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Volume 18, Number 5 September-October 1982

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The Importance of the Presentence Investigation Report *After* Sentencing

This document follows an inmate through the corrections process and is an important, although not exclusive, basis for decisions critical to the immate.

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Corrections Law Developments

The Use of Informants in Prison Discipline

By Frank S. Merritt*

The applicability of procedural due process to major prison disciplinary proceedings was firmly established by the Supreme Court some eight years ago.[1] Yet, the articulation of the process which is due in this setting continues to trouble the courts. While requiring notice, a hearing with an opportunity to present evidence, a neutral hearing body, and a written statement of the evidence relied upon and the reasons for the decision, the Court left a number of issues open. Among these was the question of the quality of the evidence that could be relied upon.

Disciplinary Process

The Supreme Court's opinion in *Wolff v. McDonnell* recognized that the institutional disciplinary hearing was not a trial and that introduction of trial rules might make the procedure so cumbersome as to be counterproductive.[2] While finding that procedural due process was required because of the potentially severe effects of discipline, both on release on parole and on the conditions of confinement, the Court recognized that the practical needs of running an institution and maintaining security required a more limited procedure than would be necessary in the free world.

The Court did not directly discuss the nature or type of evidence that may be considered by the disciplinary body. The question of evidence, however, was indirectly raised by some of the procedures that the Court requires and some that it rejects. While recognizing that confrontation and cross-examination may be desirable, the Court specifically and clearly refuses to require them as a matter of constitutional law.[3] However, both an opportunity to present evidence through witnesses and documents[4] and a statement by the disciplinary body as to the evidence relied upon are required by the decision.[5] In addition, the very fact of applying due process to the disciplinary process at all is an indication of a desire to protect against arbitrary and baseless disciplinary decisions.

The determinations of the nature and extent of admissible evidence in disciplinary proceedings has been left to the lower courts for development and exposition. From the decisions of these courts, two principles appear reasonably certain: First, hearsay evidence may be considered on the question of violation of the institutional rule[6] and

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[1] Wolff v. McDonnell, 418 U.S. 539 (1974).

[2] *Id.*

[3] *Id.* at 567-570.

[4] *Id.* at 566-567.

[5] *Id.* at 564-565.

[6] Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977); see Gobert & Cohen, *Prisoners Rights*, § 8.07, at 243 (1981).

second, the evidence upon which the decision is based must be substantial.[7] While the articulation of these two principles is reasonably clear, their application is not.

Informant Testimony

One particularly difficult and recurring problem concerns the use of testimony of informants as a basis for the disciplinary decision. Some portion of the information upon which discipline is imposed will necessarily come from other members of the inmate population. The extent to which this occurs will vary from institution to institution and depend upon the nature of the occurrence and the composition of the inmate population.[8] Experience indicates that the inmate who informs on another inmate may himself become the target for violent acts by other members of the inmate population.[9] The decision of the Court in *Wolff* not to require confrontation and cross-examination of adverse witnesses is a clear recognition of this. This recognition, however, is not an endorsement of the use of informant testimony as the basis for disciplinary decisions.

An informant, for the purposes of this discussion, is an inmate who does not appear before the disciplinary committee to give his testimony. His statement is conveyed to the committee by a third person who personally appears before the committee or provides a written and signed report to the committee. The name of the informant is not revealed to the committee, but the name of the individual who provided this information to the committee is known.

