U.S. Department of Justice
Federal Bureau of Prisons

Federal Prisons

VOL. 1, NO. 3

Winter 1994

Contents

VOL. 3, NO. 3 ■ Winter 1994

"5270.7 Tells the Tale"

Administering discipline in the Federal Bureau of Prisons

John J. DiIulio, Jr.

An associate warden I once interviewed, a man who had worked in nearly a dozen different Federal prisons, had this to say about the administration of disciplinary actions against inmates in the Federal Bureau of Prisons: "Discipline is the core of a prison operation. To be effective, it's got to be consistent, not just within an institution, but throughout the system. But to make it consistent, that takes some doing. I think we do it as well as it can be done." Inevitably, prison officials exercise discretion in the disciplinary process. But throughout the Bureau, the disciplinary process conforms to official agency policy, is valued by employees, and is administered in a way that minimizes discretion and results in like infractions receiving like penalties.

Throughout the Bureau, the disciplinary process conforms to official agency policy, is valued by employees, and is administered in a way that minimizes discretion and results in like infractions receiving like penalties.

Like most prison systems, the Bureau of Prisons has developed a detailed policy on the administration of disciplinary actions against inmates. Over the years, this policy has been spelled out and amended in various official "Program [policy] Statements," including number 5270.7 on "Inmate Discipline and Special Housing Units," dated December 29, 1987. Not counting the dozens of sample disciplinary forms and flow diagrams incorporated into 5270.7, the statement runs for some 45 single-spaced pages.

In part, its introduction reads: "So that inmates may live in a safe and orderly environment, it is necessary for institution authorities to impose discipline on those inmates whose behavior is not in compliance with Bureau of Prisons rules....Only institution staff may take disciplinary action....Staff shall control inmate behavior in a completely impartial and consistent manner. Disciplinary action may not be capricious or retaliatory. Staff may not impose or allow imposition of corporal punishment of any kind." Those words may seem simple and unexceptional. For three reasons, however, they are anything but.

- First, contrary to the historic norms, policies, and practices of many prison systems, including the Bureau itself until the late 1960's, this statement limits prison staff to disciplining inmates who violate specific rules. As one retiree recalled: "In the old days, a guard could write up a convict for looking at him crossways, or for having a surly attitude, or just because he felt like it. Nobody would say too much about it, and the convicts just took it for granted as part of what 'doing time' was about."

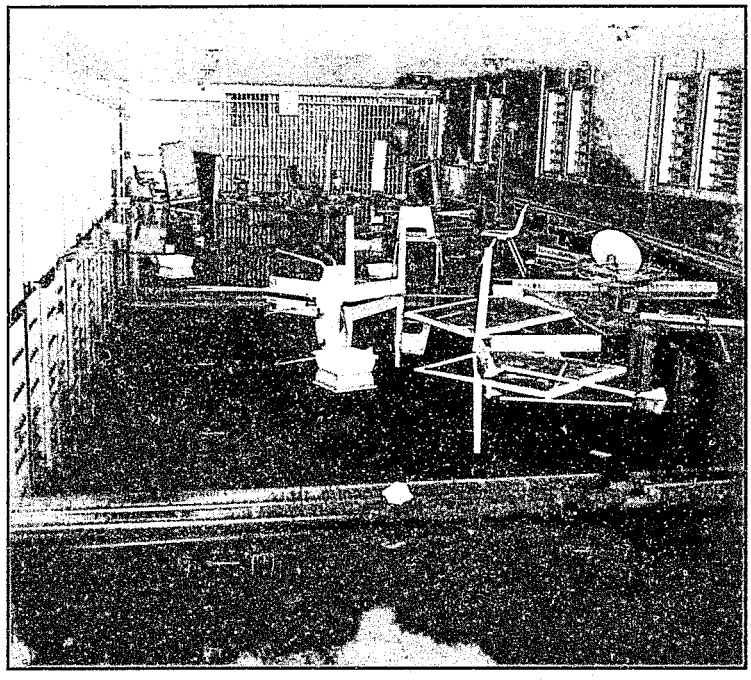
- Second, 5270.7 empowers the staff (and only the staff) to administer discipline, prohibits arbitrary, retaliatory actions, and forbids corporal punishment. Well into the 1960's, many prison systems, especially in the south, used inmates to punish other inmates ("trusties," "building tenders," "con bosses"), sometimes by means of officially sanctioned inmate-on-inmate beatings. In many systems, prison officials routinely used corporal punishment on unruly inmates. Although such actions are now prohibited by law, in some places the administration of discipline still takes this form, albeit covertly.[1]

