

CHAPTER 6

Discipline

Offenders are sent to prison *as* punishment, not to be punished further. They are no longer routinely fed bread and water as additional chastisement. Nor should they be assigned repetitive and pointless tasks, even when they do not obey officers. Rather, they should be offered a range of work and education options that are, at least nominally, designed to teach them employable skills. Although prisons may be degrading, frightening, or simply boring, they are not meant to be, in themselves, the site of further penalties.

It is for this reason that prison discipline should be accountable and fair. Rules and regulations should be clearly spelled out and consistently applied. There should also be a regulated system of redress and appeal. The Bureau has a detailed set of guidelines defining which acts may be punished and how individuals must be treated. Even though prison officers wield a certain amount of discretion in deciding how to deal with any problem of order, they too are subject to certain standards. This chapter outlines the current system of discipline in the federal prison system, including its strengths and weaknesses.

History

Questions of how to enforce discipline and order have occupied prison administrators since the establishment of the first penitentiaries. Well into the 20th century, prisons everywhere tended to maintain order by inflicting harm on the bodies of their inmates. Restricted diets, whippings, and solitary confinement were all regularly used.

In the United States, as was so often the case with other aspects of prison life, the Pennsylvania and Auburn systems encapsulated the first two different models of discipline and order, at least for the northern states of the Union. In the former, prisoners were disciplined almost exclusively through solitary confinement. There

was little corporal punishment other than restricted diets. The Auburn system, in contrast, employed a range of physical punishments including the lash and the gag, as well as solitary confinement and bread and water. In the South, where penitentiaries were established much later, discipline was largely corporal. As at Auburn, recalcitrant prisoners were whipped. They could also be set to work on a chain gang.

Traditional forms of corporal punishment like whipping were gradually abandoned in all prison systems in the mid-20th century, following the introduction of the “medical model” of punishment. In this system, which the Bureau of Prisons advocated until the 1970s, prisoners deemed difficult could be medicated with tranquilizers. As Jack Abbott (1981) describes in his memoir of prison life in the federal system, such chemical “treatment” was often combined with solitary confinement for particularly troublesome inmates. According to him,

These drugs are designed to render you so totally involved with yourself physically that all you can do is concentrate your entire being on holding yourself together. . . . No doubt there are those who need these drugs. . . . But administer this to a man who is healthy and it becomes a form of torture. (pp. 42-43)

In response to criticisms of this system from those who thought it too harsh and inconsistent as well as from those who argued that medical treatment was too soft, the Bureau gradually developed its current system of discipline. These days, the imposition and range of sanctions are subject to strict rules and regulations.

Contemporary Rules and Regulations

Today the Federal Bureau of Prisons sets out its discipline system in detail in part 541 of the Code of Federal Regulations and in the Program Statement 5270.07, “Discipline and Special Housing Units.” These documents strictly limit staff discretion in the type and amount of punishment they may apply. They direct staff to “control inmate behavior in a completely impartial and consistent manner,” reminding officers that their actions must not be capricious or retaliatory. Corporal punishment is not permitted under any circumstances. As is the nature of any complex bureaucracy, the actions of the staff may not always directly follow the letter of these rules. However, the fact that the guidelines dealing with infractions of prison rules begin with such statements suggests that the Bureau, in principle, is committed to the humane treatment of inmates.

The prison rules specify that all prisoners should be informed in writing soon after they arrive in any institution of the types of disciplinary actions that can be taken against them by staff. They should also be familiarized with the disciplinary system of their host prison and brought up to date on their rights and responsibilities. Such information is included in all Admissions and Orientation packs and should make prisoners aware of the consequences of breaking prison rules. In principle, all mainline institutions follow the same disciplinary system, and all inmates have identical rights and responsibilities unless they are housed in control

units or in ADX Florence. No matter in which prison a person lives, he or she is subject to the same rules regarding Prohibited Acts and the same Disciplinary Severity Scale. Prisoners everywhere are also eligible for the same appeals process.

According to Program Statement 5270.07, there are four levels of Prohibited Acts in the Bureau of Prisons: Greatest, High, Moderate, and Low-Moderate. Specific acts within each category correspond to a particular code. Thus, for example, the most serious offense is homicide. That is a Code 100 prohibited offense. The second most serious, Code 101, is assault, including sexual assault, which either has resulted in serious physical injury or has intended such damage. At the opposite end of the spectrum, in the Low-Moderate category, are acts such as “malingering, feigning illness” (Code 402) or “unauthorized physical contact” (Code 409).