The use of an informant's statements as the basis for a disciplinary decision denies not only the accused, but also the disciplinary committee, the ability to test the credibility of the informant. Since the informant's statement in a number of instances may be the only significant evidence linking the accused inmate to the rule infractions, to accept this evidence as the basis of a disciplinary action would be to accept the premise that discipline can be based solely or primarily on hearsay. This would violate the accepted rule that discipline must be based on substantial evidence.[10]

Judicial Approaches

The courts addressing this problem have adopted several approaches. All of these employ the test developed by the Supreme Court in *Aguilar v. Texas* for the determination of whether an informant's statements may form the basis for a determination of probable cause. This two-part test requires that there be factual evidence on the record (1) upon which the tribunal could reasonably determine that the informant was believable and (2) upon which it can be determined that the information itself is accurate.[11] Although the test appears complicated, it actually demands little more than that the informant either have a history of truth-telling or that he obtained the information in a manner which insures that it is not fabricated and that the information is sufficiently detailed to ensure that it is correct. Corroboration of the information tends to lessen the rigor with which the test is applied since the corroborating evidence tends to verify and authenticate the informant's information. While the test is not without its problems, it has served its purpose reasonably well and the Supreme Court does not appear to be questioning the validity of continued reliance upon this test for determining the existence of probable cause based on the statement of an informant.

Several of the courts considering the use of informant's statements as a basis for prison discipline have adopted the *Aguilar* test without modification.[12] The Oregon courts have adopted a variant requiring either that there must be facts demonstrating that the informant's statement is credible or that the name of the informant must be revealed.[13] An Iowa federal court has adopted an approach which addresses the problem from the perspective of the findings to be included in the decision, rather than the tests to be employed in determining whether to rely on the informant's statement.[14]

The Aguilar *Test*

The Court of Appeals for the Third Circuit recently adopted the *Aguilar* test without modification in the case of *Helms v. Hewitt*.[15] Aaron Helms was alleged to have assaulted a correctional officer and acted to disrupt the normal institutional routine. After considerable delay, Helms was given a disciplinary hearing. The sole evidence introduced against Helms at this disciplinary hearing consisted of a statement of a correctional officer that he had information from a "confidential informant" indicating that Helms had perpetrated the acts in question. On that basis, Helms was found to have violated the institutional rules and was sentenced to six months in close confinement. This practice was attacked as denying due process to the plaintiff.

The Third Circuit reversed the granting of summary judgment for defendants, noting that to allow the discipline to be based on this statement would be an abdication of the disciplinary committee's duty to decide, since the committee would be allowing the correctional officer to make the judgment as to the credibility of this information. The court, however, did

7 Aikens v. Lask, 514 F.2d 55 (7th Cir. 1975); Gomes v. Travisono, 510 F.2d 537 (1st Cir. 1974).

8 The "inmate code" stresses that inmates should not inform on other inmates. However, there are portions of any prison community who do not conform to this "code" and will report violations of the institutional rules by other inmates. See Sykes & Messinger, "Inmate Social System," in Clower, *Theoretical Studies in the Social Organization of Prison* (1960); Heffernan, *Making It in Prison* 120-133, particularly 127-132 (1972).

9 See, e.g., Gullatte v. Potts, 630 F.2d 322 (5th Cir. 1980) (institutional staff potentially liable for death of inmate who had informed but was placed in general population).

10 Aikens v. Lask, note 7 *supra;* Gomes v. Travisono, note 7 *supra*. Cf. Fournier v. Hongisto, 75 A.D.2d 660, 426 N.Y.S.2d 353 (1980) (evidence found to be substantial); Hewitt v. Department of Pub. Safety & Correctional Servs., 382 A.2d 903 (Md. 1978) (court pretermits question whether disciplinary decision is based on substantial evidence); Hanlon v. Oregon State Penitentiary, 547 P.2d 642 (Ore. App. 1976) (judicial review held limited to determining the existence of substantive evidence).

11 Aguilar v. Texas, 378 U.S. 108 (1964). "Although an affidavit may be based on hearing information and need not reflect the direct personal observations of affiant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed was 'credible' or his information 'reliable.' " *Id.* at 114 (citations omitted).

12 Helms v. Hewitt, 655 F.2d 487 (3d Cir. 1981), *cert. granted 102 S. Ct. 1629* (1982); Gomes v. Travisono, note 7 *supra;* Finney v. Mabry, 455 F. Supp. 756 (E.D. Ark. 1978).

