



**Investigatory Report of
Nebraska Department of Correctional Services
Disciplinary Process**

Nebraska Ombudsman's Office (Office of Public Counsel)

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GLOSSARY

APA	Nebraska Administrative Procedure Act
DCC	Disciplinary Committee Coordinator
IDC	Institutional Disciplinary Committee
IIR	Inmate Interview Request
NDCS	Nebraska Department of Correctional Services
NICaMs	Nebraska Inmate Case Management System
PC	Protective Custody
PHO	Principle Hearing Officer
UDC	Unit Disciplinary Committee

Executive Summary

Each year, the Ombudsman's Office (Office of Public Counsel) receives thousands of complaints from individuals about their interactions with state agencies. A large portion of these complaints are from individuals incarcerated within Nebraska Department of Correctional Services (NDCS) facilities. A significant number of the complaints received in 2022 from incarcerated individuals involved the NDCS disciplinary process. Due to the volume of complaints and the substantial impacts the process can have on incarcerated individuals, the Ombudsman's Office identified issues and conducted an investigation into the disciplinary process. This investigation included reviewing complaints to the Ombudsman's Office and NDCS data on disciplinary reports and sanctions; reviewing current statutes, regulations, and policy; observing disciplinary hearings at NDCS facilities; and speaking with numerous incarcerated individuals and NDCS leaders and staff.

After this investigation, the Ombudsman's Office found the following related to the NDCS disciplinary process:

- NDCS regulations and policies do not clearly explain the disciplinary process.
- NDCS does not give incarcerated individuals sufficient time or opportunity to organize and formulate a defense for the alleged violation(s) with which they are charged.
- NDCS facilities do not have adequate hearing rooms for Principle hearings or IDC hearings.

Based on investigative findings, the Ombudsman's Office proposes the following:

1. Adopt a new disciplinary policy for major rule violations.
2. Review the Unit Disciplinary Committee (UDC) regulations, policy, and practice for process improvements.
3. Designate a spacious, equipped, and secure room at each facility to hold Principle and Institutional Disciplinary Hearings.
4. Create specific forms for the disciplinary process.
5. Digitize all forms for the incarcerated individuals to submit electronically.

Introduction

The Ombudsman’s Office (also known as the Office of Public Counsel) receives complaints about Nebraska state agencies and conducts impartial and independent investigations to resolve issues.¹ Receiving thousands of complaints each year across Nebraska’s state agencies, the Ombudsman’s Office is in a unique position to “review administrative acts that may be unreasonable, unfair, oppressive, or inconsistent with the general course of an administrative agency’s judgements”.² The Ombudsman’s Office received complaints regarding NDCS and its established disciplinary process for incarcerated individuals. In working the complaints, the Ombudsman’s Office was able to identify policy and practice that is inconsistent, unclear, and unfair in its application. Therefore, the Ombudsman’s Office conducted an investigation and crafted recommendations.

Complaints

The Ombudsman’s Office received around 1,284 complaints from incarcerated individuals committed to NDCS in 2022. Nearly twenty percent of those complaints involved misconduct reports. A misconduct report is a report written by a NDCS team member that details how an incarcerated individual violated an institutional rule.³ If an incarcerated individual is found guilty of the charge(s), a sanction is imposed.⁴ According to NDCS policy, the purpose of the disciplinary process is to govern incarcerated individuals’ conduct and to maintain a safe and secure facility for team members, the incarcerated population, and the public.⁵ While upholding these goals, NDCS is obligated to ensure that incarcerated individuals are afforded the right to procedural due process.⁶ NDCS handles thousands of misconduct reports each month. According to data maintained by NDCS’ Nebraska Inmate Case Management System (NICaMS) Reporting-ORACLE, in the year 2022, NDCS had a monthly average of 3,410 recorded misconduct reports from each facility.

¹ See Neb. Rev. Stat. 81-8,240 *et seq.*

² See Neb. Rev. Stat. 81-8,246.

³ See 68 NAC 6-005; NDCS Policy 217.01 (“Inmate Rules and Discipline”).

⁴ 68 NAC 6-003.01; NDCS Policy 217.01.

⁵ NDCS Policy 217.01.

⁶ See Neb. Rev. Stat. 83-4,122.

The Ombudsman's Office receives a wide variety of complaints regarding misconduct reports. In these complaints, incarcerated individuals dispute the facts of the incident in question, the offense(s) with which they were charged, the sanction(s) imposed, or the collateral consequences of receiving a misconduct report. Some complaints involve the disciplinary process itself.

Incarcerated individuals allege the following flaws in the process:

- The disciplinary process is not well-defined;
- Due process rights are being violated;
- It is unclear who is on the disciplinary committee and what their roles are;
- The process does not allow for the formulation of a defense; and
- Sanctions are unfair and inconsistent.

Receiving misconduct reports can restrict an incarcerated individual's privileges, like canteen or phone use, or can result in loss of good time, which affects the length of stay in prison.⁷ Upon a review of 2022 NDCS misconduct report data, the Ombudsman's Office concluded that NDCS sanctioned 2,783 incarcerated individuals which resulted in a total of 268,461 days of lost good time. This is equivalent to 735.5 years of lost good time. Despite policy to the contrary⁸, receiving a misconduct report could also affect work assignments, classification, facility assignments, and parole, among other impacts.

Due to the wide variety of complaints involving misconduct reports, the volume of misconduct reports, and the potential impacts on incarcerated individuals, the Ombudsman's Office determined a further review of NDCS' disciplinary regulations, policies, and procedures was warranted. The disciplinary process for major rule violations was the focus. The Ombudsman's Office reviewed complaints and spoke to incarcerated individuals, reviewed relevant agency records, spoke to numerous NDCS team members throughout the system, and observed disciplinary hearings at the following facilities:

- Nebraska State Penitentiary
- Reception and Treatment Center
- Tecumseh State Correctional Institution
- Omaha Correctional Center

⁷ 68 NAC 6-0010; 68 NAC 6-011; 68 NAC 1-003.02.

⁸ 68 NAC 6-008.10, NDCS Policy 217.01.

Nebraska Department of Correctional Services' Disciplinary Process for Major Rule Violations

Neb. Rev. Stat. §§ 83-4,109 - 83-4,123 provides a baseline for the NDCS disciplinary process. The current regulations at 68 NAC 6 (“Inmate Disciplinary Procedures”) and the current NDCS Policy 217.01 (“Inmate Rules and Discipline”) generally outline the disciplinary process further. Incarcerated individuals are given a handbook during orientation that includes the disciplinary regulations, and incarcerated individuals have access to the disciplinary policy in the institutions’ law libraries.⁹ Additionally, each facility has its own internal policies on the disciplinary process, some of which provide procedural details, while others mirror general NDCS policy and are not comprehensive. Information about the disciplinary process is found across these different sources, but a good deal of critical information is not mentioned in statute, regulation, or policy as will be described throughout this report.

The NDCS disciplinary process has four main steps for major rule violations:

1. Misconduct report is written and filed
2. Investigatory Hearing/Principle Hearing held
3. Institutional Disciplinary Committee hearing held
4. Appeals Board reviews IDC decisions

Each institution has a least two disciplinary committees, the Unit Disciplinary Committee (UDC) and the Institutional Disciplinary Committee (IDC).¹⁰ Each committee can hear minor rule violations and major rule violations; however, minor rule violations are unlikely to result in a loss of good time and are mainly heard in UDC.¹¹ UDC may not impose a loss of good time as a sanction¹². Major rule violations are usually heard in IDC and could result in a loss of good time.¹³

⁹ 68 NAC 6-004, NDCS Policy 217.01.

¹⁰ 68 NAC 6-006, NDCS Policy 217.01.

¹¹ 68 NAC 6-006, NDCS Policy 217.01.

¹² 68 NAC 6-006.02.

¹³ NDCS Policy 217.01.

Institutional Disciplinary Team Members and Roles

Each facility has an institutional disciplinary team, with each team member having different roles and duties. Some team members have multiple roles and duties throughout the disciplinary process and throughout the facility.

Reporting Employee: The reporting employee is the person who writes the misconduct report and was either an eyewitness or discovered the incident after the fact, such as through the review of surveillance video or lab results.

Disciplinary Committee Coordinator (DCC): The DCC is generally responsible for logging misconduct reports, collecting and cataloging evidence, testing urine and substances, assisting with scheduling hearings, sending notices, and creating and issuing passes¹⁴, among other duties. The DCC assists the Principle Hearing Officer (PHO) and the Chairperson as needed. The DCC can also be the recorder at the IDC hearing.

Principle Hearing Officer (PHO): The PHO conducts the investigation into the alleged major rule violation.¹⁵ This includes speaking with the incarcerated individual and witnesses and reviewing evidence.¹⁶ The PHO is responsible for determining the rule violations with which the incarcerated individual should be charged.¹⁷ The PHO conducts Principle Hearings and can recommend dismissal of charges to the IDC.¹⁸ Sometimes the PHO is the recorder during IDC hearings.

Chairperson: The Chairperson is appointed to serve on the IDC and conducts IDC hearings.¹⁹ The Chairperson reviews the evidence, determines if the incarcerated individual is guilty, and imposes sanctions for guilty findings.²⁰

¹⁴ NDCS utilizes passes for incarcerated individuals to attend hearings, appointments, law library, etc.

¹⁵ 68 NAC 6-008.02 states, "Upon receipt of a Misconduct Report, the Warden or designee shall designate an investigating officer(s)." In practice, this individual is referred to as the Principle Hearing Officer, or PHO.

¹⁶ 68 NAC 6-008.02.

¹⁷ 68 NAC 6-008.02.

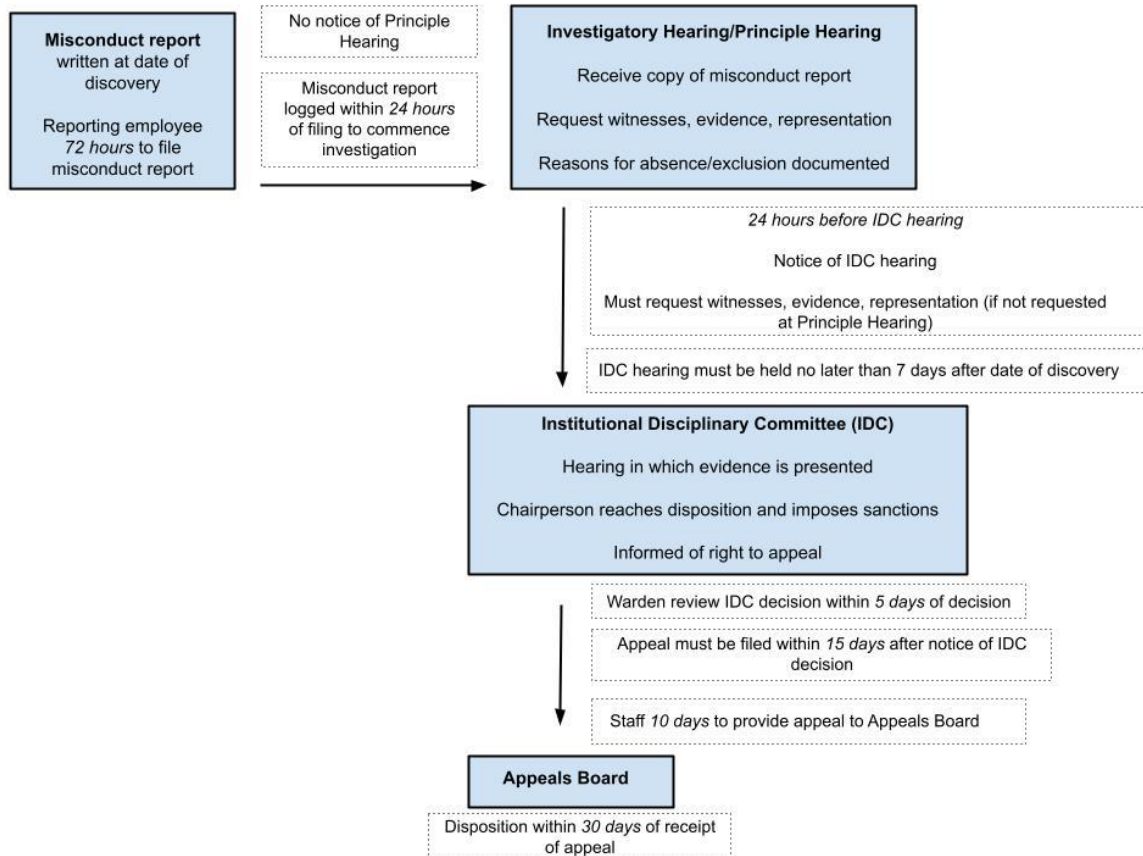
¹⁸ 68 NAC 6-008.02.

¹⁹ 68 NAC 6-007 refers to this individual as a Hearing Officer. In practice, they are referred to as the Chairperson.

²⁰ 68 NAC 6-008.09, NDCS Policy 217.01.

Process for Major Rule Violations

The flow chart below describes the NDCS Institutional Disciplinary Committee process:



Misconduct Report Written on Date of Discovery

A misconduct report is written on the date of discovery of a rule violation.²¹ The reporting employee is required to describe in the report who, what, when, where, why, and how the incident occurred. The team member has 72 hours after the date of discovery to file the report.²² The DCC then assists with logging evidence and testing substances and urine, if applicable. The misconduct report is then logged within 24 hours of it being filed.²³ The PHO decides which rules were violated and the severity of the violation to determine which charges are added to the report.²⁴ A Principle Hearing is then scheduled.

²¹ 68 NAC 6-005, NDCS Policy 217.01.

²² 68 NAC 6-005, NDCS Policy 217.01.

²³ 68 NAC 6-005, NDCS Policy 217.01.

²⁴ 68 NAC 6-008.02, NDCS Policy 217.01.

