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REPRESENTATION AT DISCIPLINARY HEARINGS FOR STATE PRISONERS

I am sorry to inform you that this office will not be able to represent you at your disciplinary hearing. Our staff is too small to permit us to offer representation at prison administrative hearings, including disciplinary, classification, and parole revocation hearings. However, we are providing the following summary of your rights in order to help you prepare for your hearing. We have also attached a copy of the regulations (103 CMR 430), which deal with prison disciplinary hearings. A current version of these regulations should be available to you in the prison law library. We strongly urge you to read these regulations.

If you are seeking legal representation at the disciplinary hearing, there is currently one law school program that may be able to help you. If you want to postpone your hearing in order to find out whether representation is available from this program or from a private attorney, you should write to the Disciplinary Officer at least 24 hours before the scheduled hearing requesting a “continuance” for the purpose of seeking representation. See 103 CMR 430.11(2).

Prisoner Legal Assistance Project (PLAP) at Harvard Law School: (617) 495-3127 (collect). PLAP provides representation at D-hearings and DDU hearings. PLAP also handles parole revocation hearings and parole release hearings for second-degree lifers. It can occasionally provide assistance with sentence calculation, lost property, and denial of visitation. Covers all Massachusetts state prisons. Because it is so difficult to get through by telephone, write PLAP as soon as a D-ticket is received and send a copy of the ticket. The address is PLAP, Gannett House 100, Harvard Law School, Cambridge, MA 02138.

YOUR RIGHTS AT THE DISCIPLINARY HEARING

Notification of the Charges

The reporting officer must file a disciplinary report within 24 hours of the offense, unless further investigation is appropriate. See 103 CMR 430.08(2). The prisoner ordinarily should receive a copy of the report and a notice of the hearing within seven business days of the date the report is filed. See 103 CMR 430.09 - 430.11. If there is a possibility you will be asked to pay restitution as a sanction, the Disciplinary Officer must provide you with an itemized list of the damages or costs associated with the alleged misconduct not less than 48 hours before the hearing. See 103 CMR 430.10(2).

The Disciplinary Officer's failure to follow the time limits described above does not necessarily mean that the charges against you must be dismissed. This is because the Superintendent or Commissioner can waive the time limits. 103 CMR 430.23. You can request dismissal of the charges if the time limits have not been met and the Hearing Officer does not produce a written waiver, although your request is unlikely to succeed unless you can show that the delay has made it more difficult for you to prepare a defense.

Informal Sanctions

A prison employee may seek to impose sanctions on you through informal procedures, meaning that you accept the sanctions without a hearing. If this happens, you should be notified through an Informal Sanction Form. The only sanctions you can get through the informal process are: a written warning, one to five hours of extra duty, one to three days of room or unit restriction, or one to three days' loss of a leisure activity. If you do not want to accept the informal sanctions, and you want the disciplinary report to go through the normal procedures, you may refuse to sign the Informal Sanction Form. See 103 CMR 430.09. We advise that you seriously consider that you will lose your rights to due process and that documentation of any pattern of harassment through discipline may not be as clear if you accept informal sanctions.

Legal Representation and Witnesses

When you receive a disciplinary report, you should also be given a request for representation/witness form. See 103 CMR 430.11(1). If you want to seek representation by an attorney or by a law student, or if you want to call a witness at your hearing, you must submit this form to the Disciplinary Officer within twenty-four hours of receiving it. See 103 CMR 430.11(6). If you fail to complete and submit it within the time limit, you may waive your rights to representation or to call your witnesses. You may request a "continuance" (postponement) of the hearing for good cause, for example because you are trying to find a lawyer. See 103 CMR 430.11 (3). You are entitled to make a telephone call to seek a lawyer or law student to represent you at the hearing. See 103 CMR 430.12(1).

If you do not speak English, do not read or write, or if the issues in your case are unusually complex or hard to understand, you have the right to the assistance of a staff member to help you at the hearing or to a telephonic interpreter service. However, you must request such help a reasonable time before the scheduled hearing. See 103 CMR 430.12(2).

If you are seeking to call witnesses, you should include on the request for representation/witness form a summary of what each witness is expected to say to show why the witness is relevant. Since the Hearing Officer may not allow your witness to appear at the hearing, it is sometimes a good idea to get an affidavit from the witness before the hearing so that you can submit it at the hearing. The Disciplinary Officer must respond to your request for witnesses no less than 48 hours before the hearing. See 103 CMR 430.11(2). Your request for witnesses should not be unreasonably denied. See 103 CMR 430.14.

Evidence

When you receive the disciplinary report, you should also receive a request for evidence form. You must submit this to the Disciplinary Officer within twenty-four hours of receiving it, or you may waive your right to present evidence. See 103 CMR 430.11(6). The Disciplinary Officer must respond to your request no less than 48 hours before the hearing. 103 CMR 430.11(2)

The disciplinary regulations that went into effect on January 30, 2006 provide that a prisoner who gets a disciplinary report is entitled to receive "automatic discovery," which means

the prison must give you certain evidence and information. This should normally be provided at the time the disciplinary report is served, but by no later than 48 hours before the hearing. It includes: copies of incident reports related to the disciplinary report; copies of, or access to, any “exculpatory evidence,” which is any evidence that helps you by showing that you are innocent or showing you are less responsible for the offenses charged; copies of any documents, photos, tape recordings or video evidence referred to in the disciplinary report or that the Disciplinary Officer intends to introduce in the hearing; and an “informant information checklist” completed by the Disciplinary Officer. See 103 CMR 430.11(1).