- Third, 5270.7 mandates that staff administer discipline "in a completely impartial and consistent manner." But nowhere in the 45 pages that follow does it establish precisely what constitutes a "completely impartial and consistent" disciplinary process, or how to apply general precepts to particular cases. As a Bureau medical worker, one who over the years had initiated several disciplinary actions against inmates, observed: "Every medical problem is unique, every disciplinary problem is unique. In both cases, however, you've got to employ judgment, and to apply universal principles to particular cases. There's no two identical heart problems calling for identical bypass operations. And there's no two identical assaults on staff calling for identical punishments. But you do your best and try to treat like cases alike, for moral and practical reasons."

[1]Probably because their administrative systems tend to be more primitive, jail systems seem to have more vestiges of such disciplinary practices than do prison systems. This includes not just small county jail systems, but big-city systems as well. During my tenure as a consultant to the New York City Board of Corrections (1986-87), for example, there were numerous incidents of officers physically abusing inmates in retaliation for some alleged infraction. In 1991, several Philadelphia officers were criminally charged with making inmates who had rioted run a gauntlet, beating them with fists and clubs as they moved down the line.

The closest 5270.7 comes to specifying what constitutes an "impartial and consistent" disciplinary process, and how to administer one, is in its section on "Prohibited Acts and Disciplinary Severity Scale." This specifies four categories of prohibited acts ("greatest"—code 100's, "high"—code 200's, "moderate"—code 300's, and "low moderate"—code 400's) and sanctions for each. In the "greatest" category, for example, are such infractions as killing (code 100), rioting (code 105), and possession of illegal drugs (code 109). Among the recommended sanctions for such infractions are "parole date rescission," "disciplinary segregation (up to 60 days)," and "loss of privileges" (recreation, visiting). At the other end of the continuum, in the "low-moderate" category, are such infractions as "possession of property belonging to another person" (code 400), "tattooing or self-mutilation" (code 405), and "unauthorized physical contact" (kissing, embracing) (code 409). Among the recommended sanctions for such infractions are "monetary restitution," "loss of job," and "reprimand."

However, there is no shortage of ambiguities in this section. For example, conduct that "disrupts or interferes with the orderly running of the institution or the Bureau of Prisons" is listed in all four categories (codes 199, 299, 399, and 499). One moderate infraction is "being unsanitary or untidy" (code 330); one low-moderate infraction is "feigning illness" (code 402). It is simply unclear how to interpret and apply such provisions in a way that serves the end of a "completely impartial and consistent" disciplinary process.



Aftermath of 1974 disturbance at USP Marion. Participants in an incident of this type would probably be charged with code 199 "disruptive conduct" or code 105 "rioting."

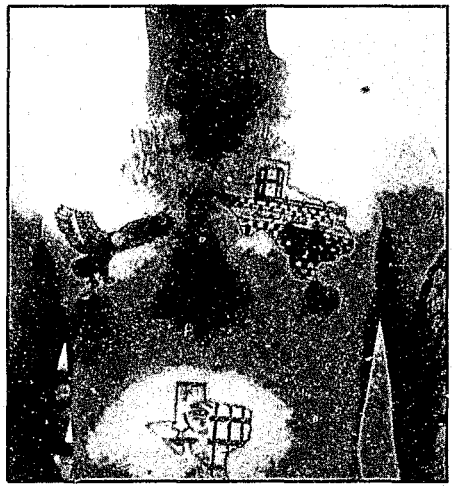
It would not be surprising, therefore, to find all manner of disparities and variations in the characterization of disciplinary offenses and the levying of sanctions. In most prison systems, and, indeed, within prisons from one warden to the next (or even one shift to the next), such discrepancies are easy to see. Within the Bureau, however, the "Prohibited Acts and Disciplinary Severity Scale" is understood and applied in much the same way by personnel at all levels throughout the system. More than that, the disciplinary process is valued by employees at all levels as an effective and fair way of ensuring that "inmates live in a safe and orderly environment." As one Central Office administrator asserted before I had fully researched the matter: "I'm telling you, John, you might not believe it based on what you've seen in other systems, but in the Bureau the discipline process is pretty damned uniform. It works in practice just like it does on paper, and we think it works mighty fine. Have you seen 5270.7? When you've had a chance to look into it more, tell me if 5270.7 tells the tale. I bet you find it does."