Investigatory Hearing/Principle Hearing

The current regulations at 68 NAC 6 provide for an investigatory phase in the disciplinary process. In practice, incarcerated individuals and team members call this the PHO and/or Principle Hearing. The person serving as the PHO has the authority to investigate the misconduct report further by talking to the incarcerated individual or to witnesses, including team members, and obtaining additional evidence.²⁵ The PHO decides if the misconduct report is a minor infraction that will be heard in front of the UDC or whether it should be heard in front of the IDC.²⁶ The PHO can make recommendations to the IDC, including dismissal of the charges.²⁷

The Ombudsman's Office observed differences in the Principle Hearing process across facilities, specifically how incarcerated individuals are notified of the Principle Hearing. Incarcerated individuals are not given written notice of the Principle Hearing. In practice, sometimes the PHO calls or radios team members to find and notify the incarcerated individual that they have a Principle Hearing. Other PHOs travel from unit to unit to conduct hearings. Others use the intercom system to page incarcerated individuals. One facility started using passes for incarcerated individuals to attend Principle Hearings. Most Principle Hearings are held in caseworker offices, which leaves little privacy, as people are coming and going during the hearing.

During the Principle Hearing, if the incarcerated individual attends, the PHO gives the incarcerated individual a copy of their misconduct report.²⁸ This is the first time the incarcerated individual is able to read the incident narrative and the charges against them. The incarcerated individual is then asked to submit any witnesses and/or a representative to be present at the IDC hearing.²⁹ According to regulations, the reporting employee is required to attend the IDC hearing, however, the Ombudsman's Office observed that some disciplinary team members believe the incarcerated individual must request the reporting employee be present at the IDC hearing, contrary to regulations.³⁰ In some cases, the PHO will require the incarcerated

²⁵ 68 NAC 6-008.02.

²⁶ 68 NAC 6-006, NDCS Policy 217.01.

²⁷ 68 NAC 6-008.02.

²⁸ 68 NAC 6-008.02, NDCS Policy 217.01.

²⁹ 68 NAC 6-008.08, NDCS Policy 217.01.

³⁰ 68 NAC 6-008.07.

individual to submit questions for a witness or reporting employee. Incarcerated individuals can also make a statement during the Principle Hearing.³¹ They may also seemingly waive their rights for the IDC hearing by signing an Inmate Waiver-Disciplinary Committee form.³² Principle Hearings are not recorded. If an incarcerated individual does not attend the Principle Hearing, they usually get a copy of the misconduct report from staff, and they have 24 hours prior to the IDC hearing to submit their requests and evidence.³³

Institutional Disciplinary Committee

The IDC hearing is considered the disciplinary hearing. Incarcerated individuals are given 24 hours' notice of the IDC hearing.³⁴ The IDC shall hear a misconduct report within seven days from the date of discovery of a rule violation.³⁵ As observed by the Ombudsman's Office, if a hearing is not held on time, the misconduct report is dismissed unless a continuance is filed. Most facilities use the pass system to allow incarcerated individuals to attend the IDC hearing. Sometimes they call or radio the unit staff to find out whether the incarcerated individual intends to be present at the hearing. IDC hearing rooms vary from facility to facility. Some hearing rooms are extremely small (more like utility closets). At the hearing, the Chairperson and the recorder are present, and all IDC hearings are recorded.³⁶ The Chairperson reads the misconduct report to the incarcerated individual and explains any attached evidence. If a video of the incident is available, the Chairperson reviews the video outside the presence of the incarcerated individual. The Chairperson assesses whether the incarcerated individual requested the presence of any witnesses or of the reporting employee. The Chairperson allows the incarcerated individual to ask questions if witnesses or the reporting employee are present at the hearing. The Chairperson asks the incarcerated individual if they want to make a statement. The incarcerated individual then is asked to leave the room (typically to wait in the hallway) while the Chairperson reviews the evidence and makes a determination on the findings. The incarcerated individual is then asked to come back into the room and is immediately told the findings of each

³¹ 68 NAC 6-008.02.

³² 68 NAC 6-008.06, 68 NAC 6-008.12, NDCS Policy 217.01.

³³ 68 NAC 6-008.08, NDCS Policy 217.01.

³⁴ 68 NAC 6-008.03, NDCS Policy 217.01.

³⁵ 68 NAC 6-008.05, NDCS Policy 217.01.

³⁶ NDCS Policy 217.01.

charge and any associated sanctions. They are given a copy of the sanctions.³⁷ The Chairperson advises the incarcerated individual that they have the right to appeal the decision.³⁸

Appeals Process

Incarcerated individuals can appeal IDC decisions. Under 68 NAC 6-014, “Appeals must be in writing and must state the charge(s) to be reviewed and the reason(s) why the charge(s) should be reversed. The inmate shall submit the appeal to unit management staff within 15 days after receiving notice of a disciplinary committee’s decision.” Unit staff then have ten days to prepare the misconduct report file along with the appeal to deliver to the Appeals Board.³⁹ The Appeals Board only reviews the evidence that was included in the misconduct report record and analyzes due process, findings of fact, and the impartiality of the decision process.⁴⁰ If the incarcerated individual obtains additional evidence after the IDC hearing, the Appeals Board will not review it. This also applies if the incarcerated individual appeals to District Court. The Appeals Board has 30 days to render a final decision and a copy is given to the incarcerated individual.⁴¹

If the incarcerated individual is sanctioned to a loss of good time by the IDC and the Appeals Board upholds the decision, the incarcerated individual has the right to file an appeal to the State District Court under the Nebraska Administrative Procedure Act (APA).⁴² The appeal must be filed within 30 days after the Appeals Board decision.⁴³ The incarcerated individual undertakes this process on his or her own — NDCS nor the Ombudsman’s Office assists with this process.

Ombudsman Analysis

During its investigation, the Ombudsman’s Office reviewed complaints; spoke to incarcerated individuals and NDCS team members; reviewed agency regulations, policy, and records; and observed disciplinary hearings in order to formulate the following conclusions:

- NDCS regulations and policies do not clearly explain the disciplinary process.

³⁷ 68 NAC 6-008.09, NDCS Policy 217.01.

³⁸ 68 NAC 6-014, NDCS Policy 217.01.

³⁹ 68 NAC 6-014.01.

⁴⁰ 68 NAC 6-014.01.

⁴¹ 68 NAC 6-014.01.

⁴² NDCS Policy 217.01.

⁴³ NDCS Policy 217.01.

- NDCS does not give incarcerated individuals sufficient time or opportunity to organize and formulate a defense for the alleged violation(s) with which they are charged.
- Hearing rooms at NDCS facilities are not adequate for holding Principle and IDC hearings.

Each issue is discussed in detail below.

NDCS regulations and policies do not clearly explain the disciplinary process.

The current regulations at 68 NAC 6 and NDCS Policy 217.01 generally outline the disciplinary process and how misconduct reports should be handled. However, there are a few areas where NDCS is not complying with or following regulations and a number of areas where the regulations or policies are silent. Each facility is permitted to create their own internal policy to further outline the process, adding to overall confusion. Some information is in regulation and other information is in policy, and some information is in neither the regulation nor policy. The Ombudsman's Office found:

- Confusion exists as to who is a member of the disciplinary team and what their training is. Despite policy, treatment team members are not participating in IDC hearings;
- Issues exist in the Principle Hearing process, including confusion about the requirements for having witnesses appear at hearings and lack of notice of Principle Hearings;
- Numerous challenges exist for incarcerated individuals in the IDC process, including inconsistency with how evidence and defenses are considered;
- Guidelines for appropriate sanctions and collateral consequences outside the prescribed sanctions are not clear in policy; and
- A formal process for new exculpatory evidence to be reviewed after the IDC hearing and/or the Appeals Board disposition does not currently exist.

The result is a fragmented, confusing process where inconsistencies exist across facilities and incarcerated individuals may experience challenges in exercising their rights.

Confusion exists as to who is a member of the disciplinary team and what their training is. Despite policy, treatment team members are not participating in IDC hearings.

The roles and duties of each disciplinary team member are not listed or explained in policy, and incarcerated individuals are uncertain as to who is a member of the IDC. Many complain to the Ombudsman's Office that they believe their due process rights are being violated when different team members participate in the hearing. For instance, when the PHO or DCC acts as the recorder during the hearing, incarcerated individuals can become confused and believe the recorder is a part of the committee. The Chairperson (who functions as a hearing officer) is the sole person on the IDC and makes all disciplinary decisions. One person is not a committee, which is another confusing aspect. Some facilities have multiple IDC Chairpersons in different areas of the facility. For example, at one facility there are three designated Chairpersons that work in different areas of the facility. At another facility, multiple staff rotate as Chairpersons instead of having one or two designated full time Chairpersons. That same facility also has DCCs serve as PHOs. It is difficult to create a disciplinary team when the Chairpersons, PHOs, and DCCs change frequently and potentially have other duties throughout the facility. This can also create inconsistency with the disciplinary process and the sanctions imposed not only across facilities, but also within the same facility.

Even though the Chairperson is the only person on the IDC, 68 NAC 6-007 states that "to the extent possible, a person representing the treatment or counseling staff at the facility shall participate as a member of the facility disciplinary committees." However, the Ombudsman's Office did not observe this occurring at any facility. Treatment and counseling staff were neither on the committee nor were they consulted prior to the hearing. To illustrate, incarcerated individual W.K., received numerous misconduct reports between November 2022 and January 2023 when he was at two different facilities, resulting in sanctions that included 731 days lost good time. There is no documentation showing that any disciplinary team member contacted a mental health provider working with W.K. to obtain information or a professional opinion about his condition. There is also no documentation regarding whether treatment or counseling staff attended or was a part of the IDC hearing. After W.K. was transferred to another facility and started working with the mental health providers there, he was diagnosed with a severe mental illness. W.K.'s mother advocated for her son and requested his misconduct reports be reviewed,

as he was amidst a mental health crisis at the time he received them. After reviewing all the evidence and speaking to treatment staff, facility administration dismissed W.K.'s major misconduct reports and restored his lost good time. The Ombudsman's Office found no instances where any treatment or counseling staff were members of the IDC. Further, there were no instances of them participating in IDC hearings. Having their expertise and recommendations could have benefits, as demonstrated in W.K.'s case and as regulations suggest.

Furthermore, NDCS policy and regulations are silent on the expertise or background required for team members who have a role in the disciplinary process, such as the DCC, PHO, or Chairperson, or if they must have a particular title or rank in the NDCS system. Additionally, there is no information about specific training required to hold such positions or how those positions should be fulfilled in addition to other roles within a facility.

Issues exist in the Principle Hearing process, including confusion about the requirements for having witnesses appear at hearings and lack of notice of Principle Hearings.

The purpose of an Investigatory Hearing is described at 68 NAC 6-008.02. In practice, NDCS refers to these hearings as Principle Hearings or PHOs. However, this is confusing as there is no mention of a Principle Hearing in policy or regulations, and a PHO is the person conducting the hearing and not the hearing itself. NDCS regulations and policy do not clearly explain that this is a hearing or how the hearing should be conducted. It is not clear what evidence the incarcerated individual must request for the IDC hearing or when written questions for witnesses are necessary. The PHO determines which rule violations to charge the incarcerated individual prior to the Principle Hearing. However, according to regulations, the PHO is supposed to conduct an investigation on the allegations made in the misconduct report and determine if there is some evidence an offense was committed.⁴⁴ This would include interviewing the incarcerated individual and possible witnesses. It is unclear when this occurs, if at all. From observation, it appears the Principle Hearing and the investigation is one in the same. Therefore, incarcerated individuals are charged with rule violations prior to an investigation. The PHO does not have the authority to dismiss charges, but can make a recommendation to the Chairperson.

⁴⁴ 68 NAC 6-008.02.

Under 68 NAC 6-008.07, “The reporting employee *shall* appear at the disciplinary hearing unless the inmate waives his/her presence in writing.” (Emphasis added). From observation, this mandate is not always followed. In some facilities, incarcerated individuals are required to submit a request at the Principle Hearing or submit an Inmate Interview Request (IIR) 24 hours prior to the IDC hearing asking that the reporting employee attend the hearing; otherwise, they do not appear. There is also confusion on what “shall appear” means. Some incarcerated individuals have complained this should mean appear in-person and not over the phone.

Under 69 NAC 6-008.11, “The inmate charged shall have an adequate opportunity to prepare a defense.” This section allows incarcerated individuals to speak to other incarcerated individuals or team members to get their advice in preparing and presenting a defense. However, this alone does not provide an incarcerated individual an adequate opportunity to prepare for a defense. This issue will be discussed in more detail later in this report.

Incarcerated individuals can waive certain rights during the disciplinary process, and these waivers shall be in writing and signed by the incarcerated individual.⁴⁵ However, in most cases, the waiver forms are not uploaded into NICaMS⁴⁶; therefore, the Ombudsman’s Office has not been able to determine if these waiver forms are being utilized. In order to be effective, NDCS must show that paper waiver forms are signed and tracked as part of the disciplinary process.

Lastly, NDCS policies and regulations are silent as to how individuals are notified of their Principle Hearing. This leads to confusion and inconsistencies across NDCS facilities. Most facilities do not issue passes for Principle Hearings. Staff are required to find the incarcerated individual and inform them of the Principle Hearing the day of the hearing. The Ombudsman’s Office has received numerous complaints from individuals who say they were never informed of the Principle Hearing nor directed to attend. Therefore, they miss the hearing.

⁴⁵ 68 NAC 6-008.06, 68 NAC 6-008.12, NDCS Policy 217.01.

Numerous challenges exist for incarcerated individuals in the IDC process, including inconsistency with how evidence and defenses are considered.

IDC procedures are generally outlined in NDCS regulations and policy. Based on observation, it appears IDC hearings are conducted fairly consistently throughout the facilities, even though the policy neither describes nor details how an IDC hearing should be conducted. Each Chairperson reviews the evidence and has the discretion to formulate a conclusion as to an incarcerated individuals' guilt. However, by reviewing complaints and observing IDC hearings, the Ombudsman's Office discovered that misconduct report outcomes can be vastly different depending on the individual Chairperson. Although the Ombudsman's Office appreciates and supports Chairpersons' discretion, it is concerning that two individuals can receive the same misconduct report and have totally different outcomes based on the same evidence.