Prison staff may punish each level of infraction with a series of possible sanctions. As one might expect, the more serious the offense, the greater the punishment. Thus, “Greatest Severity Prohibited Acts” may be punished by abolition of parole, forfeiture of good time, disciplinary transfer, or disciplinary segregation of up to 60 days. In comparison, “Low-Moderate Acts” may be punished by the forfeiture of 1 to 7 days of good time, monetary restitution, loss of privileges, loss of job, or merely a reprimand or a warning. In each instance, the officer dealing with the case may decide at his or her discretion to resolve the problem informally or to drop the charges unless they involve High-Severity Acts.

Disciplinary Hearings

According to Program Statement 5270.07, if informal methods fail, and the staff member decides to pursue an official sanction, he or she must inform the inmate of the charges against him or her within 24 hours by delivering a written incident report. An initial hearing is then held before the Unit Discipline Committee (UDC), usually within 3 business days. If the alleged violation “is serious and warrants consideration for other than minor sanctions, the UDC shall refer the charges to the Discipline Hearing Officer.” The process then progresses to the Institution Disciplinary Committee.

Officially the “Bureau of Prisons encourages informal resolution . . . of incidents involving violations of Bureau regulations.” However, both the staff member and the prisoner must agree to sort out a problem in this way. If that cannot be done, the warden will appoint one or more staff members to hold an initial hearing. These people cannot be the reporting or investigating officer, nor can they have witnessed the incident. They should also not have played “any significant part in having the charges referred to the UDC.”

During the UDC hearing, the accused has a right to be present, “except during deliberations of the decision maker(s) or when institution security would be jeopardized.” He or she may choose to waive this right. The inmate is also entitled to make a statement and to present documentary evidence on his or her own behalf. A record of the hearing and any supporting documents will be placed in the inmate’s file unless the inmate is found to be innocent, at which point the paperwork will be removed.

The prisoner must be informed if the case is referred to the discipline hearing officer (DHO). At this time, he or she should also be asked by the UDC to provide a staff representative and the names of any witnesses he or she may wish to call. While awaiting the second hearing, the accused may be held in administrative detention or other restricted status.

Each facility should have its own independent DHO to investigate alleged “acts of misconduct and violations of prohibited acts, including those acts which could result in criminal charges.” The DHO functions as the internal equivalent of both a police officer and a district attorney, gathering information and arguing against the accused in the hearing. The combination of these two roles gives the DHO enormous power in determining the outcome of the disciplinary process. For some, the level of influence possessed by a DHO oversteps the boundaries of what is regularly perceived as just and fair. There is a general concern that evidence in favor of the inmate may be overlooked because the DHO is expected to prove that prisoner’s guilt. As a result, many prisoners are suspicious of the discipline procedure in the federal system, suggesting that, in their eyes at least, it suffers from a legitimacy deficit.

The same cannot be said, however, for the perspective of management. Rather, most official literature finds that the discipline system functions fairly, consistently, and effectively. For example, in a study of how three penitentiaries, Lewisburg, Leavenworth, and Lompoc, mete out discipline, conservative criminologist John DiIulio (1994) “could not find a single example of comparable incidents that were handled in significantly different ways” (p. 64).

Even so, DiIulio, who tends to defend the Bureau of Prisons, admits that there are ambiguities in the system. Some offenses, he points out, such as conduct that “disrupts or interferes with the orderly running of the institution of the Bureau of Prisons,” appear in all four categories of seriousness (p. 62). As a result, prison officers have considerable flexibility in deciding which level of offense has been reached. Similarly, the vagueness of this offense description suggests that determining whether an act deserves punishment is subjective. A wide range of activities, including being late for work or dinner, shouting, shoving, or threatening someone, could be argued to affect the “orderly running” of a prison. They could also merely be viewed as irritants. The inconsistencies arising from these aspects of the disciplinary system often underpin prisoners’ grievances. The manner in which their grievances are addressed is often the cause for further concern.

Resolving Grievances (Administrative Remedy)

Prisoners who feel that they have not been treated impartially or who “seek formal review of an issue which relates to virtually any aspect of their confinement may appeal their decision under the Administrative Remedy Procedures” (Federal Bureau of Prisons, 2000a, p. 42). Once the prisoner has filed his or her grievance, the warden must respond in writing within 20 days. Before initiating this procedure, however, each prisoner is required to attempt informal resolution of the issue.