13 See, e.g., Hartman v. Oregon State Penitentiary, 50 Ore. App. 419, 623 P.2d 681 (1981); Gresil v. Oregon State Penitentiary, 47 Ore. App. 673, 614 P.2d 1231 (1980), *aff'd* 625 P.2d 651 (Ore. 1981), U.S. *cert. denied.*

14 Rinehart v. Brewer, 483 F.Supp. 165 (S.D. Iowa 1980).

15 Note 12 *supra* (the ceritiorari petition appears to be limited to the question of the applicability of due process in the particular situation).

not suggest that informant's testimony could not be the basis for institutional discipline. Recognizing that hearsay may serve a useful purpose in discipline, the court determined that information from an unidentified informant may form the principal basis for determining a violation of rules if the record contains " '1) . . . factual information from which the [tribunal] can reasonably conclude that the informant was credible or his information reliable; 2) the record must contain the informant's statement [written or as reported] in language that is factual rather than conclusionary and must establish by its specificity that the informant spoke with personal knowledge of the matters contained in such statement.' " [16]

The Third Circuit, in adopting this test, relied uncritically on the First Circuit's decision in *Gomes v. Travisono*.[17] That decision was a determination of whether the so-called Morris Rules were consistent with *Wolff*. The court found that these rules, the product of a negotiated settlement, were in fact a proper exposition of due process.[18]

The Oregon Approach

Originally Oregon had an administrative rule which adopted the *Aguilar* test. This rule was construed by the U.S. District Court as being satisfied by revelation to the disciplinary committee of the exact information supplied by the informant or his name.[19] The administrative rule was then changed to conform with this holding. The change was approved by the appellate courts.[20]

The Rinehart *Approach*

The district court, in *Rinehart v. Brewer*, approached the problem of the informant's status by defining the record which must be made when a disciplinary decision is based upon the statement of an informant.[21] The court required that the disciplinary decision contain:

(1) A summary of all of the confidential information given to the committee;
(2) An identification of the informant by name or relationship to the institution;
(3) An indication of the extent to which the confidential information was relied upon by the disciplinary committee in reaching its decision;
(4) A statement of why the informant is found credible and indicating what corroboration, if any, exists for his statement; and
(5) A statement of the reasons why the information must be kept confidential (or the informant's name not revealed).

This approach addresses the confidential nature of the information in addition to the ability to rely on the informant's statement, a question which neither of the other tests directly addressed.

Discussion

The task is to develop a test which reasonably assures that the informant exists and that the statement is true—not merely a contrivance of the inmates

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[16] *Id.*, 655 F.2d at 502.

[17] Note 7 *supra*.

[18] Morris v. Travisono, 310 F. Supp. 857 (D.R.I. 1970). These rules are discussed at length in Harvard Center for Criminal Justice, "Judicial Intervention in Prison Discipline," 62 J. Crim. L. 200 (1972).

[19] Bartholomew v. Reed, 477 F. Supp. 223 (D. Ore. 1979). For an Oregon case requiring full compliance with *Aguilar* under this rule, see Allen v. Oregon State Penitentiary, Corrections Div., 33 Ore. App. 427, 576 P.2d 831 (1978).

[20] See cases cited at note 13 *supra*.

[21] Rinehart v. Brewer, note 14 *supra*.

or staff[22]—yet is simple enough and flexible enough to permit reasonable adminstration in the context of a correctional institution. The Oregon test assumes that revelation of the detail of the statement or the name of the informant will be sufficient in and of itself. While simple to administer, it provides little assurance of the accuracy of the information. The name of the individual does little to assure accuracy where the individual is an inmate.[23] It is not to be expected that the members of the committee would be familiar with the entirety of the population of the institution, let alone their reputations for truth and veracity. The statement of the inmate, where sufficiently detailed, may be adequate to permit the staff to corroborate it, and should indicate that it was gained in a manner which would suggest accuracy. Revelation of the statement, however, does not ensure absolutely that it was not contrived.

