creating a hazard 303.47 Possession of contraband--miscellaneous
303.38 Causing an explosion or fire	303.39 Creating a hazard
303.42 Possession of money	303.47 Possession of contraband--miscellaneous
303.43 Possession of intoxicants	303.40 Unauthorized transfer of property 303.47 Possession of contraband--miscellaneous
303.44 Possession of drug paraphernalia	303.47 Possession of contraband--miscellaneous
303.45 Possession, manufacture, and alteration of weapons	303.47 Possession of contraband--miscellaneous
303.46 Possession of excess smoking materials	303.47 Possession of contraband--miscellaneous
303.57 Misuse of prescription medicine	303.40 Unauthorized transfer of property
Any substantive offense	303.06 Attempt 303.07 Aiding and abetting 303.21 Conspiracy

SECTION 4. HSS 303.11(3) and (3) Note are amended to read:

HSS 303.11 (3) No inmate may remain in TLU ~~for longer~~ more than ~~20~~ 21 days, except that the superintendent, with notice to the bureau director, may extend this period for ~~no longer than~~ up to ~~20~~ 21 additional days for cause. The security director shall review the status of each inmate in TLU every ~~seven~~

7 days to determine whether TLU continues to be appropriate. If upon review it is determined the TLU is not appropriate, the inmate shall be released from TLU immediately.

Note: HSS 303.11. The main purpose of the section authorizing temporary lockup is to allow temporary detention to an inmate until it is possible to complete an investigation, cool down a volatile situation or hold a disciplinary hearing. The effort is to avoid punitive segregation without a prior hearing, while assuring that inmates can be separated from the general population when there is good reason to do so. The policy is to keep an inmate in TLU only as long as necessary and then either to release the inmate or put the inmate in segregation based on a disciplinary hearing which conforms to the provisions of the chapter. The frequent reviews by high-ranking administrators and the ~~20-day~~ 21-day limit, both provided by sub. (3), are designed to implement this policy, as well as to give the inmate an opportunity to be heard on the issue of whether TLU is appropriate.

Where court decisions have dealt with temporary lockup, they have uniformly approved lockup without a prior hearing if the prison officials believe in good faith that there is an emergency or that the accused is likely to commit another offense if not locked up. See, for example, Hayes v. Walker, 555 F. 2d 625 (7th Cir. 1977). However, some courts have placed a time limit on temporary lockup: U.S. ex. rel. Miller v. Twomey, 479 F. 2d 701 (7th Cir. 1973), cert. den. 414 U.S. 1146 (reasonable time); Enomoto v. Wright, 46 L.W. 3325 (N.D. Cal. 1976), aff'd 46 L.W. 3525 (U.S. 1978) (72 hours).

In Barnes v. Govt. of Virgin Islands, 415 F. Supp. 1218 (D.C. V.I. 1976), the court required a hearing prior to lockup in all cases.

The policy is to use TLU only for an appropriate reason. Where TLU is no longer appropriate, it should be discontinued. There are situations, however, when its use for periods up to ~~20~~ 21 days is justified. This period may be extended. It is anticipated that such extensions ~~shall~~ will be relatively rare. The need arises most commonly if the sheriff's department requests it, to permit the completion of an investigation. Periodic review is to insure that abuses do not occur.

SECTION 5. HSS 303.12 Note (4th paragraph) is amended to read:

Note: HSS 303.12 Note (4th paragraph): Lesser included ~~offense~~ offenses: HSS 303.17, Fighting and HSS 303.28, Disruptive Conduct.

SECTION 6. HSS 303.13 and 303.14 are amended to read:

HSS 303.13 SEXUAL ASSAULT--INTERCOURSE. Any inmate who has sexual intercourse, as defined in s.HSS 303.02(15), with another person without that person's consent and knowing that it is without that person's consent is guilty of an offense. ~~"Sexual intercourse" means any penetration, however slight, by the penis into the mouth, vagina, or anus of another person, or any penetration by any part of the body or an object into the anus or vagina of another person.~~

HSS 303.14 SEXUAL ASSAULT--CONTACT. Any inmate who intentionally has sexual contact, as defined in s.HSS 303.02(14), with another person without that person's consent and knowing that it is without that person's consent is guilty of an offense. ~~"Sexual contact" means:~~

~~(1) Kissing;~~

~~(2) Handholding;~~

~~(3) Touching by the intimate parts of one person to any part of another person. The "intimate parts" are breast, penis, buttocks, and vaginal area, whether clothed or unclothed; or~~

~~(4) Any touching of the intimate parts of another person.~~

SECTION 7. HSS 303.15 (intro.) and (1) to (5) are renumbered 303.15 (1)(intro.) and (a) to (e) and, as renumbered, are amended to read:

HSS 303.15 SEXUAL CONDUCT. (1) Any inmate who intentionally does any of the following is guilty of an offense:

(a) Has sexual intercourse, as defined ~~under~~ in s.HSS ~~303.13~~ 303.02(15), with another person.

(b) Has sexual contact, as defined ~~under~~ in s.HSS ~~303.14~~ 303.02(14), with another person.

(c) Requests, hires or tells another person to have sexual intercourse or sexual contact;

(d) Exposes his or her intimate parts~~, as defined under HSS 303.14,~~ to another person for the purpose of sexual arousal or gratification, or for exhibitionistic purposes; or

(e) Has contact with or performs acts with an animal that would be sexual intercourse or sexual contact ~~with an animal~~ if with another person.

SECTION 8. HSS 303.15(2) is created to read:

HSS 303.15(2) Lack of consent is not an element of the offense of sexual conduct.

SECTION 9. HSS 303.17 Note (3rd paragraph) is created to read:

Note: HSS 303.17 (3rd paragraph): Lesser included offense: HSS 303.28, Disruptive Conduct.

SECTION 10. HSS 303.25 and Note are amended to read:

HSS 303.25 DISRESPECT. Any inmate who overtly shows disrespect for any person performing his or her duty as an employe of the state of Wisconsin is guilty of an offense, whether or not the subject of the disrespect is present and even if the expression of disrespect is in writing. Disrespect includes, but is not limited to, derogatory or profane writing, remarks or gestures, name-calling, spitting, yelling, and other acts intended as public expressions of disrespect for authority and made to other inmates and staff. Disrespect does not include all oral or written criticism of staff members, criticism of them expressed through the mail, thoughts and attitudes critical of them, or activity in therapy groups.

Note: HSS 303.25. Disrespectful behavior of the type prohibited by this section can lead to a breakdown of authority or a serious disturbance. This section ~~is not intended to probibit all criticism of staff members; criticism expressed through the mail or thoughts and attitudes. Nor is it directed toward activity in therapy groups, where open expression is important to treatment. It~~ is directed at conduct within the institution which is potentially disruptive or which erodes authority, not at activity outside the institution. The former policy and procedure 1.01 is very similar to this section.

SECTION 11. HSS 303.26(5) is created to read:

HSS 303.26 (5) Directs another person to give anything of value to a staff member, or agrees with another person to give anything of value to a staff member.

SECTION 12. HSS 303.271 and Note are created to read:

HSS 303.271 LYING ABOUT STAFF. (1) Any inmate who knowingly makes a false written or oral statment about a staff member with the intent to harm the staff member and makes that false statement public is guilty of an offense.

(2) This section applies to all false statements, including those made in the inmate complaint review system, which are revealed to persons outside the complaint system.

(3) A staff member who believes he or she is the subject of a false statement may not write the conduct report. The staff member may contact his or her supervisor who shall do an investigation, and, if the supervisor believes a violation has occurred, the supervisor shall write a conduct report. An inmate complaint investigator may not write a conduct report alleging lying about staff.

Note: HSS 303.271. Lying about staff can hurt the staff member and affect staff morale generally. There have been several instances in which inmates deliberately made false allegations concerning corruption and sexual misconduct by staff. The nature of the allegations and the fact that, upon investigation, it became evident the inmate was trying to injure the staff member, led to the conclusion that this behavior should subject inmates to punishment. The inmate complaint review system will not insulate inmates from all liability. However, if the inmate does not reveal the false statement to persons outside the complaint system, it is unlikely he or she intended to harm the staff member and actual harm to the staff member is minimized. Since the implicated staff member cannot write the conduct report, the likelihood of retaliation against inmates for legitimate use of the complaint system is reduced. The requirements that the inmate knew the statement was false, that he or she intended to harm the staff member, and that he or she made that false statement public, safeguard inmates from punishment for making suggestions for investigation and statements that they thought were true.