For example, on January 26, 2022, incarcerated individual J.R., received a misconduct report alleging he was involved in a physical altercation with another incarcerated individual, C.D. (who received an identical misconduct report). Both misconduct reports had the same narrative describing what happened. J.R., who was transferred to another facility, was found guilty of Use of Threatening Language or Gestures/Fighting and sanctioned to 30 days room restriction and 30 days lost good time. J.R. filed an appeal. The NDCS Appeals Board determined there was no evidence to support that he was a participant in the altercation. Instead, he was determined to be the victim. C.D., the other individual involved in the altercation, was transferred to a different facility, and his misconduct report was heard there. At the IDC hearing, C.D.'s misconduct report was dismissed due to a lack of evidence. Even though the same evidence was available and reviewed in each case, the IDC outcomes were vastly different.

The Ombudsman's Office cannot determine how or if the IDC takes into consideration circumstantial evidence or defenses. There are no guidelines in policy on how evidence is weighed. It is unknown what training is provided to Chairpersons to determine substantial evidence. It appears, based on complaints reviewed, the IDC does not take into account self-defense when considering guilty findings. For instance, incarcerated individual M.P. was placed in a cell with incarcerated individual S.M. That same day, both individuals received a misconduct report for a physical altercation. S.M. claimed M.P. attacked him while he was

sleeping, so he had to defend himself. S.M. was found guilty of Use of Threatening Language or Gestures/Fighting. However, evidence was presented that a Lieutenant was of the opinion that S.M. was indeed attacked by M.P. and had to defend himself. A nurse also suggested that she believed M.P. may have been trying to make sexual advances on S.M. Another team member stated he was aware that M.P. was suffering from a serious mental illness and had been involved in a similar event a couple of weeks earlier. That event occurred a few weeks prior, when M.P. attacked incarcerated individual G.N., while he was sleeping. G.N. got out of bed and a physical altercation ensued. M.P. was taken to the restrictive housing unit after that incident. On the day M.P. was released from restrictive housing, he assaulted S.M. in the same manner as he did G.N.

M.P. had a pattern of assaulting individuals in their sleep. Staff were also aware M.P. was suffering from a serious mental illness and was eventually placed in the mental health unit. On the night of the second incident, S.M. was locked in his cell and could not get out. With all of this taken into consideration, it appeared S.M. was defending himself from harm, which was also the opinion of a Lieutenant. However, S.M. was found guilty of Use of Threatening Language or Gestures/Fighting and sanctioned 30 days phone restriction and 30 days canteen restriction.

Another area of inconsistency is when two cellmates receive a misconduct report for the same incident, and one cellmate takes responsibility for the rule violation. In some cases, the misconduct report is dismissed for the individual who did not take responsibility, but in others they are found guilty. For example, incarcerated individual R.M. stated at the Principle Hearing that he took responsibility for the homemade alcohol found in his cell. He was found guilty at the IDC and given 14 days of room restriction. At a separate hearing, his cellmate, D.T, who was charged for the same incident, was nonetheless found guilty and sanctioned seven days room restriction even though R.M. had taken responsibility for the violation.

In another instance, incarcerated individual B.K. allegedly admitted at his Principle Hearing to possessing the drug K2. However, B.K. attended his IDC hearing and claimed he never made such an admission but instead was taking responsibility for a rule violation in a different case. Because Principle Hearings are not recorded, there is no way to prove what B.K. actually stated. He was found guilty and sanctioned 30 days canteen restriction and 30 days lost good time. His

cellmate, C.H., was charged for the same incident. However, the Chairperson dismissed C.H.'s misconduct report based on B.K. taking responsibility at his own Principle Hearing.

Guidelines for appropriate sanctions and collateral consequences outside the prescribed sanctions are not clear in policy

The current policy outlines the sanctions for UDC, however the policy does not outline the sanctions for IDC. NDCS policy refers to 68 NAC 6, which outlines the types of sanctions available for IDC. The IDC sanctions can be more restrictive than the UDC sanctions. The sanctions can range from restricting canteen to losing good time. However, NDCS does not have a resource explaining appropriate sanctions for given charges, such as a standard sanction guideline, or a sanction matrix. The Ombudsman's Office has received numerous complaints about unfair sanctions and individuals receiving different sanctions for the same incident. The Ombudsman's Office has also observed a wide range of sanctions imposed for the same charges, thus creating a fairness issue and potential animosity among incarcerated individuals and the disciplinary team. Without a clear guideline, it is difficult for the chairpersons to sanction fairly and consistently.

The current policy also does not explain the collateral consequences of receiving a misconduct report. The Ombudsman's Office receives complaints that NDCS is violating their policy, for example terminating their work assignment or placing them in Longer Term Restrictive Housing for a misconduct report that was dismissed or no misconduct report was issued. The policy states that the IDC shall not impose changes in work, education, or other program assignments as disciplinary sanctions. Actions of this nature are to be administratively decided by classification teams.⁴⁷ However, in practice, an incarcerated individual's misconduct reports (with or without guilty findings) and incidents without misconduct reports are reviewed and taken into consideration when making these decisions. Facility assignment or transfers, classification/restrictive housing and good time restoration are other areas where misconduct reports and incidents are taken into consideration. An incarcerated individual's risk score could also be affected by guilty findings, which may cause a demotion in custody level. Misconduct

⁴⁷ NDCS Policy 217.01.

reports are also reviewed during parole reviews and hearings, potentially affecting chances at parole.

As an illustration, incarcerated individual J.R. received a misconduct report alleging he was involved in a physical altercation with another incarcerated individual, C.D. (who received an identical misconduct report). C.D. was transferred to different facility, and his misconduct report was heard there. C.D.'s misconduct report was dismissed due to a lack of evidence. Both misconduct reports had the same narrative describing what happened. J.R. was transferred to another facility. Two days later, the Parole Board denied J.R. parole and scheduled him for a review. Days later J.R. attended his IDC hearing. J.R. was found guilty of Use of Threatening Language or Gestures/Fighting and sanctioned to 30 days room restriction and lost 30 days of good time. J.R. filed an appeal and the Appeals Board determined "[T]here is no evidence in the record that inmate J.R. participated in the altercation or was involved in any way other than being the victim." J.R. had already served his 30 day room restriction, but his 30 days of lost good time was restored. Receiving that misconduct report led to his transfer, parole denial, and demotion in classification, even though the misconduct report was eventually dismissed.

Another example concerns incarcerated individual E.A., who received numerous misconduct reports for inappropriately touching another incarcerated individual with whom was believed to be in a relationship. The program manager for substance use treatment was made aware of these misconduct reports and determined E.A. was focused on the relationship and not treatment. The program manager also concluded that E.A. was not showing progress and was resistant to change based on E.A.'s misconduct report history, which involved many incidents with unhealthy partnerships. E.A. was terminated from the program.

As another example, incarcerated individual N.C. was charged with multiple rule violations after he was caught trying to flush a cell phone down the toilet. N.C. was found guilty of Possessing or Receiving Unauthorized Articles and sanctioned to fourteen days canteen restriction. However, he was notified the next day he was terminated from his work assignment. In NICaMS it was documented as, "Terminate Reason-Disciplinary."

Formal process for new exculpatory evidence to be reviewed after the IDC hearing and/or after the Appeals Board disposition does not currently exist.

When exculpatory evidence is discovered after the disciplinary and appeal processes, incarcerated individuals do not have an avenue to submit new evidence that could affect the findings of a misconduct report or sanctions imposed. Also, incarcerated individuals do not have an avenue for relief when the disciplinary process is not followed according to policy.

As an example, Intel staff interviewed incarcerated individual W.J. regarding his concerns for future housing, and he requested protective custody (PC). W.J. was then transferred to another facility unbeknownst to Intel staff. W.J. requested PC when he arrived at the new facility. W.J. was taken to immediate segregation and issued a misconduct report for Disobeying an Order for refusing housing. It is unknown if an initial PC interview was conducted. While on Immediate Segregation, a PC investigation was conducted, and it was recommended that W.J. be approved for PC. During the IDC hearing for his misconduct report for refusing housing, W.J. made a statement about his fear for safety. The IDC found him guilty and sanctioned him to 30 days phone restriction and 30 days lost good time. The PC investigation report was not submitted into evidence by NDCS staff. W.J. did not have access to the report in order to introduce it into evidence, so the IDC did not consider it. Later, he was reclassified and approved for PC status. However, the Appeals Board affirmed the IDC findings. W.J. filed a complaint with the Ombudsman's Office stating he should not have been found guilty if he was approved for PC. The Ombudsman's Office brought this case to NDCS' attention. NDCS reviewed the case and determined the additional information provided did not support the violation. W.J.'s misconduct report was dismissed and his lost good time was restored.

Another example concerns incarcerated individual J.R.S., who was charged with 1H Drug or Intoxicant Abuse and 3C Possessing or Receiving Unauthorized Articles. J.R.S. and his cellmate were both charged for having homemade alcohol in their cell. However, the reporting employee told J.R.S. his cellmate took responsibility for the homemade alcohol. J.R.S. was found guilty for Drug or Intoxicant Abuse and sanctioned 30 days room restriction and 30 days lost good time. The next day, IDC heard the cellmate's charges and stated, "Neither inmate took responsibility

initially for the items found in the cell, so both inmates were held accountable.”⁴⁸ J.R.S. appealed to the NDCS Appeals Board. They affirmed the IDC decision. J.R.S. then filed a case with the Lancaster County District Court. Through the court, he received a copy of the evidence against him. J.R.S. discovered that there was evidence missing from the record, and so he contacted the Ombudsman’s Office for assistance. J.R.S. claimed there should have been an incident report from the reporting employee about his cellmate taking responsibility. J.R.S. spoke to the reporting employee about the misconduct report and asked why an incident report was not written about his cellmate taking responsibility. The reporting employee stated he did not realize he should have written an incident report to submit as evidence; however, he agreed to write one. The Ombudsman’s Office was able to confirm the reporting employee wrote an incident report three months after the incident, but it was not submitted as evidence or placed in the misconduct report record. Therefore, the IDC Chairperson, the NDCS Appeals Board, or the District Court did not have a chance to review it. The Ombudsman’s Office was informed that NDCS’ Legal Division stated new information cannot be added to the record after the disciplinary hearing is complete. If the incident report was submitted as evidence on time, the Chairperson would have reviewed it. It is unknown if this would have changed the outcome. Currently there is no formal avenue for J.R.S. or anyone else to request a review of new evidence and to determine if the findings and sanctions are appropriate.

[NDCS does not give incarcerated individuals sufficient time or opportunity to organize and formulate a defense for the alleged violation\(s\) with which they are charged.](#)

Depending on when a misconduct report is filed and logged and when the Principle Hearing is scheduled, incarcerated individuals are given two to five days to organize and formulate a defense. The Ombudsman’s Office found the following issues contribute to incarcerated individuals not having sufficient time or opportunity to plan a defense:

- Lack of notice of the Principle Hearing and not receiving a copy of the misconduct report prior to the Principle Hearing;
- Issues with requesting and reviewing evidence;
- Issues with Inmate Interview Request (IIR) forms; and
- Transfers

⁴⁸ Misconduct Report #E1CF.

Lack of notice of the Principle Hearing and not receiving a copy of the misconduct report prior to the Principle Hearing

As discussed above, incarcerated individuals at most facilities have no knowledge they are scheduled for a Principle Hearing, as they receive neither notice of the Principle Hearing nor a pass to attend the hearing. Team members must physically locate the incarcerated individual and direct them to attend the Principle Hearing. Based on observation by the Ombudsman's Office, this is done in a variety of ways across NDCS facilities: a case manager finds the individual; the PHO goes to the person's unit or work assignment area; security staff escorts the person to the hearing; or the facility intercom is used to page the individual. In some instances, incarcerated individuals have claimed to the Ombudsman's Office that they were neither asked nor directed to attend a Principle Hearing. The Ombudsman's Office observed IDC hearings where the incarcerated individual asserted they were never given a directive to attend the Principle Hearing. In numerous cases, the Ombudsman's Office observed documentation that the incarcerated individual refused to attend the hearing. However, there is no way to prove an incarcerated individual received a directive to attend the Principle Hearing or refused to attend. This has created a process where the incarcerated individual is not being held accountable to attend their hearing because they are not given notice. Team members have to spend their time tracking down incarcerated individuals to notify them of their hearings.

Despite the lack of documentation of notice or waivers, the Principle Hearing is a critical step in the disciplinary process, as it can have significant impacts on the rights of incarcerated individuals. It is essentially the step where all rights in the process are preserved, as incarcerated individuals are required to submit requests for evidence and witnesses and have a representative ready to name at the Principle Hearing.⁴⁹ If the incarcerated individual has no idea they are receiving a misconduct report and/or when the Principle Hearing is scheduled, it could be very difficult to formulate a defense within minutes of being told about the Principle Hearing.

Incarcerated individuals also do not receive a copy of the misconduct report prior to the Principle Hearing. Some incarcerated individuals do not even know they are receiving a misconduct report until they are directed to attend the Principle Hearing. The incarcerated individual is then given a

⁴⁹ 68 NAC 6-008.02, NDCS Policy 217.01.

copy of the misconduct report, including the rule violations with which they are being charged. Incarcerated individuals are expected at that moment to start formulating their defense by requesting their witnesses and any other evidence. They also have to name who they would like as their representative (most likely without consulting with that person). The incarcerated individual does have an opportunity to request these things 24 hours prior to the IDC hearing by submitting an IIR through the internal mail system. This process, however, has its own issues as presented below.