In three high-security Federal penitentiaries I studied in detail—Lewisburg, Pennsylvania; Leavenworth, Kansas; and Lompoc, California—the administration of disciplinary actions against inmates has mirrored the letter and spirit of Program Statement 5270.7. In all three prisons, the disciplinary process has the same five basic steps, and it is worth sketching them here.

■ Step one is the detection by staff of the commission of a prohibited act by one or more inmates. In all three prisons, staff estimated that about a quarter to a third of all potential code 300- and 400-level disciplinary charges were dropped or resolved informally short of a formal

disciplinary report. A veteran Lewisburg correctional officer noted: "If a guy is always dogging it on the [prison industry] job, you might see that he's threatened with an incident report. After the second or third time, you might even put pen to paper. But it's best to give him a chance to respond without having to go the whole 9 yards." A Leavenworth administrator stated: "Obviously, you can't police every little thing. If we're talking about repeated minor rule infractions, then, yes, they're going to get a report on them, and they know it. They understand how far they can skate with the small stuff. But even with that, it's generally three strikes and you're out, we make it formal." A former Lompoc correctional officer recalled: "At Lompoc, you'd have some tough guys who always had to act tough. You get these types in all of the heavier facilities. Now, guys like that, you'd be writing 300's and 400's till your arm fell off. For the petty infractions, an individual inmate's bound to get one or two free rides. But you can't bluff them. If they push it, it has to go on paper and you've got to take it to some available penalty."

■ The second step in the process—taken on all potential code 100- and 200-level infractions and more than half of the 300- and 400-level offenses—is the preparation and filing of a formal "Incident Report" by prison staff. The reports all follow the same basic form, relating the "who, what, when, and where" of the incident. Normally, notice of the report is provided to the inmate, and the disciplinary report is filed with a lieutenant, within 24 hours of the incident. In about 10 to 15 percent of all cases that reach the lieutenant, the charge is dropped or resolved informally.



Above: Of the four categories of prohibited acts, "tattooing or self-mutilation" is in the "low moderate" category.

Left: "Possession of property belonging to another person" is considered a "low-moderate" infraction.

■ In all other cases, a third step is taken—the appointment by the warden of an incident investigator. The investigator is a supervisory level employee. No one who was a party to the incident, least of all the report writer, can serve as an investigator. At Lewisburg, Leavenworth, and Lompoc, lieutenants have normally served as disciplinary investigators. The investigator interviews all parties to the dispute, both staff and inmates, and completes a report. When the investigation and report are complete, the matter is automatically referred to a "Unit Discipline Committee" (UDC).

■ The UDC represents the fourth step in the disciplinary process. Most Bureau prisons are administered around unit management teams, and two or more members of the unit team normally serve as a UDC. The UDC holds an initial hearing on the alleged misconduct. The UDC is authorized to drop or resolve informally any 300- or 400-level violations, and to impose minor sanctions. There are no good data on the rate at which UDC's drop charges or resolve matters informally; the best historic guesstimates for Lewisburg, Leavenworth, and Lompoc range from about 5 to 10 percent.

■ The final step in the disciplinary process occurs in code 100-level and some 200-level cases when the UDC concludes that a severe sanction (recommendation of a later parole date, loss of time earned for good behavior, transfer to a disciplinary unit) may be in order, or that criminal charges may need to be filed, or both. In these cases, they refer the matter to a "Discipline Hearing Officer" (DHO)—a specially trained, supervisory-level employee who may serve in this capacity at one or more prisons.[2] The UDC files all materials

[2]Prior to 1986, the Bureau used a three-person Institution Disciplinary Committee (IDC) at this stage in the process. DHO's replaced IDC's in 1988.

pertaining to the case with the DHO. The inmate charged has the right to call inmates or staff witnesses before the DHO. The DHO is empowered to informally resolve the incident report, but that almost never happens at this stage, and most inmates who find themselves before a DHO are found guilty.[3] At this or any other stage of the process, inmates found guilty have the right to challenge the decision via the Bureau's elaborate administrative remedy procedure; however, because the disciplinary hearing process is so exhaustive, the chances that an inmate will have a punishment modified or overturned are slim.[4]