SECTION 13. HSS 303.28 and Note are amended to read:

HSS 303.28 DISRUPTIVE CONDUCT. Any inmate who intentionally or recklessly engages in, causes or provokes disruptive conduct is guilty of an offense. "Disruptive conduct" includes physically resisting a staff member, or overt behavior which is unusually loud, offensive or vulgar, and may include arguments, yelling, loud noises, horseplay, or loud talking, which may annoy another.

Note: HSS 303.28. This section is intended to help preserve a reasonably quiet and orderly environment for the benefit of all inmates and staff. Its counterpart offense ~~on the~~ outside the institution setting is "disturbing the peace." As ~~on the~~ outside the institution, disruptive conduct frequently can and should be handled by a warning rather than a charge of violating this section. See HSS 303.65, offenses ~~which~~ that do not require a conduct report.

This section is somewhat similar to HSS 303.29, Talking. That section should be used in situations where no talking is allowed, while this one should be used where an inmate disturbs others by unusually loud talking or unusually offensive language, as well as for non-verbal disruptions such as physically resisting a staff member. This section also overlaps with HSS 303.25, Disrespect. HSS 303.25, rather than this section, should be used when the disruptive tendency of an inmate's words or actions is due to their message of disrespect for a staff member. Disruptive conduct is a lesser-included offense of HSS 303.12, Battery, HSS 303.17, Fighting, HSS 303.18, Inciting a Riot, and of HSS 303.19, Participating in a Riot.

SECTION 14. HSS 303.36 is repealed and recreated to read:

HSS 303.36 MISUSE OF STATE OR FEDERAL PROPERTY. (1) Any inmate who intentionally uses any property of the state in any way that is not authorized is guilty of an offense.

(2) Any inmate who knowingly mails or attempts to mail any letter or parcel on which is affixed a cancelled postage stamp is guilty of an offense.

SECTION 15. HSS 303.37 Note (4th paragraph) is amended to read:

Note: HSS 303.37 (4th paragraph). Lesser included offenses: HSS 303.38, Causing an Explosion or Fire; HSS 303.39, Creating a Hazard; HSS 303.47, Possession of Contraband -- Miscellaneous.

SECTION 16. HSS 303.40 Note (6th paragraph) is created to read:

Note: HSS 303.40 (6th paragraph). Unauthorized transfer of property is a lesser included offense of HSS 303.34, Theft, HSS 303.43, Possession of Intoxicants, and of HSS 303.57, Misuse of Prescription Medicine.

SECTION 17. HSS 303.43 Note (3rd paragraph) is amended to read:

Note: HSS 303.43 (3rd paragraph). Lesser included ~~offense~~ offenses: HSS 303.40, Unauthorized Transfer of Property and HSS 303.47, Possession of Contraband -- Miscellaneous.

SECTION 18. HSS 303.47 Note (4th paragraph) is created to read:

Note: HSS 303.47 (4th paragraph). Possession of Contraband -- Miscellaneous is a lesser included offense of HSS 303.37, Arson, HSS 303.42, Possession of Money, HSS 303.43, Possession of Intoxicants, HSS 303.44, Possession of Drug Paraphernalia, HSS 303.45, Possession, Manufacture, and Alteration of Weapons, and of HSS 303.46, Possession of Excess Smoking Materials.

SECTION 19. HSS 303.511 is created to read:

HSS 303.511 BEING IN AN UNASSIGNED AREA. Any inmate who, without a staff member's permission, intentionally enters or remains in a room or area other than the one to which he or she is assigned is guilty of an offense.

SECTION 20. HSS 303.49 Note and 303.50 Note to 303.52 Note are repealed and recreated to read:

Note: HSS 303.49 to HSS 303.52. In general, all of the sections concerning movement have the following purposes: (1) to prevent escape by monitoring inmates' movements; (2) to prevent fights, assaults and disturbances by preventing gathering of groups except in closely supervised situations; and (3) to permit the effective monitoring of inmate activity both in the institution and while the inmate is on work or study release. In addition, HSS 303.49, Punctuality and attendance, is intended to promote the smooth running of all programs of work, study and recreation, and to promote development of punctual habits by inmates. HSS 303.52 has the additional purposes of preventing theft and other illicit activity. HSS 303.50 is not intended to prohibit normal conversation between inmates who are walking.

These sections were originally derived from the former policies and procedures 4.02-4.07 which were in effect prior to 1979. The policies entitled "Group Movement" and "Individual Movement" were eliminated in the initial promulgation of HSS 303 in August 1980, for the following reasons: (1) the 2 rules were not uniform from institution to institution, so it would be better to use posted policies; and (2) in most cases the offenses described were adequately covered by one of the other 4 sections or by HSS 303.20, Group Resistance.

SECTION 21. HSS 303.53 is repealed.

SECTION 22. HSS 303.57 Note (3rd paragraph) is created to read:

Note: HSS 303.57 (3rd Paragraph). Lesser included offense: HSS 303.40, Unauthorized Transfer of Property.

SECTION 23. HSS 303.63 (title) and (1)(d) are amended to read:

HSS 303.63 VIOLATIONS OF INSTITUTIONAL POLICIES AND PROCEDURES. (1) Each institution may make specific substantive disciplinary policies and procedures relating to:

(d) Movement within and outside the institution;

SECTION 24. HSS 303.63(3) is repealed.

SECTION 25. HSS 303.631 and Note are created to read:

HSS 303.631 VIOLATING CONDITIONS OF LEAVE. Any inmate who violates conditions imposed under s. HSS 326.07(1) or (2) for leave is guilty of an offense.

Note: HSS 303.631. This rule was formerly s. HSS 303.63(3).

SECTION 26. HSS 303.68(1)(d) is amended to read:

HSS 303.68(1)(d) A "minor offense" is any violation of a disciplinary rule which is not a major offense under sub. (3) or (5) or which the security director has not classified as a major offense. ~~Only minor penalities may be imposed for a minor offense.~~

SECTION 27. HSS 303.68 (2) to (5) are renumbered HSS 303.68 (3) to (6).

SECTION 28. HSS 303.68(2) is created to read:

HSS 303.68(2) Except for an offense listed under sub. (3) or covered by sub. (5), an offense is neither a major nor a minor offense until the security director classifies it as major or minor.

SECTION 29. HSS 303.68(4)(intro.), as renumbered, is amended to read:

HSS 303.68(4)(intro) An alleged violation of any section other than ~~those identified as major~~ ones listed in sub. ~~(2)~~ (3) ~~of this section~~ may be treated as either a major or minor offense. The security director shall decide whether it should be ~~prosecuted~~ treated as a major or minor offense, if the offense has

not been disposed of summarily in accordance with s. HSS 303.74. ~~To determine~~ In deciding whether an alleged violation should be treated as a major or minor offense, the security director shall consider the following criteria ~~should be considered~~ and shall indicate in the record of disciplinary action the reason for the decision based on these criteria.

SECTION 30. HSS 303.68 Note is amended to read:

Note: HSS 303.68. For the reasons given in the note to HSS 303.64 and in Wolff v. McDonnell, 418 U.S. 539(1974), greater procedural safeguards are used when a greater punishment is possible. The dividing line between the 2 types of formal hearing is the same as the one used in Wolff, supra. If segregation or loss of good time is imposed, then all of the Wolff safeguards apply. If other lesser punishments are used, then a less formal procedure is used. In order to preserve the option of using a major punishment, the security office will designate a conduct report as containing a "major offense" whenever it seems possible that either segregation or loss of good time will be imposed by the adjustment committee. Some offenses must always be considered major offenses; these are listed in sub. ~~(2)~~ (3). Violations of other sections will be considered individually and it is left to the security director's discretion whether to treat an offense as major or minor. However, guidelines for the exercise of this discretion are given in sub. ~~(3)~~ (4).

When a security director treats an offense as a major offense, as allowed by sub. (4), the security director should indicate in the record of the disciplinary action some reason for that decision based on the criteria enumerated under sub. (4).