Application of the *Aguilar* test does place a greater burden on the disciplinary committee since not only must the statement itself be of record to demonstrate that it was gained in a reliable manner, but some evidence of the reliability of the informant must be provided. Theoretically, it provides greater protection to the inmate. However, it places a premium on the individual who has given accurate information in the past, although first-time informants are not totally excluded.[24] The existence of a system of regular informants in an institution, a "snitch system," creates a number of problems well demonstrated in the recent New Mexico disturbance.[25]

Rinehart serves as a model of a statement of the decision which would comply with the *Aguilar* test, but that test could be complied with without making all of those findings.

Ultimately, the only item of evidence reasonably available to the institution disciplinary committee upon which it can make the determination of whether to rely on an informant's statement is the statement itself. Thus, the statement ought to be revealed in all cases. Unless the statement is in detail sufficient to indicate that the informant was in a position to observe the incident and the detail is corroborated with the other facts known of the incident, it ought not be permitted to form the basis for a decision.[26] Although this would not provide the inmate with all of the protections against contrived statements which he would receive under the *Aguilar* test, the degree of additional protection provided by a determination of the reliability of the informant is minimal in actuality. In addition, the burden it places on the institutional staff and the danger it creates through the encouragement of a "snitch system" far outweigh its benefits.

This does not mean that the disciplinary committee should not inquire

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[22] See Helms v. Hewitt, note 12 *supra*.

[23] The use of anonymous statements from staff would be difficult to justify, since staff should not be subject to the dangers which justify the use of inmate informants. Of course, nonrevelation of the name of the staff member to the inmate may be appropriate, particularly where treatment staff is involved. But such does not justify the disciplinary committee not requiring an *in camera* appearance by the staff member.

[24] See United States v. Harris, 403 U.S. 573 (1971).

[25] See "Report of the Attorney General on the February 2 and 3, 1980 Riot at the Penitentiary of New Mexico," Part II, pp. 23-25, 37 (1980).

[26] It is not suggested that the existence of any corroborative evidence is sufficient to allow the informer's statement to be relied upon. The approach of Meyers and Rabiej is not adopted. Meyers & Rabiej, "Burden of Proof and the Standard of Judicial Review in Prison Disciplinary Hearings Involving Decisions Predicated Upon Uncorroborated Hearsay Evidence," 1979 So. Ill. U. L.J. 535.

of the individual reporting the informant's statement whether that individual knows of any reason why the informant might have desired to contrive a story concerning the accused inmate or whether the individual has any reason to suspect that the informant has not told the truth. However, it is doubtful whether this inquiry will often produce any evidence impinging the veracity of the informant's statement. Nor would negative responses to these inquiries satisfy the reliability branch of the *Aguilar* test, since they do not affirmatively suggest reliability.

The preferable solution to the problem of the use of informant statements in institutional discipline is not to use them. *In camera* interrogation of the informant by the committee or by a member thereof, with a record of the interrogation being maintained, is preferable.[27] The accused inmate would be provided with a summary of the statement, edited to ensure that the source is not identified. Further, the committee would not have to hear the informant's statements continuously with the conduct of other portions of the hearing, but could interrogate the informant a day or two before the hearing in a manner which would reasonably prevent his identification.

Conclusion

The maintenance of the anonymity of the informant and the assurance that the statement is not contrived are inherently conflicting goals. The resolution herein proposed provides neither total protection for anonymity nor a complete assurance of veracity. Whatever approach to the use of informant statements is ultimately adopted by a particular jurisdiction, some problems will inevitably remain.

[27] LaFave suggests the conduct of such an *in camera* hearing in the determination of probable cause. 1 LaFave, *Search and Seizure*, § 3.3, at 584-586 (1978).

END