Issues with requesting and reviewing evidence

Incarcerated individuals are not given an opportunity to review any evidence against them until they arrive at the IDC hearing where the evidence is read to them aloud. However, they are expected to have witnesses and evidence ready to submit at the Principle Hearing (held days earlier) or 24 hours prior to the IDC hearing.⁵⁰ The expectation that an individual can formulate a defense without knowledge of the evidence being used against them is unreasonable and presents significant challenges for incarcerated individuals. The Ombudsman's Office acknowledges and understands there is certain evidence that should be held confidential and not provided to the incarcerated individual to review.

For example, incarcerated individual D.B.J., while housed at a community corrections center, received a misconduct report for possession of a cell phone. The reporting employee stated he saw D.B.J. walk from his employment to the gas station while using a cell phone. During the Principle Hearing, D.B.J. denied having a cell phone. After the hearing, a team member allegedly went to D.B.J.'s employment and recovered a cell phone in his office. The team member wrote an incident report and took photos of the cell phone. This information was uploaded into the misconduct report as evidence. This information would have been presented to D.B.J. for the first time during the IDC hearing, meaning there would have been no time for D.B.J. to formulate a defense. Because D.B.J. did not know the incident report existed, he also would not have known to call the team member who recovered the phone as a witness.

⁵⁰ 68 NAC 6-008.02, 68 NAC 6-008.08, NDCS Policy 217.01.

Another example concerns incarcerated individual T.J., who received a misconduct report for being under the influence of a substance. A NDCS team member found T.J. exhibiting seizure-like movements, vomiting, slurred speech, and bloodshot eyes. The NDCS team member thought T.J. was intoxicated and was trying to assist him. Another NDCS team member arrived at the scene and almost immediately sprayed T.J. with OC spray for not complying with directives to be restrained. T.J. was finally restrained and taken to the medical department, as he became unresponsive. Medical staff gave him Narcan; however, T.J. remained unresponsive and had an elevated pulse rate. T.J. was taken to an outside hospital for medical care. T.J. did not know the NDCS nurse who assisted him that night, as he was unconscious. T.J. also did not know the NDCS nurse wrote an incident report about her observations as to his physical state and the actions she took. This incident report was submitted as evidence. When it came time for his Principle Hearing, T.J. would not have known to add the nurse as a witness. T.J. did request his medical records from the outside hospital; however, it is unknown if NDCS requested those records or had them in their possession, as they were not presented as evidence during the IDC hearing. Due to being unconscious, not knowing the nurse who assisted him, and not having information about the incident report, T.J. did not call the nurse as a witness. At T.J.'s IDC hearing, the Chairperson found him guilty of Drug or Intoxicant Abuse and sanctioned him to 30 days phone restriction and 60 days lost good time based on the reporting employee's observation and the incident report the nurse wrote. T.J. did not have all of the information necessary to formulate a defense prior to the IDC hearing.

Additionally, the Ombudsman's Office has observed cases in which the incarcerated individual is required to submit written questions and/or request statements instead of having the witness and/or reporting employee present at the hearing. This can create challenges, including the incarcerated individual not knowing who the witness was in order to request statements and witnesses refusing to answer written questions. It also requires a certain level of reading and writing skills that not all incarcerated individuals may possess. According to regulations, IDC shall state the reason a witness or evidence was not allowed at the hearing⁵¹. However, after observing practice, it is unclear why team members are requiring statements instead of having the witness present at the hearing.

⁵¹ 68 NAC 6-008.08

For instance, incarcerated individual H.S. received a misconduct report for Drug or Intoxicant Abuse. The reporting employee stated H.S. was yelling, screaming, had slurred speech and red eyes, and was foaming at the mouth. NDCS medical staff assessed him and determined H.S. showed signs of intoxication. H.S. requested that the reporting employee and the nurse be present at the IDC hearing. H.S. also asked the name of the nurse and whether she wrote an incident report. Disciplinary staff responded by telling H.S. he needed to write out questions for the nurse. He was also denied information on the nurse's name and whether an incident report was written. H.S. requested the nurse be present at the IDC hearing multiple times but his request was continuously denied. There was no reason provided to explain why her presence was not permitted. H.S. objected to writing out questions again at the IDC hearing. H.S. stated he wanted the witness present in order to lay his foundation and ask rebuttal questions if needed. H.S. was denied again. The Chairperson found him guilty of Drug or Intoxicant Abuse and sanctioned him to 30 days bay restriction and 60 days lost good time based on the reporting employee's observation and the nurse's incident report. H.S. was not given a reason as to why he was required to write out questions for the nurse, nor was any explanation documented anywhere in the record. It appears H.S. was denied his witness without justification and was told to write questions for the witness without having reviewed the evidence against him. The NDCS Appeals Board agreed with the IDC decision. H.S. went on to file an APA case in District Court with multiple arguments. H.S. represented himself during the APA case. The court affirmed the Appeals Board decision.

While regulations and policy indicate incarcerated individuals may request documents, representatives, and/or witnesses, it is unclear as to which types of evidence may be requested. For example, while observing an IDC hearing, the Ombudsman's Office witnessed an incarcerated individual ask the Chairperson to watch a surveillance video to prove he was not involved in the incident. The Chairperson stated the incarcerated individual did not request the video during his Principle Hearing; therefore, it was not submitted as part of the evidence. The incarcerated individual assumed the surveillance video of the incident would have been included as evidence, as it was in NDCS' possession. Additionally, policy does not outline what types of internal evidence NDCS should submit as evidence, such as videos, PC investigations, IIRs, Intel

reports, or negative drug tests. An incarcerated individual must request evidence 24 hours prior to the IDC hearing⁵²; however, notice of the IDC hearing is only required to be 24 hours prior to the hearing.⁵³ This could create challenges with requesting evidence on time if an individual does not request evidence at the time of the PHO. Overall, it is unclear what evidence should be requested by the incarcerated individual, how they would know what evidence to request, and what evidence NDCS should include if the evidence is in the possession of NDCS.

Issues with Inmate Interview Request (IIR) forms

If an incarcerated individual does not attend the Principle Hearing or does not have enough time to name witnesses or a representative at the Principle Hearing, they do have another option. Individuals can submit an IIR 24 hours prior to their IDC hearing to request witnesses, a representative, and any other evidence to be present or reviewed at the IDC hearing.⁵⁴ IIRs are distributed through NDCS' internal mail system. When the Ombudsman's Office asked for further detail into this process, NDCS team members stated these IIRs are mixed in with all the other IIRs, which can include medical complaints, property questions, accounting issues, or other concerns of incarcerated individuals. Sometimes the IIRs are lost or do not get to the intended person on time. If an incarcerated individual submits an IIR to request witnesses or witness questions for an IDC hearing, and the disciplinary team states they did not receive it, the IDC hearing is not continued. The IIRs are not documented or uploaded into NICaMS; therefore, there is no way to accurately track when they were sent or if they were received.

IIRs are also used to submit appeals and are sometimes lost or received late. For example, incarcerated individual C.A. received a misconduct report and was found guilty of Use of Threatening Language or Gestures/Fighting. C.A. submitted an IIR with the statement, "On this day (omitted) I am turning in my appeal for MR (omitted)." C.A. attached his written appeal document to the IIR. The team member only submitted the IIR to the Appeals Board and not the attached appeal document. The Appeals Board stated the IIR was not sufficient and declined to hear the appeal. C.A. tried to resolve this issue with team members, however no one was willing to submit the appeal. C.A. then filed a complaint with the Ombudsman's Office and requested a

⁵² 68 NAC 6-008.08, NDCS Policy 217.01.

⁵³ 68 NAC 6-008.03, NDCS Policy 217.01.

⁵⁴ 68 NAC 6-008.08, NDCS Policy 217.01.

solution to the matter. Based on the error, the Appeals Board reviewed the situation again and reversed the IDC decision.

Transfers

Incarcerated individuals are frequently transferred from one NDCS facility to another, yet policy is vague as to how disciplinary matters should be handled when an incarcerated individual transfers during the disciplinary process. When the Ombudsman's Office asked for clarification, some NDCS team members stated that the incarcerated individual would have to resubmit their requests for evidence, witnesses, and a representative at their new facility. On the contrary, other team members stated the incarcerated individual would not have to repeat their requests. In general, because policy does not address how to proceed after a transfer, incarcerated individuals assume if they make a request at one facility, the request will transfer and be honored at the next facility.

To illustrate, incarcerated individual M.M. received a misconduct report due to a physical altercation. A Principle Hearing was conducted and M.M. requested two witnesses (incarcerated individuals V.Y. and S.T.), a representative, and the reporting employee to be present at the hearing. The first IDC hearing was continued due to M.M. requesting a new representative and time to prepare written questions for witnesses. It is unknown when or why M.M. was directed to write these witness questions. M.M.'s questions were not uploaded as evidence, and it is unknown who was in possession of the questions. M.M. was then transferred to another facility. The IDC hearing was again continued to another date. All of M.M.'s requests were noted on the continuance document. The IDC hearing was conducted. An Inmate IDC Statement (by V.Y.), was entered into evidence. The statement was signed by a team member who wrote "Refused" in the narrative section. There were no other documented inmate statements on the record. It is unknown if anyone made contact with the other witness (S.T.) or gave him M.M.'s questions. M.M. requested another continuance in order to have a representative present, as the one he originally requested was at the other facility. The IDC Chairperson stated he should have requested a new one when he transferred. M.M. attempted to explain that this was not in the rule book. The IDC did not allow M.M. a continuance to find another representative or to call his witnesses. M.M. was found guilty of Assault and Possession or Manufacture of Dangerous

Contraband and sanctioned to 730 days lost good time. After the NDCS Appeals Board affirmed the IDC decision, M.M. filed an APA case in District Court. M.M. was represented by an attorney. The court ruled M.M.'s due process rights were violated by refusing to allow S.T. as a witness and by conducting the hearing without the requested representative. The court remanded the case back for a new IDC hearing.

Hearing rooms at NDCS facilities are not adequate for holding Principle and IDC hearings.

The Ombudsman's Office observed several hearing rooms throughout the different NDCS facilities. Some hearing rooms were extremely small. For example, one of the hearing rooms appears to be a converted utility closet. One of the hearing rooms at another facility was very small and had a gas smell coming from the floor vent. The rooms were set up to have the Chairperson and the recorder on one side of the table, which was furthest from the door. The incarcerated individual would sit across the table and had access to the door. This arrangement could potentially become a dangerous situation for team members if an incarcerated individual were to become upset or aggressive. For example, incarcerated individual T.A., during his IDC hearing, had to be removed due to his behavior. He was already in restraints due to being on restrictive housing status. After T.A. was given sanctions he became confrontational and argumentative with the disciplinary staff. Thankfully security staff were in close proximity and removed him from the hearing room. The Ombudsman's Office spoke with many disciplinary team members who stated they would appreciate an adequate and safe space to conduct hearings.

Some disciplinary team members have to transport their equipment through several different housing units to conduct hearings, as there is no centralized hearing room. Some hearings are conducted in case managers' offices, which creates a loud, uncomfortable, disruptive, and non-private environment for all parties involved. After speaking to numerous disciplinary staff members from different facilities, they all stated a designated centralized hearing room would benefit the facility, staff, and incarcerated individuals.

Ombudsman Proposals

The NDCS disciplinary policy is significant both in its role in maintaining safe and secure facilities and also in its potential impacts on incarcerated individuals. Upon investigation into the

NDCS disciplinary process, the Ombudsman's Office discovered areas of existing policy and practice that lack clarity, result in confusion for incarcerated individuals, and create inefficiencies or safety concerns for staff. Opportunities for improvement exist that allow for safety and security to be maintained while also clarifying the disciplinary process to ensure due process for incarcerated individuals, promoting greater efficiency, and improving transparency. Based on the investigative analysis, the Ombudsman's Office proposes the following:

1. Adopt a new disciplinary policy for major rule violations.
2. Review the UDC regulations, policy, and practice for process improvements.
3. Designate a spacious, equipped, and secure room at each facility to hold Principle and Institutional Disciplinary Hearings.
4. Create specific forms for the disciplinary process.
5. Digitize all forms for the incarcerated individuals to submit electronically.

[1. Adopt a new disciplinary policy for major rule violations.](#)

The Ombudsman's Office recommends adopting a new disciplinary policy for major rule violations. An example policy is attached to this report. The example policy combines the current regulations and policy. The example policy also includes additional information and clarifications to ensure due process, transparency, and complete records. This information is underlined in the example policy. The Ombudsman's Office encourages NDCS to add the following to their disciplinary policy:

Disciplinary Members: Disciplinary team members' roles and duties are not described in the current policy. Providing this information, as included in the example policy, will alleviate confusion and provide transparency in the disciplinary process.

Preliminary Investigation: The PHO is required to conduct an investigation to determine if there is some evidence that an offense was committed. The investigation includes a review of NDCS evidence before filing any rule violations on the accused incarcerated individual as well as interviews of the incarcerated individual, reporting employee, witnesses, and treatment/counseling staff.

Treatment and Counseling Staff: From the Ombudsman's Office's observations it appears treatment and counseling staff do not currently participate in IDC hearings. However, their expertise and input is vital for incarcerated individuals who are diagnosed with chronic medical or mental health issues. Mandating that the PHO consult with treatment and counseling staff in certain cases during the preliminary investigation will ensure an equitable process.

Principle Hearing: As previously discussed, current policy does not mention the Principle Hearing. Instead, it is referred to as the Investigatory hearing. However, in practice, it is called the Principle Hearing, which causes confusion. Renaming the Investigatory Hearing to "Principle Hearing" in policy aligns policy with current practice and provides transparency. The current policy also does not afford incarcerated individuals notice of the Principle Hearing or a copy of the misconduct report prior to the Principle Hearing. Giving incarcerated individuals notice of the Principle Hearing and a copy of the misconduct report ensures due process and allows incarcerated individuals sufficient time to formulate a defense. Clarifying the Principle Hearing process and the incarcerated individual's rights and responsibilities, including what evidence they can request, will alleviate confusion and any due process concerns. Currently, incarcerated individuals do not know what evidence will be used against them during the hearing. Providing a list or summary of the evidence prior to the hearing is aimed at providing incarcerated individuals an opportunity to formulate a proper defense.