SECTION 31. HSS 303.71(1) is amended to read:

HSS 303.71 CONTROLLED SEGREGATION. (1) USE. Any inmate in TLU or segregation of any kind who exhibits loud and seriously disruptive behavior or destructive behavior toward the contents of the cell or himself or herself may be put into controlled segregation upon order of the shift supervisor. No inmate may be placed in controlled segregation unless a conduct report is written for the conduct giving rise to the use of controlled segregation. The adjustment committee shall review the report to determine if disciplinary action is appropriate. Controlled segregation normally lasts for not more than 72 hours for a single inmate. ~~After an inmate has been in controlled segregation for a total of 72 hours, he or she must be returned to a regular segregation cell for at least 24 hours before he or she may be returned to controlled segregation.~~ , but the security director may extend the placement for uncontrollable behavior. Extensions shall be reviewed every 24 hours. When the behavior is brought under control, the inmate shall be removed from this status.

SECTION 32. HSS 303.72(3) and (4) are amended to read:

HSS 303.72 (3) ROOM AND CELL CONFINEMENT. Room and cell confinement may be imposed ~~during non-school or non-work program hours, including weekends~~ at any time for a maximum of 10 days. During the hours of confinement, the inmate may not leave his or her quarters without specific permission. Permission may be granted for attendance at religious services, medical appointments, showers, and visits from outside persons, if these must occur during the hours of confinement. Any or all electronic equipment may be removed from an inmate's quarters if room confinement is imposed.

(4) LOSS OF A SPECIFIC PRIVILEGE. Specific privileges which may be lost if abused include but are not limited to: use of inmate's own TV, radio or cassette player; phone calls; participation in offgrounds activities; ~~and~~ having meals in the dining room; and canteen privileges. These privileges may be taken away for up to 30 days for the first offense, for up to 60 days for the second, and permanently for the third. However, visiting and mail may be suspended for periods of time in accordance with ~~departmental rules relating to resources for inmates~~ ss. HSS 309.05 and 309.17.

SECTION 33. HSS 303.75 and 303.76 and Notes are repealed and recreated to read:

HSS 303.75 HEARING PROCEDURE FOR MINOR VIOLATIONS. (1) NOTICE. When an inmate is alleged to have committed a minor violation and the security director or his or her designee has reviewed the conduct report pursuant to s. HSS 303.67 and the conduct report has not been disposed of summarily in accordance with s. HSS 303.74, a copy of the approved conduct report shall be given to the accused inmate. The conduct report shall include the offense or offenses charged, the facts upon which the charges are based, the sources of information and the date of the hearing, and shall notify the inmate of the time of the hearing and that the hearing may be conducted without the inmate being present if the inmate refuses to appear at the hearing.

(2) TIME LIMITS. Except as provided in this subsection, the hearing may not be held until at least 2 working days after the inmate receives the approved conduct report, or later than 21 days after the inmate receives the approved conduct report. The inmate may request more time to prepare, and this request shall be granted by the hearing officer unless there is a good reason to deny the request. An inmate may waive in writing the time limits provided in this section.

(3) HEARING OFFICER. The superintendent shall appoint one or more staff members to serve as hearing officers. Only persons who are eligible to serve on the adjustment committee may be appointed. A hearing officer with substantial involvement in the conduct report may not hold a hearing on that conduct report.

(4) HEARING. At the hearing, a hearing officer shall review the conduct report and discuss it with the inmate. The inmate shall be provided with an opportunity to respond to the report and make a statement about the alleged violation. The hearing officer may question the inmate. The inmate has no right to a staff advocate, to confront witnesses or to have witnesses testify on his or her behalf. If an inmate refuses to attend a hearing, the hearing may be conducted without the inmate being present.

(5) DECISION AND DISPOSITION. (a) The hearing officer shall decide the guilt or innocence of the inmate on each charge, decide the punishment and announce these decisions to the inmate. Penalties for minor violations shall be imposed in accordance with s. HSS 303.72. Penalties for major violations when a due process hearing is waived under s. HSS 303.76 (6) shall be imposed in accordance with ss. HSS 303.83 and 303.84.

(b) The institution shall establish guilt based on the preponderance of the evidence.

(c) The hearing officer shall state in writing the finding of guilt for each charge, the punishment and the reasons for it on the conduct report and return it to the security office for record entry and compliance with the disposition.

(6) APPEAL. An inmate may appeal the disposition of a minor hearing within 10 days to the superintendent.

Note: HSS 303.75. The hearing procedure for minor violations, often called an "informal hearing," has several safeguards to protect the inmate from an erroneous or arbitrary decision. It is used in the following situations: (1) When the inmate did not agree to summary disposition, because he or she contested the facts or for some other reason; (2) When the appropriate punishment, if the inmate is found guilty, is more severe than permitted on summary disposition but not so severe as to require a full due process hearing; and (3) When the inmate waives a due process hearing.

The protections present in the minor hearing procedure are: subsection (1)--notice of charges; subsection (2)--specific time limits for the hearing and opportunity to waive them; subsection (3)--an impartial hearing officer; subsection (4)--opportunity for the inmate to explain or deny the charges; subsection (5)--a decision based on the preponderance of the evidence; subsection (6)--the right to appeal; and HSS 303.85--no records are kept in any offender-based file if the inmate is found not guilty.

The ACA, standard 4334, Discussion, draws the line between "major" and "minor" violations in a different place: "Minor violations usually are those punishable by no more than a reprimand or loss of commissary, entertainment or recreation privileges for not more than 24 hours." Because minor penalties as defined in HSS 303.68 include several which are more severe, the minor offense disciplinary procedure is somewhat more formal than that recommended by the ACA.

HSS 303.76. HEARING PROCEDURES FOR MAJOR VIOLATIONS. (1) NOTICE. When an inmate is alleged to have committed a major violation and the security director or his or her designee has reviewed the conduct report pursuant to s.HSS 303.67, a copy of the approved conduct report shall be given to the inmate within 2 working days after its approval. The conduct report shall inform the inmate of the rules which he or she is alleged to have violated, the potential penalties or other potential results that may be imposed, including but not limited to removal from work release, and that he or she may exercise the right to a due process hearing or may waive this right in writing. The inmate shall be informed that if he or she waives the right to a formal due process hearing, he or she will be given an informal hearing under s. HSS 303.75. The inmate shall be informed that if a formal due process hearing is chosen, the inmate may

present oral, written, documentary and physical evidence, and evidence from voluntary eye witnesses in accordance with this section and s. HSS 303.81; that he or she has a right to the assistance of a staff advocate in accordance with this section and s. HSS 303.79; that the adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness; that repetitive, disrespectful and irrelevant questions are forbidden; and that the inmate may appeal the finding and disposition of the adjustment committee in accordance with sub. (7). The inmate shall also be informed that if he or she refuses to attend a hearing, the hearing may be conducted without the inmate being present.

(2) WAIVER. An inmate may waive the right to a due process hearing in writing at any time. If the inmate waives a due process hearing, the conduct report shall be disposed of under the hearing procedures for minor violations, s. HSS 303.75. A waiver does not constitute an admission of the alleged violation. A waiver may not be retracted without the security director's approval.

(3) TIME LIMITS. A due process hearing shall be held no sooner than 2 working days or later than 21 days after the inmate receives a copy of the conduct report and hearing notice. An inmate may waive these time requirements in writing if the security director agrees to the waiver. The inmate may request additional time to prepare for the hearing, and the security director shall grant the request unless there is a good reason to deny it.

(4) PLACE. The due process hearing may take place at the institution where the alleged conduct occurred, at a county jail or at an institution to which an inmate has been transferred.

(5) HEARING. The adjustment committee, as defined in s. HSS 303.82, shall conduct the due process hearing. If an inmate refuses to attend the hearing or disrupts the hearing, the hearing may be conducted without the inmate being present. At a due process hearing, the conduct report shall be read aloud and all witnesses for or against the accused, including the accused himself or herself and the staff member who wrote the conduct report, shall have a chance to speak. The adjustment committee may require that physical evidence be offered. The adjustment committee may permit direct questions or require the inmate or his or her advocate to submit questions to the adjustment committee to be asked of the witness. Repetitive, disrespectful or irrelevant questions are forbidden.