Across Lewisburg, Leavenworth, and Lompoc penitentiaries, the vast majority of disciplinary actions against inmates (about 80 percent on average) have been for code 200- and 300-level violations, with the rest divided more or less evenly between the most serious (code 100) and least serious (code 400) actions. Based on the data available, it is difficult to calculate rates of disciplinary action across these three facilities. Bureau research analysts have reported that, in the early 1980's, the average number of incident reports per 100 inmates per month at all high-security facilities was about 9.[5] The institutions varied little around this average; such variations as did occur could be explained by changes in inmate population mixes and other factors, rather than by any systematic differences in the way discipline was administered. The few published accounts of the Bureau disciplinary process produced by independent analysts do not contradict this view.[6]

Above and right: Inmates in disciplinary segregation for "code 100's" have 1 hour per day of enclosed recreation.

Indeed, four Bureau employees, each of whom had worked in at least two of the three facilities under consideration here, all reported that the processes were virtually identical from one prison to the next. One would expect as much from looking at each prison's "Inmate Handbook." In each, the basics of Program Statement 5270.7 were conveyed straightforwardly; in all three handbooks, parts of the text of 5270.7 were reprinted verbatim.

Beneath the superficial differences are profound operational uniformities in the administration of disciplinary actions. Indeed, I could not find a single example of comparable incidents that were handled in significantly different ways at Lewisburg, Leavenworth, and Lompoc. Almost without exception, in each prison, reports on all sorts of minor infractions were preceded by informal warnings to the inmate-perpetrators. In each, investigating lieutenants, UDC's, and DHO's played almost precisely the role assigned to them by 5270.7. In each, the relevant associate wardens (and, in serious cases, the wardens) were actively involved in making sure that the facts were straight, the penalties proportionate, and the entire process conducted in accordance with policy.

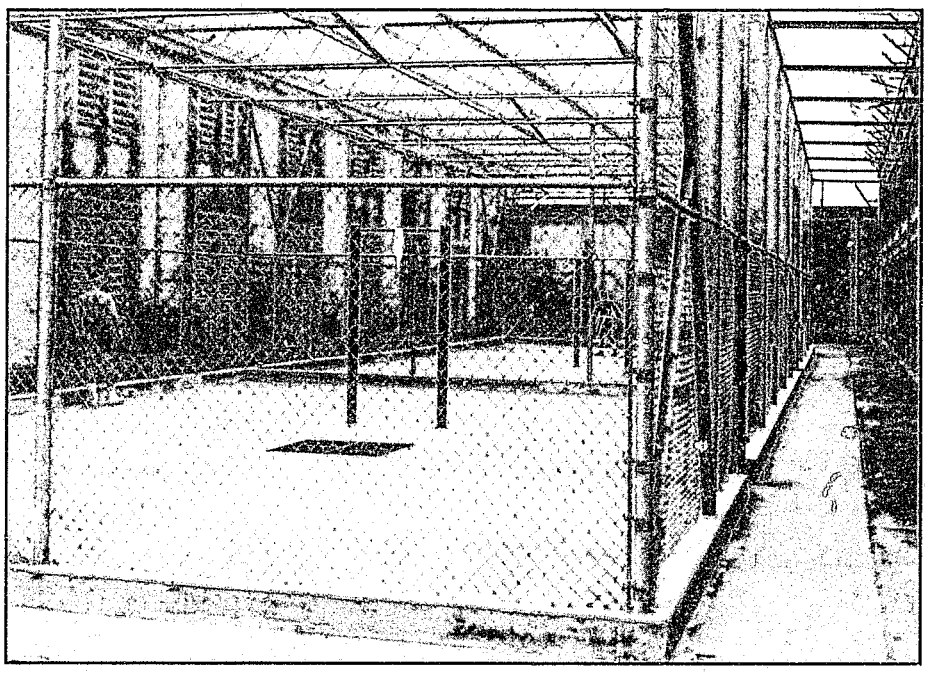
As a final, loose test of the "5270.7 tells all" notion, I asked a nonsupervisory and a supervisory employee at each of the three penitentiaries how they would characterize and dispose of a hypothetical incident in which an inmate set fire to his cell, several officers saw him do it, and conclusive evidence showed that the inmate committed this act as part of a would-be escape plan. All six of those to whom I posed this hypothetical incident characterized it as a 100-level or "great-

[3]A 1987 study of DHO's at six pilot facilities found that DHO's issued "not guilty' findings in only 1.9 percent of all cases; see Loren Karacki, *Research Review: Evaluation of the Discipline Hearing Officer Pilot Project* (Washington, D.C.: Federal Bureau of Prisons, December 1987).