The Hearing

The disciplinary report must state the date, time, and place of the alleged violation. If you are charged with “violating a departmental rule” or “violating a departmental regulation,” the disciplinary report must also state which rule or regulation you violated. If the D-report does not contain this information, you should request a dismissal of the charges. If you are charged with several different offenses, all based on the same incident or action, you should request a dismissal of all but the most relevant charge or, in the alternative, request that the Hearing Officer combine charges in the interests of fairness.

The Hearing Officer must be impartial. You may challenge the impartiality of the Hearing Officer if you have a good reason, for example if the Hearing Officer was a witness to the events at issue in your disciplinary report. See 103 CMR 431.13(2).

All evidence should be presented in front of you at the hearing, except for certain informant information. See 103 CMR 430.14(2). If the evidence that the DOC is relying upon is not presented, you may request that the charge be dropped for lack of evidence. If there is a videotape of the incident, it should be shown at the hearing if you so request.

You may request that your disciplinary hearing be tape-recorded. See 103 CMR 430.12(3). You should weigh two considerations before deciding whether to request a recording. On the one hand, the benefit of recording your hearing is that you ensure, for future judicial challenges, that all of your helpful testimony and evidence are preserved. On the other hand, the problem with recording your hearing is that the recording may allow a judge to find that you had a fair hearing, even where the Hearing Officer’s written record is inadequate to establish that on its own. If you choose not to record the hearing, you should consider writing an affidavit prior to the hearing which sets forth all evidence that you want brought to the disciplinary board’s attention, including the expected testimony of any requested witnesses. This affidavit, which becomes part of the written record, preserves your evidence if you need it for a court challenge, even if the Hearing Officer ignores it.

Pleading Guilty and Remaining Silent

You may plead either guilty or not guilty to the charges against you. Occasionally, a Disciplinary Officer will offer the prisoner a “plea bargain,” which means that, in exchange for a guilty plea, your sanction will not be as severe as it would be if you went through with the hearing and lost. Under no circumstances should you plead guilty to a disciplinary charge that has also been referred to the District Attorney. A guilty plea can be used against you in criminal proceedings and may result in you receiving an additional criminal sentence. If you are ultimately charged with criminal charges, you will be assigned a criminal attorney.

You also have the right to remain silent at your hearing, but unlike at a criminal trial, the Hearing Officer is allowed to use your silence against you. 103 CMR 430.14(3). Because

whatever you say at your hearing may be used against you in court, we strongly advise you to remain silent if the charges have been referred to the District Attorney.

Findings of the Disciplinary Hearing Officer and Sanctions

If you are found guilty of the charges against you, you must be given a written description of the evidence the Hearing Officer relied upon and the reasons for his decision within five business days after the hearing. 103 CMR 430.17(1). The possible sanctions are listed at 103 CMR 430.24 and 430.25.

Appeal

You have the right to appeal to the Superintendent if you are found guilty. You can also appeal any sanction imposed by the Disciplinary Officer, even if you do not wish to appeal the finding of guilt. You must submit the appeal in writing to the Superintendent within fifteen days of receiving the Disciplinary Officer's written decision. This is *not* business days, but all days, although if the 15th day falls on a weekend or holiday you can submit the appeal on the next business day. See 103 CMR 430.18(1).

The Superintendent may uphold the Hearing Officer's findings and sanctions, or s/he may order a rehearing, reduce the offense, reduce or suspend the sanction, or dismiss the charges. The Superintendent **may not** increase any sanction on appeal. 103 CMR 430.18(2). S/he will normally give you written notice of his/her decision within five weekdays of having received your appeal. 103 CMR 430.18(2).

If you are considering a court challenge to your disciplinary hearing, you must first appeal to the Superintendent in order to exhaust your administrative remedies.

Continuance without a finding

The Hearing Officer, Disciplinary Officer or appellate authority may offer to continue your disciplinary report without a finding for up to a year. If you agree to this, you are giving up the right to a hearing and an appeal on whether you are guilty of the offense(s) charged. At the end of the continuance period, the disciplinary report will be filed without sanctions, unless you are found guilty of another disciplinary offense during that period. If you are found guilty of another disciplinary offense during that period, then you will automatically be found guilty of the offense that was continued and you will only be able to challenge and appeal the sanctions for that offense. We advise that you do not agree to continue any ticket without a finding because you lose your due process rights and will have an automatic guilty finding that you will not be allowed to challenge if you receive another ticket within the time period given.

Note: MCLS has prepared this material to help you understand your rights in this area of the law. Although we do our best to offer reliable information, we cannot promise that what we say here is accurate, complete or up-to-date. It is your responsibility to consult with an attorney or do your own legal research before you apply this information to your personal situation.