(6) DECISION. After the hearing the adjustment committee shall deliberate in private, considering only the evidence presented to it and the inmate's records. The institution is required to establish guilt by a preponderance of the evidence. The adjustment committee may find the inmate guilty or not guilty. A committee of 3 may find the inmate guilty if at least 2 of the 3 members find by a preponderance of the evidence that he or she is guilty, and if 2 agree upon a sentence, may sentence the inmate. A committee of 2 or of one may find the inmate guilty if the committee members unanimously find by a preponderance of the evidence that the inmate is guilty and may sentence the inmate if they are unanimous as to the sentence. If a sentence is not agreed upon, the matter shall be referred to the superintendent for decision. The committee shall then recall the accused and his or her advocate, if any, and announce its decision or the decision of the superintendent. The accused and his or her advocate, if any, shall each receive a written copy of the decision.

(7) APPEAL. (a) Any time within 10 days after a due process hearing, an inmate who is found guilty may appeal the decision or the sentence, or both, to the superintendent.

(b) The superintendent shall review all records and forms pertaining to the appeal and make his or her decision within 10 days following receipt of the request.

(c) The superintendent's decision shall be to:

1. Affirm the adjustment committee's decision and the sentence;

2. Affirm the adjustment committee's decision but reduce the sentence in type or quality;

3. Reverse the adjustment committee's decision. In this case, all records of the decision shall be removed from all offender-based files. Records may be kept for statistical purposes only; or

4. Return the case to the adjustment committee for further consideration.

(d) The superintendent's decision is final.

Note: HSS 303.76. HSS 303.76, 303.78, and 303.82 prescribe a hearing procedure for major offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539, 564 (1974).

Subsection (1) concerns notice. With respect to notice, the Supreme Court said:

> We hold that written notice of the charges must be given to the disciplinary-action defendant in order to inform him of the charges and to enable him to marshal the facts and prepare a defense. At least a brief period of time after the notice, no less than 24 hours, should be allowed to the inmate to prepare for the appearance before the Adjustment Committee.

In accordance with Taylor v. United States, 414 U.S. 17(1973), the inmate is informed that if he or she refuses to attend the hearing, the hearing may be held without the inmate being present.

Subsection (2) concerns waiver. When an inmate waives a hearing for a major due process violation, he or she waives all rights associated with that type of hearing and has only the rights associated with hearings for minor violations. Waiver includes waiving the right to question or confront witnesses. Just as a criminal defendant may waive his or her right to a trial, so an inmate accused of a disciplinary offense can waive his or her right to a due process hearing. In that case, a hearing of the type used for minor offenses is held. The inmate still has an opportunity to make a statement, there is an impartial hearing officer, a decision is based on the evidence, and an entry in the records is made only if the inmate is found guilty. See s. HSS 303.75 and Note.

To ensure that any waiver is a knowing, intelligent one, the inmate must be informed of his or her right to a due process hearing and what that entails; be informed of what the hearing will be like if he or she waives due process; and be informed that the waiver must be in writing.

A waiver is not an admission of guilt.

Subsection (3) concerns time limits, which are the same as those under s. HSS 303.75.

Subsection (4) allows the hearing to be held at one of a number of places. In the past, disciplinary hearings were held only at the institution to which the inmate was assigned at the time of the misconduct. Transfer brought disciplinary proceedings to an end. This was undesirable for a variety of reasons. Therefore, this section provides for hearings at the new location.

Generally, it is desirable to provide hearings where the violation occurred. This practice is current division policy. Sometimes, this is impossible, particularly in the camp system. When it is impossible, fairness requires that the inmate have the same protections where the hearing is held as he or she would have at the institution where the violation is alleged to have occurred.

Subsection (5) prescribes a hearing procedure for major offenses which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). Those requirements are:

(a) "A written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action." Morissey v. Brewer, 408 U.S. 471, 489 (1972).

(b) The inmate is allowed to call witnesses and present documentary evidence in his or her defense if permitting him or her to do so will not jeopardize institutional safety or correctional goals.

(c) The inmate has no constitutional right to confrontation and cross-examination in prison disciplinary proceedings. Such procedures in the current environment, where prison disruption remains a serious concern, must be left to the discretion of the prison officials.

On cross-examination and confrontation of adverse witnesses, the court said:

> In the current environment, where prison disruption remains a serious concern to administrators, we cannot ignore the desire and effort of many states, including Nebraska, and the Federal Government to avoid situations that may trigger deep emotions and that may scuttle the disciplinary process as a rehabilitation vehicle. To some extent, the American adversary trial presumes contestants who are able to cope with the pressures and aftermath of the battle, and such may not generally be the case of those in the prisons of this country. At least the Constitution, as we interpret it today, does not require the contrary assumption. Within th limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries. Id. at 568

Subsection (5) does not greatly limit the adjustment committee's discretion to prohibit cross-examination and confrontation, as it appears to do, because of the fact that the witness need not be called at all. The committee may rely on hearsay testimony if there is no reason to believe it is unreliable. See HSS 303.86, Evidence.

Subsection (6) requires that the committee give the inmate and his or her advocate a written copy of the decision. The Supreme Court stated about this requirement:

> We also hold that there must be a "written statement by the factfinders as to the evidence relied on and reasons" for the disciplinary action. Morrissey, 408 U.S. at 489, 92 S. Ct. at 2604. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered "to be incorrigible by reason of frequent intentional breaches of discipline," Neb. Rev. Stat. s.83-185(4) (Cum. Supp. 1972), and are certainly likely to be considered by the

> state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding. Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff v. McDonnell, 418 U.S. 539, 564-65 (1974).

Subsection (7) gives the inmate the right to appeal an adverse decision. Appeal is not required by Wolff v. McDonnell; in fact, an opportunity for appeal is not even an element of required due process in a criminal proceeding. Griffin v. Illinois, 351 U.S. 12 (1956). Appeal or review is one of three ways of controlling discretion, according to Kenneth Culp Davis. The other 2 are limiting discretion by placing outer limits on it, and structuring discretion by listing guidelines or factors to be considered. Appeal increases uniformity in decision-making, may eliminate or reduce abuses of discretion, and provides an opportunity for the superintendent to review the work of his or her subordinates in handling disciplinary cases.

SECTION 34. HSS 303.77 and 303.78 and Notes are repealed.

SECTION 35. HSS 303.79 and Note are renumbered HSS 303.78 and Note, and HSS 303.78 Note (intro.), as renumbered, is amended to read:

Note: HSS 303.78. ~~HSS 303.76, 303.78, 303.79, 303.80, and 303.82 prescribe a~~ One of the requirements of the hearing procedure for major offenses ~~which complies with the requirements of Wolff v. McDonnell, 418 U.S. 539 (1974). One of these requirements~~ is that:

SECTION 36. HSS 303.80 is repealed.

SECTION 37. HSS 303.81(title) (1), (2), (3), (4), (8) and Note are amended to read:

HSS 303.81 DUE PROCESS HEARING: WITNESSES. (1) ~~Requests~~ A request by the inmate for witnesses to appear at the major violation hearing, including requests for the appearance of the staff member who signed the conduct report, may be made by the accused to the advocate who shall deliver ~~them~~ the request to the security office. Except for good cause, an inmate may present no more than ~~3~~ 2 witnesses in addition to the reporting staff member or members. If an inmate does not have an advocate, the request shall be sent directly to the security office. ~~Such requests~~ This requests ~~must~~ shall be made within 2 days of the service of notice ~~as provided in s.~~ HSS ~~303.76~~.

(2) After all witness requests have been received, the hearing officer shall review them and do any investigation necessary to determine whether the witnesses should be called. The hearing officer may only call witnesses who possess relevant information. If a witness refuses to appear, the hearing officer shall determine if the refusal is justified. If the refusal is justified, the hearing officer shall note on the record the reason for the witness' refusal to appear.

(3) Witnesses requested by the accused who are staff or inmates ~~should be required to~~ shall attend the disciplinary hearing unless:

(a) There is a significant risk of bodily harm to the witness if he or she testifies; or

(b) The ~~inmate's~~ witness is an inmate who does not want to testify; or

(c) The testimony is irrelevant to the question of guilt or innocence; or

(d) The testimony is merely cumulative of other evidence and would unduly prolong the hearing; or

(e) ~~If~~ An inmate witness must be transported to a county jail to testify, in which case the advocate may be required to interview the witness and report on the testimony to the committee in lieu of a personal appearance by the witness.