Passes: Current policy is not clear about how incarcerated individuals attend Principle Hearings or IDC hearings. Some facilities issue passes, while others use the intercom system or have team members physically find the incarcerated individual. The lack of consistency causes confusion when the process is different from facility to facility. This also causes team members to use their time finding incarcerated individuals to attend hearings, when it should be the incarcerated individual's responsibility to attend. Issuing passes for all hearings will create efficiencies for team members and hold incarcerated individuals accountable. Issuing passes also helps contribute to a complete record of the disciplinary process.

Institutional Disciplinary Hearing: Currently, NDCS refers to disciplinary hearings as “Institutional Disciplinary Committee” hearings. However, IDC is not really a committee. The sole person who runs the IDC is the Chairperson. Therefore, renaming the IDC to “Institutional Disciplinary Hearing,” or IDH, clarifies that it is a disciplinary hearing and not a committee. Outlining the hearing process and the duties of the Chairperson, including reviewing circumstantial evidence and mitigating factors, provides transparency and consistency. Creating a Sanctions Guideline will alleviate complaints about bias and fairness and provide consistency across facilities. Also, the example policy clarifies that the incarcerated individual can face collateral consequences outside the disciplinary process as a result of a misconduct report or incident. Incarcerated individuals need a realistic view on the effects of receiving a misconduct report or being involved in an incident.

Evidence: It is important to clarify what evidence NDCS should submit into the record. This varies from facility to facility and case by case. Creating clear guidelines will provide consistency and a complete record. Also, mandating that all evidence collected is uploaded into the record is vital for a complete record. As previously states, it is also important to clarify what evidence incarcerated individuals can request and have access to.

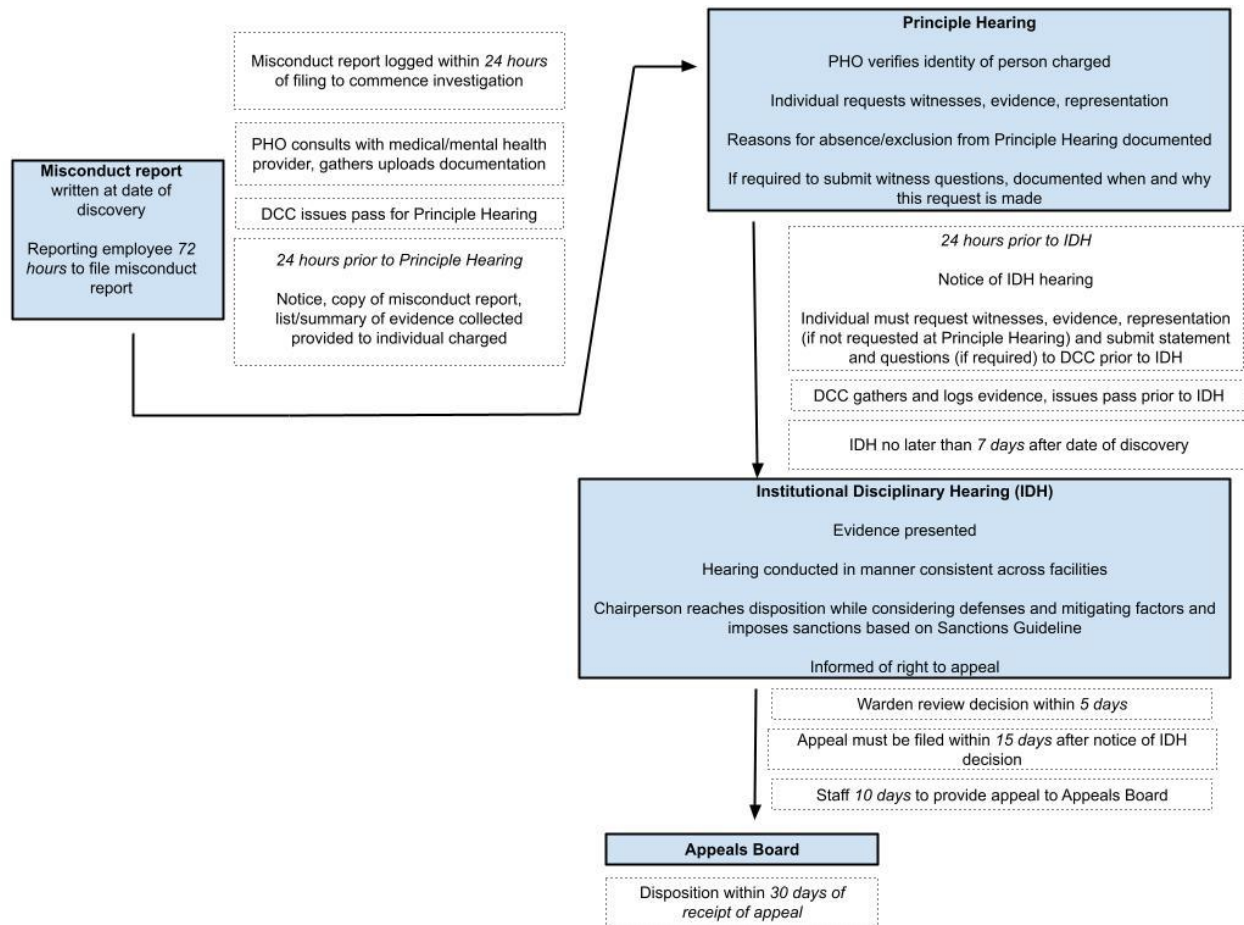
Clinical Review: Currently, there is a process for clinical teams to review misconduct reports related to clinical treatment/recommendations. The clinical team is able to review the misconduct report and determine if treatment is necessary, for example an incarcerated individual who is found guilty of a 1H Drug or Intoxicant Abuse may need some substance abuse treatment.

Exculpatory Evidence: Currently, there is not a process for when exculpatory evidence and/or new information is discovered after final disposition. The Ombudsman’s Office has assisted incarcerated individuals with this issue by bringing the information to NDCS. In most cases the issues were resolved. Creating an internal process for when exculpatory evidence and/or new information is discovered after the hearing and Appeals Board decisions are finalized is a necessary step to provide due process for incarcerated individuals and consistency throughout the system.

The Ombudsman's Office omitted some sections of the current policy where the information may be appropriate in other policies/guidelines:

- Section V (D): Identification of Confiscated Medications. This sections describes how staff members are to confiscate and identify medication.
- Section VI: Hearing Procedures for UDC. See Ombudsman Proposal 2.
- Section X (C): Team Member Summons/Notifications. This section describes what staff members should do if they are given a summons.

The following flow chart demonstrates the process included in the example policy:



2. Review the UDC regulations, policy, and practice for process improvements.

The Ombudsman’s Office focused on the IDC hearing process during this investigation. However, NDCS utilizes another disciplinary track, the UDC, mainly for minor rule infractions. There are some potential issues NDCS may want to consider, including but not limited to the following:

- UDC is not a committee, but a sole Chairperson.
- UDC does not allow witnesses or the reporting employee to attend the hearing.⁵⁵ It is unclear what evidence is allowed, if any to be presented.

⁵⁵ NDCS Policy 217.01.

- UDC sanctions can have an impact on an incarcerated individual’s ability to earn good time.⁵⁶
- UDC dispositions are not appealable, which is potentially a due process issue.

The Ombudsman’s Office recommends NDCS review and analyze regulations, policy, and practice for process improvements for the UDC. The Ombudsman’s Office would encourage NDCS to rename the UDC to “Unit Disciplinary Hearing (UDH)” to align with the proposal to rename the IDC to “Institutional Disciplinary Hearing (IDH)”.

3. Designate a spacious, equipped, and secure room at each facility to hold Principle and Institutional Disciplinary Hearings.

The Ombudsman’s Office recommends designating at least one centralized hearing room for each facility. There may need to be more than one hearing room depending on the facility structure and incarcerated individual population. These hearing rooms should be adequately sized and arranged with the safety and security of the disciplinary team in mind. For example, the restrictive housing hearing room at one of the NDCS facilities provides enough space for staff to conduct hearings in a safe manner. The room has two doors: one for the incarcerated individual to enter and another door that leads to an office for staff to access. This layout gives staff the safety and security they would need if the incarcerated individual became aggressive or assaultive. Having a centralized hearing room and issuing passes would shift the responsibility to the incarcerated individual to attend the hearing. Team members should not have to spend their time finding incarcerated individuals so they can attend their disciplinary hearing.

4. Create specific forms for the disciplinary process.

The Ombudsman’s Office recommends NDCS create specific forms for the disciplinary process. IIRs are used for communication between incarcerated individuals and NDCS team members on a variety of topics, not just the disciplinary process. Hundreds of IIRs could be submitted in one day. There have been many cases where individuals have complained to the Ombudsman’s Office that IIRs have been lost. Creating specific forms would simplify the disciplinary process

⁵⁶ See Neb. Rev. Stat. 83-1,107 (2)(b).

across all facilities and help staff maintain a complete and accurate record. The Ombudsman's Office recommends NDCS create forms for:

- Requesting witnesses, documentation, reporting employee, or a representative;
- Witness questions and/or a witness statement; and
- Misconduct report appeals.

5. [Digitalize all disciplinary forms for the incarcerated individuals to submit.](#)

The Ombudsman's Office recommends NDCS utilize a digital system for staff and incarcerated individuals to send and receive documents. Currently, NDCS uses paper documents for notices, copies of misconduct reports, and IIRs (requests for evidence, request for witness statements, and appeals). Incarcerated individuals have complained that the IIRs they submit are sometimes lost or not received on time. Individuals have also complained that they did not receive notice of the hearing or a copy of the misconduct report. The Ombudsman's Office confirmed this by reviewing complaints and speaking with team members on the disciplinary team. Digitizing the forms would create an accurate and complete record for NDCS and any potential legal matters. All documents (including notices and forms) should be uploaded into the misconduct report as evidence in NICaMS.

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APPENDIX

Example Policy Rules and Discipline for Major Rule Violations

Nebraska Department of Correctional Services Response

Example Policy

Rules and Discipline for Major Rule Violations

The example policy combines the current regulations and policy. The example policy also includes information and clarifications discussed in the attached report to ensure due process, transparency, and complete records. This new language is underlined below.

Purpose

It is an objective of the Nebraska Department of Correctional Services (NDCS) to maintain a safe, secure, and humane environment for incarcerated individuals, team members and the public. In furtherance of this objective, the Department shall promulgate a set of rules governing inmate conduct which shall be called the Code of Offenses. The Code of Offenses is promulgated as Title 68, Nebraska Administrative Code, Chapter 5, which establishes penalties for violation of such rules. The Department shall further promulgate a set of rules governing incarcerated individual disciplinary procedures which shall be called Inmate Disciplinary Procedures. The Inmate Disciplinary Procedures is promulgated as Title 68, Nebraska Administrative Code, Chapter 6 which establishes incarcerated individual disciplinary procedures. These rules are incorporated into this Policy by reference. This policy is reviewed at least annually and updated, if necessary. ¹

All incarcerated individuals in the custody of or under the supervision of the Department shall be subject to the Code of Offenses. Any violation of the Code of Offenses may result in disciplinary action. No conduct of an incarcerated individual constitutes an offense unless it is defined as such in the Code of Offenses. ² The Warden shall ensure that all incarcerated individuals are informed of the Code of Offenses. Any changes in the Code of Offenses shall be prominently posted.³

Process

The Warden of each facility shall maintain a clearly defined disciplinary procedure that complies with the provisions of this rule and is consistent with guidelines issued by the Director. The disciplinary procedure shall be designed to give incarcerated individuals due process rights, including an opportunity to formulate a defense, contribute to the efficient operation of the facility, and to be conducive to the successful re-socialization of the incarcerated individuals confined therein. ⁴

¹ NDCS Policy 217.01.

² 68 NAC 5-002.

³ 68 NAC 5-003.

⁴ 68 NAC 6-002.

Availability of Policy and Rulebook

Incarcerated individuals will have access to the Rules and Discipline for Major Rule Violations-policy at each of the facility's law library. Title 68, Nebraska Administrative Code, Chapters 5 and 6 which contain all chargeable offenses, ranges of penalties and disciplinary procedures, shall be given to each incarcerated individual and team member. Title 68, Nebraska Administrative Code, Chapters 5 and 6 shall be translated into those languages spoken by significant numbers of incarcerated individuals. Signed acknowledgements of receipt of the rulebook shall be maintained in the incarcerated individual's file. When a literacy or language problem prevents an incarcerated individual from understanding the rulebook, a team member or translator shall assist the individual in understanding the rules and this action shall be documented in the individual's institutional file. Visually impaired individuals will have access to an audiotape of Title 68, Nebraska Administrative Code, Chapters 5 and 6.⁵

Disciplinary Team Members

Reporting Employee: The reporting employee is the team member who writes the misconduct report. This reporting employee was either an eyewitness or discovered the incident.

Disciplinary Committee Coordinator (DCC): The Disciplinary Committee Coordinator is responsible for, but not limited to, the following: logging misconduct reports, collecting and logging evidence, assisting with scheduling hearings, sending notices, and creating and issuing passes. The DCC shall assist the Principle Hearing Officer and the Chairperson as needed. The DCC shall be the recorder at the Institutional Disciplinary Hearing.

Principle Hearing Officer (PHO): The Principle Hearing Officer will complete the preliminary investigation, which shall include speaking to witnesses and reviewing the evidence collected. The PHO is responsible for determining the rule infraction(s) and charging the incarcerated individual within the Code of Offenses. The PHO shall conduct Principle Hearings and shall make recommendations to the Chairperson. The PHO shall not be the reporting employee and shall not have been involved in the incident in question.⁶

Chairperson: The Warden shall appoint a sole Chairperson to conduct and manage the Institutional Disciplinary Hearing (IDH). The Chairperson shall conduct IDHs and impose sanctions for incarcerated individuals who have violated the rules. The Chairperson shall be objective and unbiased while reviewing the evidence and be fair and consistent when imposing sanctions. The IDH shall hear major rule violations. Major rule violations are those infractions that are likely to result in the loss of good time.⁷ The Warden may appoint other Chairperson(s) to serve in this capacity in the absence of the designated Chairperson.