[4]The administrative remedy procedure is invoked by the use of BP-9, BP-10, and BP-11 forms. Inmates who wish to raise issues concerning any aspect of their confinement can file the BP-9 with institutional officials, and, if necessary, the BP-10 (with regional office officials) and the BP-11 (with central office officials) on appeal. In the mid-1980's, the agency-wide denial rates for BP-9's, -10's, and -11's were about 85, 95, and 95 percent, respectively. For example, in 1986, 422 Lompoc inmates filed BP-9's, and 322 (89 percent) were denied; 165 of those denied by the institution filed BP-10's, and 151 (94 percent) were denied by the regional office; 63 of those filed BP-11's, and 59 (94 percent) of those were denied.

[5]Michael Janus et al., "Security and Custody: Monitoring the Federal Bureau Of Prisons Classification System," *Federal Probation*, Volume 50, Number 1, March 1986, p. 35-43.

[6]For one such account, see Mark S. Fleisher, *Warehousing Violence*, Frontiers of Anthropology Series, Volume 3 (Newbury Park, London, New Delhi: Sage Publications, 1989), p. 80-86.



est severity" offense (three correctly specified it as a code 103 offense—setting a fire to further an escape attempt); all six summarized the disciplinary process in much the same terms, with as much excruciating detail as I would allow; and all six correctly specified the categories of sanctions that could be applied. Five of the six said that the hypothetical inmate would be a likely candidate for loss of good time and, depending on where he was housed, for disciplinary transfer; only one said that the incident would definitely result in parole date rescission. As it turned out, their responses mirrored what has actually happened in such cases.

To find that the administration of disciplinary actions followed official agency policy, and that it varied little from one prison to the next within the system, was surprising. But to find that staff at all levels seemed to prize the process as a management tool left me a bit incredulous. After all, in many prison systems, the dominant ethos, at least among line staff, has favored "curbstone justice," not bureaucratic procedure, as a means of handling inmates who violate the rules or seriously challenge authority.

But, as a Bureau Central Office administrator who had worked as an agency legal counsel explained: "For most of prison history, discipline was arbitrary. Sometimes, staff are going to want to just dispense justice on the spot, and to get physical. But, when that officer out there knows the pen is mighter than the sword, when he knows by experience that if he properly writes up an inmate for some offense the inmate really did, then the inmate's almost certainly going to get punished, that's all it takes." In the same vein, a regional administrator who had served as a DHO remarked: "Look, when staff get used to doing things a certain way, then, even if that way is not natural, they'll just do it, especially if it's proven effective. That's the story with our disciplinary process." Likewise, a junior correctional officer recalled: "They stress in [pre-service] training that you don't ever rough up an inmate. You do and you lose your job, and you may go to jail, too. But they also stress that you have a far better way to keep discipline. That's the [incident] reports....Sure, I've already had times when I'd like to forget about the DHO's and all that and let an inmate have it. But the older officers here would never respect that. They only respect guys who do their jobs the right way all the time."

Former Bureau Director Norman A. Carlson was a bit amused by my interest in the disciplinary process, and completely unmoved by the "finding" that it seemed to work as called for in policy. "The staff get lots of training and oversight. They administer that process every day. They know it works well, and that it's certainly a heck of a lot better than any sort of vague, variable process....I'm just not too surprised." Carlson's successor, J. Michael Quinlan, had much the same reaction: "I'd be shocked if it didn't work the way it's supposed to. When I was a warden, I found the process very useful. Again, it's not just that it's official policy....It's that it's a good policy, and one we really do believe in." ■

John J. DiIulio, Jr., is Professor of Politics and Public Affairs at Princeton University and a Nonresident Senior Fellow at the Brookings Institution. This article is drawn from his forthcoming book Principled Agents: Leadership, Administration, and Culture in a Federal Bureaucracy, *to be published by Oxford University Press.*