(4) If an inmate witness will be unavailable due to hospitalization, transfer or release, or if a staff member witness, who may be the officer who reported the rule violation, will be unavailable due to illness, no longer being employed at the location, being on vacation or being on a different shift, but there is no other reason to exclude the witness's testimony under sub. (3), then the hearing officer shall attempt to get a signed statement from the witness to be used at the disciplinary hearing.

(8) Witnesses ~~who are not~~ other than inmates or staff may not ~~be required to~~ attend hearings ~~nor may~~ but they may be contacted by advocates with the hearing officer's permission. ~~Rather,~~ The adjustment committee ~~shall~~ may designate a staff member; ~~usually the work release coordinator,~~ to interview any such witness and report to the committee.

Note: HSS 303.81. The inmate facing a disciplinary proceedings for a major violation should be allowed to call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals. Ordinarily, the right to present evidence is basic to a fair hearing; but the unrestricted right to call witnesses from the prison population carries obvious potential for disruption and for interference with the swift punishment that in individual cases may be essential to carrying out the correctional program of the institution. We should not be too ready to exercise oversight and put aside the judgment of prison administrators. It may be that an individual threatened with serious sanctions would normally be entitled to present witnesses and relevant documentary evidence; but here we must balance the inmate's interest in avoiding loss of good time against the needs of the prison, and some amount of flexibility and accommodation is required. Prison officials must have the

necessary discretion to keep the hearing within reasonable limits and to refuse to call witnesses that may create a risk of reprisal or undermine authority, as well as to limit access to other documentary evidence. ~~Although we do not prescribe it, it would be useful for the adjustment committee to state its reason for refusing to call a witness, whether it be for irrelevance, lack of necessity, or the hazards presented in individual cases.~~

This new rule requires the adjustment committee or hearing officer to state on the record its reason for determining that a witness need not be called. It is hoped that stating on the record the reasons for refusing to call a witness will facilitate review of disciplinary proceedings. The adjustment committee may determine that a witness should not be called because the testimony would be irrelevant, unnecessary, or due to other circumstances in an individual case.

The decision of whether to allow a witness to testify has been delegated to a hearing officer. Sub. (2). The time for making requests is limited under sub. (1), in order to give the hearing officer an opportunity to consider the request prior to time for the hearing, which normally must be held within 21 days. See HSS ~~303.78(3)~~ 303.76(3).

Sub. (3) lists the factors to be considered in deciding whether to call a requested witness.

Sub. (4), (5), and (6) indicated that signed statements are preferable to other hearsay, but other hearsay may be relied on if necessary.

Subs (7) and (9) provide that the same hearing officer who considers the requests for witnesses is also the person to schedule the hearing and notify all participants. There is a time limit on the hearing--it must be 2 to 21 days after notice to the inmate. See HSS ~~303.78~~ 303.76(3).

Sub. (8) forbids interviewing members of the public and requesting their presence at hearings without the hearing officer's permission. Members of the public are not permitted to attend hearings. Such people are usually employes and school officials who are involved in work and study release. There is no authority to compel their involvement in hearings. More importantly, requesting their involvement or permitting adversary interviewing seriously jeopardizes the programs by making the people unwilling to cooperate. It also creates the possibility that there will be harassment of such people. Instead, the work release coordinator should get whatever information these people have and provide it to the committee.

SECTION 38. HSS 303.82 (1), (2)and Note are amended to read:

HSS 303.82 ADJUSTMENT COMMITTEE. (1) Due process disciplinary hearings shall be conducted by a committee of one, 2~~,~~ or 3 staff members appointed by the superintendent. Persons eligible to serve on an adjustment committee are: ~~superintendents,~~ the superintendent, assistant superintendents, supervisors, correctional officers, social workers, and any other equally responsible staff

members. ~~At least one member of each committee made up of 2 or 3 members shall be from the treatment staff.~~ Efforts shall be made to place staff from diverse backgrounds on the multi-member adjustment committee. At least one member of ~~all~~ every adjustment ~~committees~~ committee shall be a supervisor.

(2) No person who has ~~direct personal involvement in~~ personally observed or been a part of an incident which is the subject of a hearing may serve on the committee for that hearing. Committee members should find out the subject matter of ~~hearings~~ the hearing in advance in order to allow replacement of committee members if necessary and thereby avoid the necessity of postponing ~~a~~ the hearing. The security director who reviews the conduct report or classifies the offense, as required by ss. HSS 303.67 and 303.68, is not involved in the incident by reviewing the conduct report or classifying the offense to the extent that he or she is automatically disqualified from being on the adjustment committee.

Note: HSS 303.82. Wolff v. McDonnell, 418 U.S. 539 (1974), requires that the adjustment committee members be impartial in the sense that they should not have personally observed or been a part of the incident which is the basis of disciplinary charges. However, the court specifically held that a committee member could be "impartial" even if he or she was a staff member of the institution. Nevertheless, this section ~~provides for~~ encourages some diversity on ~~the panel~~ panels with 2 or 3 members ~~by the requirement that at least one member be from the treatment, rather than custodial, staff~~.

The use of one and 2 member committees is a recent development. There are 2 principal reasons for it. The camp system has never held due process hearings because of the fact that the staff is small and it is impossible to involve staff from distant institutions. For example, some camps have as few as 4 staff members. To provide a 3 person committee and an advocate and to prevent the complainant from being one of these people is impossible. Of course, there would be no one to supervise the camp during the hearing, either. The conflict between the desire to have due process hearings at the camps and limited resources is resolved by permitting smaller committees.

The problem of available staff also exists at larger institutions. So many staff can be tied up in the process that other important functions are neglected. It is thought that fairness can be achieved by relying on smaller committees while other correctional objectives are also achieved.

SECTION 39. HSS 303.84(1) (intro.) and (h), (2)(a) (table), (am) and (b) and Note are amended to read:

HSS 303.84 SENTENCING PROCEDURE AND SCHEDULE OF PENALTIES. (1) In every case where an inmate is found guilty of one or more violations of the disciplinary rules, ~~only~~ one or more of the following penalties shall be imposed, except as provided in sub. (2) and ss. HSS 303.68 to 303.72:

(h) Program segregation for a specific term of 30, 60, 90, 120, 180 or 360 days;

(2)(a) (table):

SCHEDULE OF PENALTIES
(Maximum in days)

		Adjustment Segregation	Program Segregation	Good Time Loss
Offenses against bodily security				
303.12	Battery	8	360	20
303.13	Sexual assault--intercourse	8	360	20
303.14	Sexual assault--contact	8	360	20
303.15	Sexual conduct	4	120	10
303.16	Threats	5	~~120~~ 180	10
303.17	Fighting	8	~~360~~ 180	20
303.18	Inciting a riot	8	360	20
303.19	Participating in a riot	6	360	10
303.20	Group resistance and petitions	4	~~120~~ 180	10
303.21	Conspiracy	Maximum for completed sentence		
303.22	Escape	8	360	20
303.23	Disguising identity	8	~~360~~ 180	20
Offenses against order				
303.24	Disobeying orders	~~4~~ 6	~~60~~ 180	10
303.25	Disrespect	~~5~~ 8	~~60~~ 180	10
303.26	Soliciting staff	8	360	20
303.27	Lying	5	60	10
303.271	Lying about staff	8	360	20
303.28	Disruptive conduct	5	~~60~~ 360	10
303.29	Talking	4	60	0
303.30	Unauthorized forms of communication	5	60	10
303.31	False names and titles	4	60	0
303.32	Enterprises and fraud	6	120	5
303.33	Attire	4	60	0
Offenses against property				
303.34	Theft	8	360	20
303.35	Damage or alteration of property	~~6~~ 8	120 180	15
303.36	Misuse of state property	4	60	0
303.37	Arson	8	360	20
303.38	Causing an explosion or fire	~~4~~ 6	120 180	15
303.39	Creating a hazard	~~4~~ 6	60 120	10
303.40	Unauthorized transfer of property	5	120	0
303.41	Counterfeiting and forgery	8	360	20