No person shall maintain a position on the disciplinary team if that person has first-hand knowledge of the charges brought against the accused incarcerated individual, either as an eyewitness, or as the reporting employee or PHO. However, a team member may be a member of

⁵ NDCS Policy 217.01, 68 NAC 6-004.

⁶ 68 NAC 6-008.02.

⁷ NDCS Policy 217.01.

a disciplinary team when the incident is so widely witnessed that virtually every employee has witnessed it in whole or in part.⁸

Team Member Training

Team members working with incarcerated individuals shall receive training in the Code of Offenses, the rationale for these rules, and the sanctions available.⁹

Informal Resolution

Often incarcerated individual misconduct can be handled informally. The team member observing the misbehavior will decide if the misbehavior is best handled by writing an incident report, writing a warning log entry and/or discussing the behavior with the individual informally. The team member should consult with the supervisor as needed. If a misconduct report is not written, it is advisable to write an incident report.¹⁰

REPORT AND PRELIMINARY INVESTIGATION

Report

If a team member witnesses or has a reasonable belief that an infraction of the Code of Offenses has been committed by an incarcerated individual, the team member shall prepare a written misconduct report (MR).¹¹ The report shall include:

- Date of incident;
- Narrative of incident;
- Inmate behavior/statements made;
- Names of all incarcerated individuals involved in the incident;
- Names of staff or team members involved in the incident;
- List of evidence collected;
- Any action/steps taken by team members; and
- Reporting employee's signature, date and time report was written.

Misconduct reports shall not be issued for self-harm/suicide attempts.¹²

The report shall be filed with the DCC, within 72 hours of the occurrence of the infraction or the discovery of it. The point of discovery of a drug violation based on a laboratory drug test is when the result of the laboratory test is received by the facility's designated team member. The report shall be placed in the files of the facility and logged in the facility records. The report shall be logged within 24 hours after the report is filed, which commences the preliminary

⁸ 68 NAC 6-007.

⁹ NDCS Policy 217.01.

¹⁰ NDCS Policy 217.01.

¹¹ NDCS Policy 217.01, 68 NAC 6-005.

¹² NDCS Policy 217.01.

investigation.¹³ Records of disciplinary proceedings shall be maintained in the incarcerated individual's institutional file unless dismissed on appeal.¹⁴

Incarcerated individuals with pending rule violation(s) may be held on immediate segregation status. The incarcerated individual's status shall be reviewed within seventy-two hours by the Warden or designee.

If the alleged rule violation is also a criminal offense, the case may be referred for consideration for criminal prosecution. Criminal prosecution does not stay disciplinary actions.¹⁵

Preliminary Investigation

After a misconduct report is logged, the DCC will gather all NDCS evidence without unreasonable delay, unless there are exceptional circumstances. Any exceptional circumstances shall be documented.¹⁶ The DCC will log all NDCS evidence 24 hours prior to the Principle Hearing. The PHO will review all the submitted evidence. As needed, the PHO will speak with the incarcerated individual, reporting employee, and/or any witnesses for the preliminary investigation.

Treatment and Counseling Staff: The PHO shall investigate whether the accused incarcerated individual is chronically ill, physically disabled, geriatric, seriously mentally ill, or developmentally disabled. If the accused incarcerated individual is diagnosed; being treated for such condition; or there is a concern for the incarcerated individuals' physical/mental health, the PHO shall consult with the appropriate medical and/or mental health provider. The PHO shall gather documentation from the provider to determine whether:

- The incarcerated individual's condition or diagnosis impaired or impacted their actions or judgement;
- The incarcerated individual is competent to understand the disciplinary process; and
- There are specific sanctions that would negatively impact the treatment of the incarcerated individual.

The PHO will upload this documentation as evidence in the misconduct report file.

Code of Offenses

Based on the preliminary investigation, the PHO will determine the rule infraction(s) and charge the incarcerated individual within the Code of Offenses.

An incarcerated individual may be found guilty of committing an offense, aiding and abetting in the commission of an offense, or attempting to commit an offense.¹⁷

¹³ NDCS Policy 217.01, 68 NAC 6-005.

¹⁴ 68 NAC 6-007.

¹⁵ 68 NAC 6-012.

¹⁶ NDCS Policy 217.01.

¹⁷ 68 NAC 5-004.

Aiding and Abetting: An incarcerated individual may be disciplined if the Chairperson finds that he or she knowingly commanded, induced, procured or aided another person in the commission of the offense. No incarcerated individual shall be disciplined if the incarcerated individual withdrew from participation in the offense and made a reasonable effort to prevent its commission. In any disciplinary hearing under this section, it is not a complete defense that charges against another incarcerated individual were dismissed.¹⁸

Attempt: An incarcerated individual may be disciplined for attempting to commit an offense if: (1) The incarcerated individual acts with the kind of culpability required for commission of such offense, or engages in conduct that constitutes the acts necessary for the commission of the offense except its completion; (2) The incarcerated individual willfully provides substantial and knowing assistance to a person attempting to commit an offense under the Code of Offenses; or (3) The incarcerated individual agrees with one or more persons to engage in or cause the performance of such conduct. An incarcerated individual found guilty of an attempt shall be subject to the same penalties that correspond to the offense attempted.¹⁹

Possession: Any or all incarcerated individuals assigned to a cell, room, bay, school or work area will be presumed to have possession of all items found in the cell, part of the room, bay, work or school area assigned to the incarcerated individual(s), including but not limited to, the bed, locker, desk, and workstation.²⁰

Intoxicant: For purposes of incarcerated individual discipline, intoxicant means any substance whose purpose is to induce a condition of intoxication, stupefaction, depression, giddiness, paralysis, inebriation, excitement or irrational behavior or in any manner change, distort or disturb the auditory, visual mental or nervous processes.²¹

Offenses

The following are acts and behaviors that are prohibited and subject to disciplinary sanctions:

I [A] **Murder/Manslaughter**. The killing of another person.

I [B] **Mutinous Actions**. Mutiny; inciting to riot; insurrection; taking hostages or arson.

I [C] **Assault**. Physical attack on another person; continuing a fight after the opponent is no longer participating; spitting or throwing bodily waste or bodily fluids on another person; or using a weapon, object, a substance as a weapon in an assault or fight.

I [D] **Possession or Manufacture of Dangerous Contraband**. Possessing or manufacturing any weapon, explosive, or incendiary device; or possessing a caustic or flammable material without authorization.

¹⁸ 68 NAC 5-004.01.

¹⁹ 68 NAC 5-004.02.

²⁰ 68 NAC 5-004.03.

²¹ NDCS Policy 217.01.

I [E] **Escape.** Unauthorized departure from any part of a facility; departure from any work assignment or any extended limits of a facility with the intent to remain away; or failure to return from a pass or furlough with the intent to remain away.

I [F] **Omitted**

I [G] **Interference with or Refusal to Submit to a Search.** Refusing to submit to a search of person, clothing, property, or living quarters when ordered by authorized personnel; interfering with such a search; disposing of or concealing any article after being ordered to submit to a search; fleeing to avoid a search; or teasing, harassing, agitating or distracting a canine during a search.

I [H] **Drug or Intoxicant Abuse.** Using, possessing, manufacturing selling, giving or being under the influence of a medication, controlled substance or inhalant not prescribed for the possessor; using, possessing, manufacturing, selling, giving or being under the influence of an intoxicant; refusing to submit to a drug test upon instruction from authorized personnel; failing to comply with drug test procedures; contaminating the substance to be tested or intentionally invalidating a drug test in any manner; or failing to submit a urine specimen for testing within five hours.

I [I] **Escape Paraphernalia.** Possessing, manufacturing, or using escape paraphernalia.

I [J] **Destruction of Property Over \$500.** Destroying, altering, or wasting property valued over \$500 that belongs to the state or another person; or using such property without authorization.

I [K] **Extortion.** Demanding or receiving anything from another person in exchange for a favor or for protection from another person; demanding or receiving anything in exchange for not informing on another person; or threatening to inform on another person unless demands are met.

I [L] **Possession of Unauthorized Electronic Communication Devices.** Possessing cellular telephones or other electronic communication devices without authorization.

I [M] **Stalking.** Engaging in a course of conduct directed at a specific person with the intent to injure, terrify, threaten, or intimidate such person.

I [N] **Omitted.**

I [O] **Sexual Assault.** Sexually penetrating or having sexual contact with another person without that person's consent; or pressuring someone to engage in sexual activities

I [P] **Cruelty to Animals.** Kicking, beating or otherwise inflicting any harm on an animal.

II [A] **Bribery.** Offering to sell, give, or loan any item or to perform any service for the benefit of any person in exchange for a person's deviation from assigned authorized duties or institutional rules.

II [B] **Drug Paraphernalia.** Possessing or manufacturing any drug or narcotic paraphernalia.

II [C] **Sexual Activities.** Consensual intercourse, sodomy, kissing (except as authorized in the visiting room) or touching another person's intimate parts; or allowing another incarcerated individual to touch one's intimate parts; touching another person with one's intimate parts; or intentionally exposing one's sexual organs to another person in a location or manner where such exposure has no legitimate purpose.

II [D] **Destruction of Property Valued Between \$100 and \$500.** Destroying, altering, or wasting property valued between \$100 and \$500 that belongs to the state or another person; or using such property without authorization.

II [E] **Disobeying an Order.** Disobeying a verbal or written order from an employee; or refusing to comply immediately with an order.

II [F] **Forgery or Possession of Forged Documents.** Knowingly possessing a falsified or altered paper or document; signing another incarcerated individual's name or number; or altering or falsifying a document with the intent to deceive or defraud.

II [G] **Theft.** Taking property from another person or from the state with the intent to deprive the owner of the use of the property; or possessing stolen property.

II [H] **Use of Threatening Language or Gestures/Fighting.** Using language or gestures threatening physical harm to another person.

II [I] **Gambling or Promoting Gambling.** Promoting gambling; possessing gambling devices or records; or betting on the outcome of a future event such as a game of skill or chance.

II [J] **Unauthorized Areas.** Being in or reporting to any area without proper authorization; or loitering.

II [K] **Improperly Handling Funds.** Failing to turn over all incoming monies to the Department's accountant or designee for processing; cashing payroll checks; diverting incoming monies; making unauthorized deductions from payroll checks; or possessing official government money without authorization or in excess of the amount authorized by the Warden.

II [L] **Improper Use of Transportation.** Operating a motor vehicle without authorization from the Department; operating a company-owned, job-related vehicle for any purpose other than work; or riding in any vehicle without authorization.

II [M] **Failure to Report Law Enforcement Contacts.** Failing to promptly notify Department authorities of any contact with law enforcement officials.

II [N] **Failure to Report.** Failing to report to a work or program assignment without proper authorization.

II [O] **Medication Abuse.** Using or possessing authorized medication contrary to prescription; possessing expired medication; possessing authorized medication not in its original container; or possessing non-prescription medication without authorization.

II [P] **Piercing, Branding, or Mutilation.** Intentionally piercing, branding, or cutting any portion of another's body; or intentionally piercing or branding any portion of one's own body.

II [Q] **Tattoo Activities.** Performing tattoo services; possessing tattoo paraphernalia; or receiving a tattoo.

II [R] **Gang/Security Threat Group Activity.** Communicating involvement in a gang or security threat group through any verbal or written means; flashing gang or security threat group signs; dressing in a manner associated with a gang or security threat group or wearing gang colors; possessing any materials depicting symbols or signs associated with a gang or security threat group; or drawing or marking any surface with symbols or signs associated with a gang or security threat group.

II [S] **False Reporting.** Giving false information to state personnel; falsely implicating an incarcerated individual; planting evidence/contraband; turning in a false alarm; diverting attention of staff; or concealing one's identity.

II [T] **Violation of Passes or Furloughs.** Failure to return to a community facility within the time prescribed, or going anywhere while on pass or furlough without authorization. Failure to remain within the extended limits of confinement, or unauthorized absence from an approved location.

II [U] **Fighting.** Fighting not covered by Rule 5-1-[C] Assault.

II [V] **Sexual Harassment.** Making sexual gestures, or any other communication, or conduct of a sexual nature directed toward staff or another incarcerated individual not covered by 5-II-[C] Sexual Activities.

II [W] **Refusing to Submit to DNA Test.** Refusing to submit to a buccal cell collection or blood draw for DNA identification purposes upon instruction from authorized personnel; failing to comply with buccal cell collection or blood draw procedures; or contaminating the buccal cell collection or blood to be tested.

III [A] **Flare of Tempers/Minor Physical Contact.** Displaying a flare of tempers; horse-playing; or having minor physical contact where the contact is offensive or inappropriate.

III [B] **Destruction of Property Under \$100.** Destroying, altering, or wasting property valued under \$100 that belongs to the state or another person; or using such property without authorization.

III [C] **Possessing or Receiving Unauthorized Articles.** Possessing unauthorized articles or receiving articles from another person without the approval of the Warden. Any item that is altered or that has not been issued to an incarcerated individual, purchased by him/her through proper institutional channels or otherwise specifically approved for his/her possession by the Warden is an unauthorized article.

III [D] **Swearing, Cursing, or Use of Abusive Language or Gestures.** Swearing or cursing at another person; directing abusive gestures or language at another person; or intending to harass, demean, or cause alarm in another person by words or actions.

III [E] **Tobacco Products.** Smoking or using tobacco products inside any building or vehicle owned, leased or controlled by the Department of Correctional Services; or possessing smoking material including but not limited to tobacco, pipes, matches or lighters contrary to DCS regulations.

III [F] **Selling, Loaning; or Giving Items to Others.** Selling, loaning, or giving, anything to another person without the prior approval of the Warden or designee.

III [G] **Violation of Sanctions.** Violating disciplinary restrictions or sanctions.