Many prisoners do not favor the administrative remedy option because they do not have faith that prison officers will criticize each other. As a result, one man currently housed in administrative segregation describes it as a system in which “*all allegations will be denied.*” For prisoners like him, the Bureau’s policy of administrative remedy is seen merely as a means to block inmate access to more objective sources of redress in the courts.

Another cause for concern and criticism for many prisoners is that by requiring problems to be sorted out primarily within the penal institution, the Bureau has greatly reduced the level of outside scrutiny from others. In particular, many feel that the courts no longer monitor daily life in prison systems.

Prison Litigation Reform Act

Prisoners’ access to the courts has been severely restricted by the 1996 Prison Litigation Reform Act, commonly referred to as PLRA. A useful guide to the effects of this act can be found in Chapter 15 of the 2000 edition of *A Jailhouse Lawyer’s Manual* (Columbia Human Rights Watch Law Review, 2000).¹ Since its enactment in April 1996, prisoners have been required to “exhaust all administrative remedies before filing lawsuits in federal court” (Federal Bureau of Prisons, 2000a, p. 42). Prisoners now also have to pay fees to lodge appeals that were previously free. Courts are now directed to dismiss cases that are deemed to be “frivolous” or “malicious” and that fail to state a claim or that seek damages from a defendant immune from such claims. Finally, under the PLRA, prisoners are not allowed to bring a civil suit against a correctional facility for “mental” or “emotional” injury.

For its supporters, this act streamlines the complaints system by leaving most of the work to the institution. Prison officers, it is believed, know better than the courts how to deal with internal problems. If the case does come to court, those involved in the administrative remedy process will have compiled a detailed record that can be submitted to the courts for judicial review (Federal Bureau of Prisons, 2000a, p. 43). For its opponents, however, this act has tied the hands of inmates seeking legal redress or reform on any number of issues. By requiring prisoners to exhaust every grievance procedure available to them in prison before approaching the courts for help, it makes prisoners dependent on the very institution that they may be trying to challenge. The act also restricts indigent prisoners who cannot afford the legal fees associated with filing in court by requiring them to arrange for their prison to provide detailed documentation about their financial status. Once again, this provision renders the inmate dependent upon the facility. In light of these criticisms, currently the Legal Aid Society is involved in challenging aspects of PLRA in court.

The involvement of the courts in the U.S. prison system has long been a source of some contention. Although such involvement was initially supported by those who sought to ameliorate prison conditions, courts have recently curbed much of their interest in prison life. Reflecting a societywide shift to increasingly punitive views, courts no longer provide much of a haven to prisoners wishing to appeal their conditions or treatment.

Conclusion: Punishment, Discretion, and Legitimacy

In an account of how prison officers should use discretion and skills to deal with prohibited acts and “potentially volatile situations,” author Chester Sigafoos (1994) suggests that “it is not always necessary for staff to resolve less severe conflicts by writing incident reports, or by physically overpowering the inmate” (p. 17). He further argues that “if such tactics are used, they serve to undermine the relationship staff have with inmates” in three specific ways. They heighten tension in the prison, they provide examples of behavior that may later be used against staff, and they reinforce a self-fulfilling prophecy that the only way to handle inmates is with force (p. 17).

Sigafoos seems to be arguing, in other words, that the formal discipline process outlined above need not always be invoked. The fact that his article was published in the Bureau’s own journal suggests that practices of discretion remain an important management strategy, despite the codification of regulations. Although such variability is not necessarily a bad thing, criminologists Sparks et al. (1996) point out that it must be used with care. In making decisions about how to respond to violations of prison regulations, the staff need to be seen as fair and consistent. Otherwise, discipline may be interpreted as illegitimate. Indeed, any system of prison discipline operates with a significant legitimacy deficit because few prisoners will wish to be punished for their actions. It is therefore particularly important that prison officials make all aspects of the decision process clear to inmates as early as possible.

Prison Rules and Program Statements

- Prison Rules 28 CFR §§ 541.2 to 541.68 deal with all aspects of the disciplinary system.
- Prison Rules 28 CFR §§ 542.10 to 542.19 deal with all aspects of the administrative remedy process.
- Program Statement 1330.13 outlines Bureau policy on the administrative remedy program.
- Program Statement 5270.07 outlines current Bureau policy on discipline and special housing units.

Note

1. I would like to thank Dennis Akervik for bringing this publication to my attention.