		Adjustment Segregation	Program Segregation	Good Time Loss
Contraband offenses				
303.42	Possession of money	8	360	20
303.43	Possession of intoxicants	8	360	20
303.44	Possession of drug paraphernalia	8	360	20
303.45	Possession, manufacture and alteration of weapons	8	360	20
303.46	Possession of excess smoking materials	4	60	0
303.47	Possession of contraband--miscellaneous	6	120	10
303.48	Unauthorized use of the mail	8	360	20
Movement offenses				
303.49	Punctuality and attendance	~~4~~ 5	120	5
303.50	Loitering	4	120	5
303.51	Leaving assigned area	5	120	10
303.511	Being in unassigned area	5	120	10
303.52	Entry of another inmate's quarters	8	360	20
303.53	Posted policies and procedures relating to movement	6	120	10
Offenses against safety and health				
303.54	Improper storage	4	60	5
303.55	Dirty quarters	4	60	0
303.56	Poor grooming	4	60	0
303.57	Misuse of prescription medication	8	360	20
303.58	Disfigurement	5	120	10
Miscellaneous				
303.59	Use of intoxicants	8	360	20
303.60	Gambling	4	60	~~0~~ 5
303.61	Refusal to work or attend school	4	60	~~0~~ 5
303.62	Inadequate work or study performance	4	60	5
303.63	Violation of institutional policies and procedures ~~and conditions on leave~~	~~4~~ 6	~~60~~ 180	~~5~~ 10
303.631	Violating conditions of leave	8	360	20
303.06	Attempt	Maximum for completed offense		
303.07	Aiding and abetting	Maximum for completed offense		

(2)(am) ~~At one hearing, the maximum penalty possible for a single violation when a minor penalty is imposed is 30 days loss of specific privileges for the first offense, 60 days for the second offense, and permanently for the third, 30 days building confinement, 10 days room confinement, or 10 days extra duty without pay. For more than one violation, the total sentence may not exceed the sum of the maximum penalties for the separate violations.~~ More than one minor penalty may be imposed for a single offense and both a major and minor penalty may be imposed for a major offense.

(b) Loss of ~~earned~~ cumulated good time may be imposed as a punishment only where the violation is regarded as especially serious because of its nature or the inmate's prior record--generally, only in cases where program segregation is also imposed. The number of days lost on one occasion may be based on the number of prior occasions on which the inmate lost good time and shall not exceed the following:

Number of prior occasions	Maximum number of days lost
None	5
One	10
2	15
3 or more	20

Note: HSS 303.84. There are two limits on sentences which can be imposed for violation of a disciplinary rule: (1) A major punishment cannot be imposed unless the inmate either had a due process hearing, or was given the opportunity for one and waived it. Major punishments are program and adjustment segregation and loss of good time; and (2) Only certain lesser punishments can be imposed at a summary disposition. See HSS 303.74. This section limits both the types and durations of punishments.

In every case, where an inmate is found guilty of violating a disciplinary rule, one of the penalties listed in sub. (1) must be imposed. Cumulative penalties may be imposed. ~~in accordance with sub. (2).~~ For example, ~~an inmate cannot be punished with both room confinement and adjustment segregation. However,~~ if adjustment segregation is imposed, program segregation or loss of good time, or both may also be imposed. The inmate will then serve his or her time in each form of segregation and lose good time. Similarly, more than one minor penalty may be imposed for a single offense. A major and minor penalty may be imposed for a major offense.

Sentences for program segregation may only be imposed ~~in~~ for specific terms. The possible terms are 30, 60, 90, 120, 180 and in some cases, 360 days. This is contrary to, for example, adjustment segregation where terms from 1-8 days may be imposed. The specific term represents the longest time the inmate will stay in segregation unless he or she commits another offense. However, release prior to the end of the term is possible. HSS 303.70 provides that a placement in program segregation may be reviewed at any time and must be reviewed at least every 30 days.

~~Sub. (2) (a) also provides that sentences imposed at one hearing cannot be cumulated to result in a sentence longer than certain maximums. The reasons for this limit are: first, the offenses for which an inmate is sentenced at a single hearing are usually based on a single incident and may be closely related to each other, and second, the punishments begin to lose effectiveness as a deterrent beyond a certain point.~~

The terms in sub. (2) (a) are maximums and should be imposed rarely.

The limits on loss of good time which are found in sub. (2) (b) are required by s. 53.11(2), Stats. This statute ~~limits~~ lists the number of days of good time which can be lost to 5 for the first offense, 10 for the second, and 20 for each subsequent offense. This section also creates an intermediate stage of the loss of 15 days. In addition, this section follows current practice by limiting loss of good time to serious offenses. On the other hand, loss of good time must be imposed by the committee or hearing officer--it is never automatic. See HSS 303.68 - 303.72 and Notes.

SECTION 40. HSS 303.85(1)(b) is amended to read:

HSS 303.85(1)(b) If the inmate was found guilty by a hearing officer or an adjustment committee. Records must be removed if an appeal is successful (See HSS ~~303.78~~ 303.79).

SECTION 41. HSS 303.86(5) Note is amended to read:

Sub. (5) deals with the handling of information received from a confidential informant. This information will not be placed in the inmate's case record where it would be accessible to him or her, but will be filed only in the security office. ~~See ch. HSS 307 for the handling of records which are classified "restricted."~~

SECTION 42. HSS 303.86(6) is amended to read:

HSS 303.86(6) The original conduct report and all due process documents shall be placed in the inmate's case record. However, restricted informant reports shall be placed only in the security department restricted file. ~~Restricted records shall be retained or disposed of according to the provisions of ch. HSS 307, adult offender based records.~~

SECTION 43. HSS 303.87 and Note are created to read:

HSS 303.87 HARMLESS ERROR. If a procedural requirement under this chapter is not adhered to by staff, the error may be deemed harmless and disregarded if it does not substantially affect the rights of the inmate. Rights are substantially affected when a variance from a requirement prejudices a fair proceeding involving an inmate.

Note: HSS 303.87. This rule is to make clear that technical, nonsubstantive errors on the part of staff in carrying out the procedures specified in this chapter, may, if harmless, be disregarded. For example, if an inmate is not served with an approved conduct report within the time specified, this would be harmless unless it affected the inmate's right to present a defense in a meaningful way. This rule conforms to present practices.

SECTION 44. HSS 306.01 is amended to read:

HSS 306.01 APPLICABILITY AND PURPOSE. (1) Pursuant to authority vested in the department of health and social services by ~~s.~~ ss. 46.03(6)(b), 53.07

and 227.014(2), Stats., the department adopts this chapter ~~which applies to the department, division~~ for purposes of establishing security procedures at correctional institutions and establishing guidelines which permit inmates to participate in activities within a secure surrounding that may assist them in a successful reintegration into the community.

SECTION 45. HSS 306.045 and Note are created to read:

HSS 306.045 VOLUNTARY CONFINEMENT. (1) The security director may place an inmate in voluntary confinement if:

(a) The inmate requests the placement in writing; and

(b) The security director is satisfied that the placement is necessary for the safety and welfare of the inmate.

(2) An inmate shall remain in voluntary confinement for at least 72 hours from the time of placement unless the security director approves prior release.

(3) If the security director does not approve an inmate's release from voluntary confinement before 72 hours elapse, the inmate shall be released after 72 hours, if:

(a) The inmate requests release in writing; or

(b) The security director is satisfied that the placement is no longer necessary.

(4) An inmate in voluntary confinement shall be in maximum close custody as defined in s. HSS 302.12(1)(a).

(5) Inmates in voluntary confinement shall have the following privileges and property:

(a) During the first 72 hours, privileges and property at least equivalent to privileges and property allowed to inmates in temporary lock-up (TLU) status, s. HSS 303.11;

(b) After 72 hours, privileges and property at least equivalent to privileges and property allowed to inmates in program segregation, s. HSS 303.70; and

(c) Additional privileges and property as determined by what is ordinarily allowed inmates by the rules governing the location of the unit in which the inmate is voluntarily confined.

(6) The security director shall review placements in voluntary confinement at least every 90 days.

Note: HSS 306.045. Some inmates wish to be confined because they fear for their safety. Voluntary confinement is permitted by this rule.

An inmate will ordinarily remain confined for at least 72 hours to prevent abuses of the status. For example, it is not to be used to avoid work or school or to take a day off. The security director may approve earlier release.

Maximum close custody is used in this case for the inmate's safety. Because the status is not punitive, efforts should be made to provide normal property and privileges consistent with the place where the confinement occurs, but the inmate must be allowed at least the privileges and property allowed in

temporary lock-up (TLU) for the first 72 hours and thereafter privileges and property allowed in program segregation.