III [H] **Violation of Any Signed Program Agreement.** Violating a term or condition of a signed program agreement.

III [I] **Omitted.**

III [J] **Sanitation.** Failing to maintain a clean or sanitary living or work area; or littering.

III [K] **Disruption.** Disrupting duties of staff or incarcerated individuals; creating a disturbance; causing a delay; delaying count; tampering with locks; creating excessive noise by any means or creating or maintaining a health, safety or fire hazard.

III [L] **Omitted.**

III [M] **Omitted.**

III [N] **Violation of Regulations.** Failing to adhere to any written or posted order or regulation.

III [O] **Misuse of a Computer.** Accessing directly or indirectly any computer or altering, damaging, deleting or destroying any computer, computer system, computer software, computer network, computer program or data without authorization.²²

[Refer to UDC or IDH](#)

Each institution shall have an Institutional Disciplinary Hearing (IDH). IDH shall hear misconduct reports for major rule infractions. “Major Rule Infractions” are those infractions that are likely to result in the loss of good time. Each institution shall have a Unit Disciplinary Committee(s) (UDC). UDC shall hear minor misconduct reports for rule infractions. “Minor UDC Infractions” are those infractions that are not likely to result in the loss of good time.²³

Each Warden will develop guidelines for his/her facility to assist the PHO in determining which infractions will be handled by the UDC and which by the IDH. A Principle Hearing shall be held

²² 68 NAC 5-005.

²³ NDCS Policy 217.01.

regardless of whether the disciplinary matter will be assigned to UDC or IDH. The PHO shall refer cases to either IDH or UDC as follows:

- Review the infractions allegedly committed; and
- Review the incarcerated individual's disciplinary history, the nature of the alleged offense(s) and the likelihood of loss of good time being imposed.²⁴

Notification of Principle Hearing

The incarcerated individual charged shall have an adequate opportunity to prepare a defense.²⁵ The DCC shall send the incarcerated individual the following information at least 24 hours prior to the Principle Hearing:

- Notice of the Principle Hearing
- Misconduct report
- List/summary of the evidence collected

The DCC shall issue the incarcerated individual a pass to attend the Principle Hearing.

PRINCIPLE HEARING

Requests for Evidence and a Representative

The Principle Hearing is to give the incarcerated individual an opportunity to make a statement, request evidence, witnesses, and a representative for the IDH.

The PHO will verify the incarcerated individual's identity at the beginning of the hearing. If the incarcerated individual does not attend the Principle Hearing, it shall be documented.

Reporting Employee: The Reporting Employee shall appear at the IDH unless the incarcerated individual waives his/her presence in writing.²⁶ The incarcerated individual does not need to make a request to have the reporting employee present.

During the Principle Hearing the incarcerated individual has the right to request and/or provide the following evidence for the IDH:

Independent Confirmation Testing: Before an incarcerated individual can be disciplined for a drug or alcohol violation, the incarcerated individual may request and NDCS shall provide independent confirmation testing of positive results of urinalysis testing. If the confirmation test is positive, the incarcerated individual may be required to pay for the cost of the confirmation test.²⁷ The independent confirmation testing does not include testing the actual physical substance or contraband that was confiscated.

²⁴ NDCS Policy 217.01.

²⁵ 68 NAC 6-008.11.

²⁶ 68 NAC 6-008.07.

²⁷ 68 NAC 6-008.01

Documents: Documentation may include, but is not limited to, urinalysis tests, drug tests, lab tests, photos, statements from witnesses, etc.

Videos: Video evidence may include institutional video, body camera video, and all other video that may have captured the incident.

Witnesses: An individual who was an eye witness to the incident or has firsthand knowledge/background information on the incident.

Written Statement/Questions: The PHO may request the incarcerated individual write questions or request a statement from a witnesses if it would compromise the safety and security to allow the requested person to appear at the IDH. It shall be documented when and why the PHO made this request. The incarcerated individual may write a list of questions/request a statement from the witness during the Principle Hearing or submit a statement request/questionnaire 24 hours prior to the IDH. The witness shall submit the answers and/or a statement to the DCC. If the witness is an incarcerated individual and refuses to submit answers and/or a statement, the refusal shall be documented.

Witnesses from outside the facility may not be present during the IDH²⁸. If a witness is from another NDCS facility (staff or incarcerated individual), the incarcerated individual may request a statement or write a list of questions for that witness. The incarcerated individual will submit the request for statement/questionnaire during the Principle Hearing or to the DCC 24 hours prior to the IDH. The DCC will coordinate with the DCC from the other facility to obtain the statement or answers from the witness. Failure to receive the requested statement/answers from the witness does not require a continuance.²⁹

Witnesses (not affiliated with NDCS) from outside the facility may not be present during the IDH. An incarcerated individual may obtain a written statement from a witness from outside the facility who has relevant knowledge of the incident. The incarcerated individual requesting the statement is responsible for obtaining any such statement. The incarcerated individual must submit the statement to the DCC 24 hours prior to the IDH.

Representative: The incarcerated individual charged shall have an adequate opportunity to prepare a defense. Such opportunity shall include the right to assistance and advice in preparing and presenting a defense from any incarcerated individual in general population or staff member at the facility where the hearing is held. The incarcerated individual or staff member may serve only in an advisory capacity for the incarcerated individual so charged. The incarcerated individual or staff member may not coach, prompt or verbally assist the charged incarcerated individual in communicating their defense during the hearing. A representative will be appointed when it is apparent that an incarcerated individual is not capable of collecting and presenting evidence effectively on his or her own behalf or when the incarcerated individual or staff member chosen by the charged incarcerated individual is unavailable. No incarcerated individual or staff

²⁸ NDCS Policy 217.01.

²⁹ NDCS Policy 217.01.

member shall be recruited to serve in such advisory capacity involuntarily. A request for a representative must be made at the time of the Principle Hearing, or must be in writing and received by the DCC at least 24 hours prior to the IDH.³⁰

Statement: Incarcerated individuals may provide the PHO a statement during the Principle Hearing or submit a statement in writing to the DCC 24 hours prior the IDH.

If an incarcerated individual transfers to another facility during the disciplinary process, the incarcerated individual must submit all requests in writing to the DCC at the new facility. Requests shall be made within 24 hours after the transfer. Requests previously submitted at another facility will not be accepted.

The DCC shall issue a pass to the requested witnesses and representatives within the facility for the IDH. The DCC shall gather and log all evidence requested from the incarcerated individual prior to the IDH. The DCC shall gather and log all evidence in the possession of NDCS that is relevant to the incident. This shall include exculpatory evidence.

The PHO shall forward the misconduct report to the Chairperson with a recommendation about whether the report should be dismissed.³¹

Waivers

The incarcerated individual may voluntarily waive the right to:

- Have the reporting employee at the hearing;
- Twenty-four hours' notice of the IDH;
- Twenty-four hours' notice of the charges;
- A representative,
- Request witness; and
- Be present at the hearing.

Waivers and consents shall be in writing, signed by the incarcerated individual, and reviewed by the PHO. A signed waiver may be rescinded only for good cause as determined by the Chairperson.³² Waivers shall be uploaded into the misconduct report file.

Notification of Institutional Disciplinary Hearing

Incarcerated individuals charged with a rule violation referred to the IDH shall be scheduled for a hearing as soon as practicable, but no later than seven working days (excluding holidays and weekends) after the alleged violation. Incarcerated individuals shall be notified of the time and place of the hearing at least 24 hours before the hearing.³³

³⁰ 68 NAC 6-008.11.

³¹ 68 NAC 6-008.02.

³² 68 NAC 6-008.12.

³³ NDCS Policy 217.01.

The DCC shall provide the incarcerated individual a copy of the misconduct report and written notice of the date and time for the IDH. The DCC shall issue the incarcerated individual a pass to attend the IDH.

INSTITUTIONAL DISCIPLINARY HEARING (IDH)

The Chairperson may transfer cases to the UDC, and the UDC may transfer cases to the IDH.³⁴

An incarcerated individual shall have an opportunity to appear before and address the IDH unless the incarcerated individual waives this right in writing or is excluded because of his or her behavior. An incarcerated individual may be excluded during the testimony of any incarcerated individual whose testimony must be given in confidence.³⁵ Reasons for the incarcerated individual's absence or exclusion from the hearing must be documented.³⁶ The Chairperson will verify the incarcerated individual's identity at the beginning of the hearing.

The Chairperson may grant a continuance or postponement of the IDH. A request for a continuance may be made by either institutional staff involved in the discipline process or the incarcerated individual. A continuance may be granted only for good cause shown for a reasonable period of time, and shall be made in writing and made part of the disciplinary record.³⁷ The incarcerated individual will receive notice of the date and time of the new IDH.

The Chairperson may request investigations, but cannot conduct investigations themselves.³⁸

The Chairperson shall officiate the hearing. The proceedings before the IDH shall be digitally recorded and that recording shall be retained by the institution for at least two years.³⁹ The DCC will assist the Chairperson and record the hearing. The Chairperson is the sole person to make findings and impose sanctions.

The Chairperson will conduct the hearing in the following manner:

- Read the misconduct report including the rule infraction(s).
- Read and/or describe the evidence collected and logged.
- The Chairperson may compel an employee with relevant information to appear as a witness.⁴⁰
- Incarcerated individuals shall have the opportunity to make a statement, ask their representative questions, and call their requested witnesses/reporting employee.
- The Chairperson shall state its reasons in writing for refusing to allow a witness to testify or to have requested documentary evidence at the hearing.⁴¹

³⁴ 68 NAC 6-006.04.

³⁵ 68 NAC 6-008.06.

³⁶ 68 NAC 6-008.06.

³⁷ 68 NAC 6-008.13.

³⁸ 68 NAC 003.06.

³⁹ NDCS Policy 217.01.

⁴⁰ 68 NAC 6-008.08.

⁴¹ 68 NAC 6-008.08.

- The refusal of an incarcerated individual to make a written statement or to testify shall be documented.⁴²
- Incarcerated individuals will not be allowed to review institutional video and will be asked to step out of the hearing room while the Chairperson reviews the video.
- Incarcerated individuals may be excluded during the testimony of any incarcerated individual whose testimony must be given in confidence.⁴³

The Chairperson shall review all of the evidence presented at the hearing. This should include consideration of all aggravating and mitigating circumstances. The Chairperson shall consider any defenses presented during the hearing, including but not limited to: self-defense; protective custody requests; mental health or medical crisis; another incarcerated individual took responsibility; and coercion or intimidation or pressure.

An incarcerated individual may be found guilty of a rule infraction only when substantial evidence exists that he or she engaged in conduct that fulfills all the necessary elements of the offense. The conduct must be voluntary and be intentional, reckless or grossly negligent. The accused must have had notice that the conduct was proscribed by the Code of Offenses. An incarcerated individual may be found guilty of committing an offense, aiding and abetting in the commission of an offense or attempting to commit an offense.⁴⁴

The decisions of the Chairperson shall be based solely on information obtained in the hearing process.⁴⁵ The Chairperson will determine if the incarcerated individual is guilty of any of the alleged rule violations. The Chairperson shall determine what sanctions the incarcerated individual will receive for each rule infraction. The Chairperson will inform the incarcerated individual of the guilty finding or not guilty finding for each rule violation and any corresponding sanction(s). The incarcerated individual shall be advised of the right to appeal at the time he or she is notified of the Chairperson's decision.⁴⁶

The DCC will provide the incarcerated individual a copy of the written record of the Chairperson's decision, supporting reasons for the decision, and corresponding sanction(s) after the IDH.

SANCTIONS

Disciplinary action is used to regulate an incarcerated individual's behavior within acceptable limits. Disciplinary sanctions are imposed to hold the incarcerated individual accountable for his/her misconduct and to deter that incarcerated individual and other incarcerated individuals from engaging in similar misconduct in the future.⁴⁷

⁴² 68 NAC 6-008.08.

⁴³ 68 NAC 6-008.06.

⁴⁴ 68 NAC 5-004.

⁴⁵ NDCS Policy 217.01.

⁴⁶ 68 NAC 6-014.

⁴⁷ 68 NAC 6-003.01.

NDCS shall create a system-wide Sanctions Guideline. The Sanctions Guideline will include the following:

- Each disciplinary sanction imposed must be proportionate to the seriousness of the incarcerated individual's misconduct;⁴⁸
- Consideration of all aggravating and mitigating circumstances including defenses presented;⁴⁹
- Prior offenses for the same or similar behavior;⁵⁰
- The behavior of incarcerated individuals committed to the custody of NDCS shall be controlled in an impartial and consistent manner;⁵¹
- Disciplinary action shall not be capricious, retaliatory or revengeful;⁵²
- Corporal punishment of any kind is prohibited;⁵³
- Withholding or modifying meals shall not be administered as discipline;⁵⁴
- The Chairperson shall impose disciplinary sanctions in a progressive manner as appropriate.⁵⁵

Institutional Disciplinary Sanctions

Possible sanctions for rule violations shall be listed in the sanction guideline and are as follows:

1. A verbal reprimand
2. A written warning
3. Extra duty without pay
4. Room restriction
5. Restrictions from any correctional activities, except the recognized worship activity for his/her religious faith group, dining hall, designated group or individual therapy and school for all violations arising out of one incident. Restrictions on clothing, bedding, mail, visitation, use of toilets, washbowls, scheduled showers or facilities and materials needed for access to the courts shall be imposed only for abuse of such privileges or facilities.
6. Restitution
7. Restrictions from tablet/kiosk access
8. Restrictions from canteen access
9. Restrictions from telephone access
10. Restrictions from housing unit lobby access
11. Restrictions from yard and recreation access
12. Loss of Good Time⁵⁶

⁴⁸ 68 NAC 6-003.01.

⁴⁹ 68 NAC 6-003.01.

⁵⁰ 68 NAC 6-003.01.

⁵¹ 68 NAC 6-003.02.

⁵² 68 NAC 6-003.03.

⁵³ 68 NAC 6-003.04.

⁵⁴ 68 NAC 6-003.05.