SECTION 46. HSS 306.07(6) and (4) Note to (6) Note are amended to read:

HSS 306.07 (6) ~~All shots should be fired to wound the inmate, not~~ A staff member who fires a shot under sub. (5) (c) may aim to cause death or great bodily injury~~, unless~~ if the inmate's activity poses an immediate threat of death or great bodily harm to another.

~~HSS 306.07 Note Sub. (4).~~ Note: HSS 306.07(4) to (6). Sub. (4) indicates the nature of the weapons training and qualifications program staff must complete to be certified to be issued weapons. It is important ~~that, if weapons are used,~~ the ~~people~~ staff who have ~~them~~ weapons know how to use them. This greatly increases the chances that they will be used responsibly and diminishes the chances for accidents or negligent handling of them. ~~There~~ Moreover, there is a great need for training in human relations and alternatives to force. This training should be part of weapons training.

To insure that weapons are handled responsibly, sub. (5) indicates the procedure to be followed before discharging a weapon. It will not always be possible, given the nature of the situations in which firearms are used, to follow this procedure. However, it is required that it be followed unless it is not feasible to do so. For example, if it ~~were~~ becomes necessary to shoot at a person holding a hostage, the procedure might not be followed.

The procedure is designed to verbally inform the inmate that a staff member possesses a weapon and that the inmate should stop the activity. An adequate verbal warning to a person attempting to escape would be to say, "Halt, don't move! I have a weapon." If the verbal warning is disregarded and the inmate does not halt, a warning shot should be fired. If this is disregarded, it might be necessary to fire shots at the inmate. Such shots should be fired to stop the ~~inmate by wounding him or her,~~ activity and, if possible, not to kill or cause great bodily harm. ~~This is consistent with HSS 303.06.~~ There may be situations in which it is necessary to shoot to kill. This is provided for in sub. (6) by the phrase "~~unless the inmate~~ if the inmate's activity poses an immediate threat of death or great bodily harm to another." In such case, shooting with the intention of causing death or great bodily injury would be justified and is authorized by the rule.

SECTION 47. HSS 306.16(3) and (3) Note are amended to read:

HSS 306.16(3) A strip search may be conducted:

(a) Before an inmate leaves or enters the security enclosure of a maximum or medium security institution or the grounds of a minimum security institution;

(b) Before an inmate enters or leaves the segregation unit of a correctional institution;

(c) Before and after a visit to an inmate; ~~and~~

(d) ~~If~~ At the direction of the shift supervisor who is satisfied that there are reasonable grounds to believe the inmate possesses contraband~~.~~ ; or

(e) In the absence of the shift supervisor, if a staff member is satisfied that there are reasonable grounds to believe the inmate possesses contraband.

Note: HSS 306.16 (3). Sub. (3) identifies the circumstances in which strip searches are permitted. The rule is written to limit the use of strip searches in 2 principal ways. First, in pars. (a) to (c) the rule identifies the specific situations in which inmates may be strip searched. All of those situations are ones in which contraband is moved most frequently or where the danger created by the presence of contraband is so great as to require the authority to exist for strip searches. The other limitation, in pars. (d) and (e), is to permit such searches only if ~~the shift supervisor approves, after having found that reasonable~~ grounds exist for the search to believe that the inmate possesses contraband.

Because inmates bring contraband in and out of institutions, it is necessary to permit strip searches upon entry and exit. If this were not permitted, it is likely that there would be less movement in and out of institutions. This would defeat program objectives. Sub. (3) (a).

The segregation unit of a correctional institution is usually a tense place. Inmates are there because they have committed a serious violation of prison rules, or because they are dangerous or disturbed. It is essential to the safety of inmates that contraband not be brought into a segregation unit. Inmates cannot be constantly observed while in segregation or when they are temporarily absent~~, and a weapon could be used to kill or severely injure a self-destructive inmate or another. Sub. (3) (b) permits the strip search of inmates going and coming into segregation, for whatever reason~~. Without the strip search of inmates entering and leaving segregation, a weapon could be taken in or out and used by a self-destructive inmate to kill or severely injure himself or herself or someone else.

Sub. (3) (c) authorizes strip searches prior to and after a visit. Visitors bring contraband to and also carry it from institutions. Frequently, they are not restricted to the visiting area during visits. Either the authority must exist to permit the search of visitors and inmates, or contact with visitors must be limited. On balance, it seems preferable to emphasize searches of inmates. Authority is also given to search visitors, however. See HSS 306.17.

Sub. (3) (d) and (e) do not give staff members unlimited discretion to conduct strip searches. They state that a strip search may be made if there are reasonable grounds to believe the inmate possesses contraband. This is a less than probable cause standard, but more than mere suspicion. It is the same standard as in sub. (2) (a). Sub. (7) indicates what may be considered in determining if there are reasonable grounds. What a staff member observed, information from a reliable source, prior seizures of evidence from the inmate, and the experience of the staff member are all relevant to the determination to ~~be made by a shift supervisor~~ strip search. The staff member must believe that it is necessary to strip search an inmate without supervisory approval because a strip search is necessary to preserve evidence or in other cases in which timeliness is very important. Of course, a staff member may also conduct a strip search of an inmate at the direction of the shift supervisor.

In Bell v. Wolfish, supra, the U.S. Supreme Court held that strip searches including visual body cavity inspections were permissible anytime a pretrial detainee had contact with a member of the public. This principle is applied in this rule, as well as in other situations where the likelihood of contraband being moved or the danger created by the contraband is such that, in the judgment of correctional officials, a search should be permissible.

SECTION 48. HSS 308.04(2) and (4) and (2) and (4) Notes are repealed and recreated to read:

HSS 308.04(2) An inmate may be placed in administrative confinement for either of the following reasons:

(a) The inmate presents a substantial risk of serious physical harm to another person as evidenced by recent homicidal, assaultive or other violent behavior or by an attempt or threat to cause that harm; or

(b) The inmate's recent activity gives a staff member or another inmate reason to believe that the inmate's continued presence in the general population will result in a riot as defined under s. HSS 303.18 or in a disturbance as defined under s. HSS 306.22(1).

(4) An inmate shall be given written notice of the review which shall include:

(a) The reason under sub. (2) that administrative confinement is considered necessary;

(b) The evidence to be considered at the review;

(c) The sources of information relied upon unless the disclosure would threaten personal safety or institutional security;

(d) An explanation of the possible consequences of any decision;

(e) An explanation of his or her rights at a review which are:

1. The right to be present at the review;

2. The right to deny the allegation;

3. The right to present documentary evidence;

4. The right to present and question witnesses in accordance with the hearing procedures for major disciplinary offenses and sub. (6);

5. The right to assistance of an advocate;

6. The right to receive a written decision, stating the reasons for it based upon the evidence; and

7. The right to appeal the finding; and

(f) The date, time, and place of the review and an order that the inmate appear at the review.

Note: HSS 308.04. Sub. (2) establishes the conditions under which administrative confinement may be used. They are similar to a standard used to determine dangerousness for involuntary civil commitment under s. 51.20, Stats., although not the same. The analogy between the administrative confinement and involuntary civil commitment standards is apt since both are vehicles for removing dangerous persons from the population in which they live.

Inmate misconduct is handled through the disciplinary process. Segregation in administrative confinement cannot be a penalty for misconduct, but may result either prior to or subsequent to a disciplinary proceeding or independent of any such proceeding.

Sub. (4) gives the inmate certain rights. It requires that adequate written notice of the review be given the inmate. If necessary, a verbal explanation of the notice should be made in accordance with the inmate's needs. The rights also include the right to present and question witnesses in the same manner as for due process hearings, s. HSS 303.81.

SECTION 49. HSS 308.04 (5), (6), (7), (11) and (3) Note, (5) Note, and (10) to (11) Notes are amended to read:

HSS 308.04 (5) The review shall take place not sooner than two days and not later than ten days after service of notice to the inmate. The inmate may waive these time limits in writing. Prior to the waiver, the inmate shall be informed what type of review he or she will receive if he or she waives the time limits.

(6) At the review, the ~~allegation of the inmate's dangerousness~~ reason for placing the inmate in administrative confinement shall be read aloud and all witnesses for or against the inmate, including the inmate and the staff member who recommended the placement, ~~into administrative confinement,~~ shall have a chance to speak. The PRC may require medical or physical evidence to be offered. The PRC may permit direct questions or require the inmate or his or her advocate, ~~(if any)~~, to submit questions to the PRC to be asked of the witnesses. Repetitive, disrespectful, or irrelevant questions may be forbidden. ~~Whenever the PRC determines that a witness shall not be called, or that the~~

~~identities of sources of information shall not be relied upon, or that any statements or evidence shall not be included in a written record because personal safety or institution security is implicated, the PRC shall indicate the fact of the omission in the record.~~

(7) After the review, the PRC shall deliberate in private considering only the evidence presented to it that supports or refutes the need for administrative confinement and the inmate's records. ~~and the standard for dangerousness noted under sub. (2).~~ The PRC shall decide whether ~~an inmate is dangerous and upon a finding of dangerousness shall place the inmate in administrative confinement~~ the evidence and the records support the need for administrative confinement and, if so, shall order the placement. If the vote is not unanimous, the record, with the views of each PRC member, shall be forwarded to the superintendent for a decision. This information, except portions regarding the identities of sources of information or containing statements or evidence ~~implicating a danger to~~ that could, upon disclosure, threaten personal safety or institution security, ~~upon disclosure,~~ shall be shared with the inmate who may make known any additional relevant information in writing to the superintendent. The reasons for the decisions of the PRC and superintendent shall be based upon the evidence and given to the inmate in writing.

(11) An inmate who ~~fails to evidence dangerousness~~ does not continue to exhibit the behavior for which he or she was placed in administrative confinement, after spending a reasonable period of time in ~~administrative confinement~~, that status shall be given the opportunity to show that ~~he or she is not dangerous~~ the placement is no longer necessary through gradually increased contact with persons both inside and outside of his or her cell. ~~Such~~

This contact shall be carefully supervised to ensure the safety of others.

Records of the contact shall be kept.

Note: Sub. (3) requires special review by the PRC. This review combines components of the standard PRC review under ch. HSS 302 and the major disciplinary hearing. This review is provided despite the fact that the U.S. Supreme Court has indicated that ~~such transfers may not require~~ due process does not require this review for these transfers. Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976). Due process protections are important and are afforded to few inmates affected by this provision because of the seriousness of the prolonged social isolation of administrative confinement. At this special review, ~~dangerousness shall be the sole criteria for placement~~ in this status. there must be proof, from evidence presented at the hearing and from the inmate's records, that he or she meets one of the criteria for administrative confinement under sub. (2). The responsibility for placement rests solely with the PRC, and the decision therefore is a classification decision. An appeal is provided ~~to~~ first to the superintendent and then to the director of the bureau of adult institutions, one of the highest levels in the division, in recognition of the potential serious consequences of prolonged segregation in administrative confinement.

Sub. (5) provides for the time of the review. The inmate may waive these time limits. To ensure that any waiver is a knowing and intelligent one, the inmate must be informed of what the review will be like if he or she waives the time limits, and the waiver must be in writing. The waiver is not an admission ~~of dangerousness~~ that administrative confinement is necessary.

Sub. (10) reflects the view that administrative confinement may have serious consequences and that extreme care should be exercised at the highest level in assessing ~~an inmate's dangerousness and~~ the need for ~~enduring close~~ continued confinement.

An inmate ~~shall~~ will be given every opportunity consistent with his or her status and behavior to show that ~~he or she is not dangerous~~ continued confinement is not necessary. Sub. (11). This may be done by increasing his or her personal contacts through enhanced visitation privileges and movement from the cell. Great care should be taken to ensure the safety of others and to keep adequate records.

This gradual "stepping-down" process allows the inmate to demonstrate to the PRC that he or she ~~is~~ no longer ~~dangerous~~ needs to be confined. ~~It also allows the PRC to better judge the likelihood of the inmate evidencing dangerousness if released from this status.~~ However, compliance with departmental rules alone may not be sufficient ~~evidence of nondangerousness,~~ and an inmate may continue to be confined if there is still reasonable fear of violent behavior, ~~or~~ harm to others or riots.

SECTION 50. HSS 310.13 and Note are amended to read:

HSS 310.13 CONFIDENTIALITY. (1) ~~Complaints~~ Except as otherwise provided in this section, complaints filed with the inmate complaint review system (ICRS) shall be confidential. Persons working in the ICRS shall respect the confidential nature of the work. The identity of complainants and the nature of the complaint shall be revealed only to the extent necessary for thorough investigation and implementation of the remedy.

(2) Confidentiality of complaints ~~can~~ may be waived by the superintendent if the security of the institution, staff or inmates is involved.

(3) A copy of material relating to an inmate's written complaint ~~shall~~ may not be filed in any case file, nor ~~shall~~ may any notations regarding a complaint be made in those files.

(4) A breach of confidentiality in the process may itself be the subject of a complaint. ~~Such complaints~~ This type of complaint shall be filed directly with the CCE.

(5) A complainant may make public any aspect of a complaint at any time. If the complaint contains a false statement meeting the requirements of s.HSS 303.271, making that false statement public constitutes the offense of lying about staff.

(6) No ~~sanctions~~ sanction ~~shall~~ may ~~result from~~ be applied against an inmate for filing a complaint.

(7) Subsections (3), (4) and (6) do not apply if a conduct report based on an inmate's complaint is filed under s. HSS 303.271.

Note: HSS 310.13. If the ICRS is to have integrity and the confidence of the inmates, complaints entered must be treated confidentially~~;~~ and, with certain limited exceptions, no sanctions can result from use of the system. Because of the unique and complex relations existing between prison inmates and staff, friction and irritation almost inevitably will arise from time to time. The source of some of these feelings will be the application or misapplication of rules and discretion. The complaint system is an appropriate forum for resolving these issues, but because complaints often identify a staff member as the perceived perpetrator of some injustice, the complainant must be protected from retribution or penalty for legitimate use of the system. If use of the system routinely resulted in penalties or sanctions, the system would quickly be abandoned. The desirability of ensuring that no adverse action results from the filing of a grievance is recognized by National Advisory Commission, standard 2.14 (2) (b)~~;~~ and ACA, standard 4301.

~~On the other hand,~~ The nature of some complaints is such that a meaningful investigation cannot be made without revealing the identity of the complainant, but this should be done only when necessary. Confidentiality can be waived if it can be shown that the security of the institution, staff, or inmates is involved. ~~The desirability of ensuring that no adverse action results from the filing of a grievance is recognized by National Advisory Commission, standard 2.14 (2) (b); and ACA, standard 4301.~~

This is not to say that inmates are free to make false statements about staff, knowing they are false and with the intent to harm the staff, especially if those false statements are made public. There have been malicious lies about staff corruption and sexual behavior made in the complaint system. This rule does not insulate inmates from disciplinary action for the illegitimate use, or rather abuse, of the complaint system.

Those inmates joining a group complaint should ~~recognize~~ realize that, if a decision is posted as provided in HSS 310.06 ~~(4)~~ (5), confidentiality cannot be maintained.

The ICI must use discretion in revealing only enough information about the nature of the complaint to allow for a thorough investigation.

The complainant is free to reveal any information about a complaint that he or she has filed. However, if an inmate makes a false accusation pursuant to s.HSS 303.271, revealing that false accusation to persons outside the complaint system may subject the inmate to disciplinary action.

(End)

beh/73

The repeals and rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.026(1), Stats.

Department of Health and Social Services

Dated: March 6, 1985

By: _____
Linda Reivitz
Secretary

SEAL:

beh/73

State of Wisconsin \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES
1 West Wilson Street, Madison, Wisconsin 53702

Anthony S. Earl
Governor

Linda Reivitz
Secretary

Mailing Address:
Post Office Box 7850
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March 6, 1985

RECEIVED
MAR 7 1985
Revisor of Statutes
Bureau

Mr. Orlan Prestegard
Revisor of Statutes
411 West, State Capitol
Madison, Wisconsin 53702

Dear Mr. Prestegard:

As provided in s. 227.023, Stats., there is hereby submitted a certified copy of HSS 303, administrative rules relating to prohibited conduct, discipline, disciplinary hearings, administrative confinement, voluntary confinement and complaints of inmates at adult correctional institutions.

These rules are also being submitted to the Secretary of State as required by s. 227.023, Stats.

Sincerely,

Linda Reivitz
SECRETARY

Enclosure