⁵⁵ NDCS Policy 217.01.

⁵⁶ NDCS Policy 217.01.

NDCS does not utilize disciplinary segregation.⁵⁷ NDCS does not utilize solitary confinement.⁵⁸

The Chairperson shall not impose changes in facility assignment/transfers, classification, immediate segregation/longer term restrictive housing, work, education, or other program assignments as disciplinary sanctions. Actions of this nature are administratively decided by classification teams.⁵⁹ However, misconduct reports (with guilty findings or not) and incidents without misconduct reports are reviewed and taken into consideration while making these decisions.

Misconduct reports may affect an incarcerated individual's risk score, which may cause a demotion in custody level. Good time restoration may also be impacted by misconduct reports. Misconduct reports are reviewed during parole reviews and hearings, potentially affecting chances at parole.

Room Restriction: Room restriction is the status of being restricted from certain privileges normally afforded members of the general incarcerated population. It does not consist of total separation from the general population and does not constitute disciplinary segregation.⁶⁰

- When an incarcerated individual is on IDH room restriction, the incarcerated individual shall not attend his/her institutional work assignment.
- Incarcerated individuals on room restriction shall be afforded at least 24 hours of out of cell time within a seven day period.
- When imposing extra duty or room restriction, the Chairperson shall specifically state the number of hours of extra duty and/or the number of days the incarcerated individual shall be on room restriction.⁶¹

Restriction: An incarcerated individual may be restricted from any correctional facility activities for disciplinary reasons except the recognized worship activity for his/her religious faith group, dining hall, designated group or individual therapy, and school, for a period of time not to exceed 90 days for all violations arising out of one incident. Restrictions on clothing, bedding, mail, visitations, use of toilets, wash bowls, scheduled showers or facilities and materials needed for access to the courts shall be imposed only for abuse of such privileges or facilities.⁶²

Extra Duty: An incarcerated individual may be assigned additional work duties without pay during a period of time not to exceed 30 days. Work assignments need not be in the area of the incarcerated individual's present work assignment. Extra duty shall not exceed 120 hours for all violations arising out of one incident.⁶³

Reprimand: An incarcerated individual may be reprimanded verbally or in writing for violating the Code of Offenses.⁶⁴

⁵⁷ 68 NAC 6-003.09.

⁵⁸ 68 NAC 6-003.10.

⁵⁹ NDCS Policy 217.01.

⁶⁰ 68 NAC 6-015.

⁶¹ NDCS Policy 217.01.

⁶² 68 NAC 6-011.02.

⁶³ 6 NAC 6-011.01

⁶⁴ 6 NAC 6-011.03.

Restitution: An incarcerated individual may be required to make restitution for: an amount up to the actual value of property intentionally or recklessly destroyed belonging to the state or any other person; an amount up to the actual cost to the state for injuries, repairs or other damages caused by intentional acts of the incarcerated individual; and for the reasonable costs incurred by the state when returning the incarcerated individual to the correctional facility after an escape. Before restitution can be ordered for disciplinary reasons, the incarcerated individual must be found to have violated a pertinent rule, and a Chairperson must determine the amount of restitution based on substantial evidence introduced at the IDH. Restitution monies may be taken only from the incarcerated individual's institutional account.⁶⁵

Loss of Good Time

Loss of Good Time may be imposed if the Chairperson finds the violation to be serious or flagrant. Flagrant or serious misconduct shall include:

- (1) Major disruption to the operation of the institution;
- (2) Threats to the safety or security of the institution, public visitors, staff and/or other incarcerated individuals;
- (3) Violence;
- (4) Substantial destruction of property;
- (5) Escape or attempted escape; or
- (6) Repeated violations of the same offense in the past 12 months.⁶⁶

Class I Offenses: Loss of good time not exceeding 180 days for violations not involving assault or injury to a person. Loss of good time not exceeding 730 days for violations involving assault or injury to a person. The Chairperson may designate loss of good time involving assault or injury to a person as non-restorable.⁶⁷

Class II Offenses: Loss of good time not exceeding 90 days.⁶⁸

Class III Offenses: Loss of good time not exceeding 60 days.⁶⁹

The maximum sanction involving loss of good time shall not exceed 180 days for all charges arising out of one incident except for violations involving assault or injury to a person.⁷⁰

Non-Restorable Loss of Good Time may only be imposed for assaults resulting in serious injury to a person. For the purposes of sanctioning non-restorable good time, a serious injury involves a substantial risk of death involving serious, permanent disfigurement or long-term loss or impairment of the function of any body part or organ.⁷¹

⁶⁵ 68 NAC 6-011.04.

⁶⁶ NDCS Policy 217.01.

⁶⁷ 68 NAC 6-0010.01.

⁶⁸ 68 NAC 6-0010.02

⁶⁹ 68 NAC 6-0010.03

⁷⁰ 68 NAC 6-0010.

⁷¹ NDCS Policy 217.01.

When imposing the loss of good time, the Chairperson shall specifically state the amount of good time being taken.⁷²

Warden's Review

The Warden/designee shall review and approve the Chairperson's decisions to assure conformity with policy and regulations. It is expected that the Warden/designee will review all IDH actions within 5 days of the Chairperson decision. The Warden/designee may modify or decrease sanctions imposed by the Chairperson, but may not increase the severity of the sanctions.⁷³ The Warden's responsibilities under this paragraph may not be delegated to anyone who served as a member of the disciplinary team hearing the case to be reviewed.⁷⁴

Clinician Review

All misconduct reports related to clinical needs or clinical recommendations shall be forwarded to the appropriate clinical team for review. The clinical team will review the incident, charges, and current clinical recommendations, and determine if additional assessments or treatment are needed.

RIGHTS OF APPEAL

NDCS Appeals Board

The incarcerated individual shall be advised of the right to appeal at the time he or she is notified of the Chairperson's decision. Appeals must be in writing and must state the charge(s) to be reviewed and the reason(s) why the charge(s) should be reversed. The incarcerated individual shall submit the appeal to unit management staff within 15 days after receiving notice of the Chairperson's decision.⁷⁵

Within 10 days after receiving the incarcerated individual's appeal, unit management staff will send a complete copy of the misconduct report record, and the incarcerated individual's appeal to the Appeals Board. The complete misconduct report record includes the misconduct report, disciplinary action sheet, and other relevant documents. The Appeals Board will render a decision based on this evidence. The Appeals Board will review and analyze due process, findings of fact, evidence relied upon, and the impartiality of the decision-making process. Appeals Board staff will send the incarcerated individual a copy of the Appeals Board decision within 30 days after receipt of the appeal.⁷⁶

⁷² NDCS Policy 217.01.

⁷³ NDCS Policy 217.01.

⁷⁴ 68 NAC 6-009.

⁷⁵ 68 NAC 6-014.

⁷⁶ 68 NAC 6-014.01.

Administrative Procedure Act

If the Chairperson imposes a loss of good time as a sanction, the incarcerated individual has the right to appeal the action to the State District Court under the Nebraska Administrative Procedure Act (APA). If the incarcerated individual chooses to appeal under the APA, he or she may file a petition in State District Court within 30 days after the service of the Department Appeals Board's final decision.⁷⁷

Certified Transcripts

When ordered by the Nebraska Department of Justice, a certified transcript of the disciplinary record reviewed by the Appeals Board and a transcript of the digitally recorded hearing will be transmitted to the State District Court by the Appeals Board staff or NDCS Legal Division within 30 days after the service of the summons in an appeal under the APA absent a court ordered extension of time. The Assistant Attorney General assigned to the appeal will be notified promptly by the Appeals Board staff or NDCS Legal Division of any need for an extension of these time limits so that additional time may be requested from the court.⁷⁸

EXCULPATORY EVIDENCE

If exculpatory evidence is discovered after the disciplinary and appeal process, the incarcerated individual shall submit an Inmate Interview Request to the Warden to request further review of the misconduct report and sanctions imposed. The incarcerated individual shall provide proof of the exculpatory evidence. The Warden will review this request along with the submitted evidence to determine if the misconduct report and sanctions imposed should remain in place, modified, or dismissed. The Warden shall document their decision and provide notice to the incarcerated individual within 30 days of the corresponding Inmate Interview Request.

RECORDS

If the Chairperson, Warden or an appellate body dismisses or reverses all charges on a misconduct report, all records of the disciplinary action, regardless of disposition, shall be removed from the incarcerated individual's misconduct report history; however, NDCS may preserve such records to be used for statistical/research purposes in a location which is separate and apart from the incarcerated individual's misconduct report history. When an incarcerated individual is found guilty of only some of the rule violations he or she was originally charged with, the disciplinary record must show which charges were dismissed. This provision includes misconduct reports dismissed at IDH, by the Warden/designee, or overturned on appeal by the NDCS Appeals Board, the District Court, Court of Appeals, or Supreme Court.⁷⁹

⁷⁷ NDCS Policy 217.01.

⁷⁸ NDCS Policy 217.01.

⁷⁹NDCS Policy 217.01.



Jim Pillen, Governor

September 6, 2024

Julie L. Rogers, Public Counsel/Ombudsman
State Capitol
P.O. Box 94604
Lincoln, Nebraska 68509

RE: Investigatory Report of Nebraska Department of Correctional Services (NDCS) Disciplinary Process
Nebraska Ombudsman's Office (Office of Public Counsel), May 2024

Dear Ms. Rogers:

We greatly appreciated the opportunity to meet with you and Assistant Public Counsel Sarah Amsberry on September 5, 2024, to discuss the above referenced investigatory report. A summary of our responses to the specific recommendations shared at our meeting are as follows:

1. Adopt a new disciplinary policy for major rule violations.

We do not support adopting a new disciplinary policy for major rule violations. Our current policy meets all statutory requirements and complies with all relevant standards established by the American Correctional Association (ACA). However, we agree that revisions to our current disciplinary policy would be beneficial to provide better understanding, clarity, and more clearly articulate expectations.

As detailed in the report, the initial processing of disciplinary reports is the same for both major (Institutional Disciplinary Committee) and minor (Unit Disciplinary Committee) rule infractions. Priority will be given to address Inmate Disciplinary Committee processes (IDC/major rule violations) as well as those applicable to Unit Disciplinary process (UDC/minor rule violations). Revisions will include, but will not be limited to, further clarifying the duties for the various disciplinary process team member roles, reviewing/establishing training specific to each of these roles, instituting a consistent process to ensure appropriate notification and due process to incarcerated individuals throughout the process, and establishing a systematic approach to evidence handling procedures. As policy revisions are made, orientation materials provided to the inmate population will be modified accordingly.

As provided in Neb. Rev. Stat. § 83-4,122(1) and Title 68 Neb. Admin. Code, Chapter 6, § 007, to the extent possible, a person representing the treatment or counseling staff of the facility shall participate as a member

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of the facility disciplinary committees. We agree that increased participation of clinical team members in specific situations would be a best practice. To utilize clinicians' time most effectively, we will explore alternative methods for treatment and counseling staff to provide input into disciplinary decisions when warranted in lieu of having them physically present during disciplinary hearings.

We do not support establishing a process for exculpatory evidence and/or new information after final disposition (appeal) of an inmate disciplinary report. We note that judicial review of disciplinary cases which involve the loss of good-time credit is available in accordance with the Administrative Procedure Act pursuant to Neb. Rev. Stat. § 83-4,123; a court may affirm, reverse or modify the decision of the agency or remand the case for further proceedings under Neb. Rev. Stat. § 84-917(5)(a); and, if the court determines the interests of justice would be served by the resolution of any other issue not raised before the agency, the court may remand the case to the agency for further proceedings under Neb. Rev. Stat. § 84-917(5)(b). However, we do understand that there may be exigent circumstances that would warrant further review of a final disposition by the agency absent judicial review. While we do have informal processes available to accomplish this, we will consider potential solutions that could be formalized during the Policy review process.

In addition, implementation of an internal audit process will be considered to ensure fidelity of the inmate disciplinary process.

2. Review the UDC regulations, policy, and practice for process improvements.

We agree that process improvements specific to UDC (minor rule violations) will be considered similar to that described for IDC.

3. Designate a spacious, equipped, and secure room at each facility to hold Principle and Institutional Disciplinary Hearings.

We agree it is necessary to provide adequate space for disciplinary hearings to ensure the safety of all as well as the confidentiality of disciplinary matters. Wardens have been tasked to evaluate current spaces utilized for disciplinary hearings and make modifications and/or adjustments as needed.

4. Create specific forms for the disciplinary process.

We do not agree that there is a need to create specific disciplinary process forms. Current forms exist for the disciplinary process that meet all statutory and policy requirements and comply with relevant ACA standards. However, we agree that revisions to the established forms will be considered as part of the overall process improvement review.

5. Digitize all forms for the incarcerated individuals to submit electronically.

We agree that this would be ideal; however, as we currently have no mechanism for incarcerated individuals to submit forms electronically this is not a viable option at this time. NDCS is currently working on the implementation of an electronic grievance process with our contract provider (ViaPath). Once this process is complete, it is anticipated that we will implement an electronic process for Inmate Interview Request

forms. Following this, consideration will be given to other processes that would benefit from electronic form submission.

As shared during our meeting, extensive revisions to policy and practice will require input and expertise from a variety of team members across the agency and will be a time intensive project. Ms. Amsberry's comprehensive report will certainly serve to guide this effort. In the spirit of continuing a cooperative working relationship with you and your team, and with respect to the importance of the fidelity of the disciplinary process, we will develop a way to keep you and Ms. Amsberry updated on our progress.

Again, thank you for the opportunity to discuss the report and recommendations. If concerns specific the disciplinary process arise in the future, please do not hesitate to share that information with us so that we can also consider those during the review process.

Sincerely,



Diane Sabatka-Rine
Assistant Director

c: Rob Jeffreys, NDCS Director
Sarah Amsberry, Assistant Public Counsel/Ombudsman
Robert Madsen, NDCS Deputy Director-Prison Operations

Ryan Gilbride, NDCS General Counsel