

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
NO. 85-71

CARL HOFFER et al,
Plaintiffs

v.

MICHAEL V. FAIR,
COMMISSIONER OF CORRECTION
Defendant

^{#11}
MEMORANDUM, ORDER AND JUDGMENT

I. INTRODUCTION

By their amended complaint the inmates in the Departmental Segregation Unit (DSU) at M.C.I. Cedar Junction and in the M.C.I. Norfolk DSU request declaratory and injunctive relief regarding conditions in those units and the procedures by which they are placed and held therein. The complaint was later further amended to add "additional statutory grounds."

I referred the matter to Andrew R. Linscott, Esquire, as Master and directed that any amended complaint be filed by April 15, 1986. On September 9, 1986 the Master's Report regarding fire safety was confirmed and adopted and the defendant's Proposed Fire Safety Plan was allowed. The Master later allowed a motion to amend the Complaint and substitute named plaintiffs and allowed a motion for class certification ("all persons who are or may in the future be designated by the . . . commissioner . . . as . . . (DSU) prisoners or housed in the DSUs at M.C.I. Cedar Junction or MCI Norfolk.")).

The Master filed his Final Report on July 16, 1987 and allowed the parties' motion for a period of time, up to and including September 30, 1987, in which to file supplemental briefs in response to the Final Report. The parties were later advised by letter that they had until that date to file objections to the Report. On September 28th I allowed a joint motion to enlarge the time for filing "responses

and objections" until October 14th. On that day the plaintiffs filed a motion to amend the complaint with claims for compensatory and punitive damages, requesting partial summary judgment on the equitable claims and remand for resolution of the damage claims. They also filed a "Memorandum Regarding the Master's Final Report." The Commissioner filed "Objections to Certain Findings of the Final Report of the Special Master and Request for Additional Findings." The Plaintiffs then filed a Motion to Strike the Affidavit of Michael T. Maloney which was attached to the Commissioner's Objections.

On November 10th I held a hearing on the Master's Report and requested that briefs be filed on December 1st.

Thus, I have before me, in addition to the Amended Complaint (as amended), the Master's Final Report, the Plaintiff's Motion to Amend with claims for damages, the Plaintiffs' Memorandum Regarding the Master's Final Report, the Plaintiffs' Motion to Strike the Mahoney Affidavit; and the Commissioner's Objections and Request.

II. THE MASTER'S REPORT

I summarize the Master's Subsidiary Findings which include the following:

The plaintiffs are or recently have been confined to segregation and they are representative of a class of prisoners at Cedar Junction.

Cedar Junction has 60 cells in the segregation unit (30 in the west wing and 30 in the east wing) and Norfolk has 30 cells in the segregation unit. Segregation is the highest level of security.

The Master considered the Regulations in Exhibit 1 to be the most important exhibit because they governed the placement, supervision, and release of a person in segregation. (However, the Regulations before the Master - 103 CMR 420 and 421, dated 1/1/78 have been supplanted by revised versions - 103 CMR 420 dated 7/10/87 and 103 CMR 421 dated 12/31/86).

All prisoners are classified and classification is reviewed every 90 days. The Commissioner has the final word on who is placed in and relieved from segregation. In 1986 the disciplinary boards recommended 121 Cedar Junction inmates for consideration for placement in segregation (after having made findings of the commission of specific punishable offenses). The Superintendent recommended 8.

The notice for classification meetings and for reclassification meetings does not contain a recital of Regulations 420.13 and 421.08 where applicable; or any indication of how an inmate or attorney may obtain a postponement. The notice also lacks a specific statement of the reason for the meeting.

The initial meeting is to decide whether an inmate referred by a disciplinary board or by the Superintendent is a substantial threat to the safety of others, poses a substantial threat of damaging or destroying property, or poses a substantial threat of interrupting the operation of the prison.

The case worker does little to assist the inmate before or during the meeting; tape recording of the meetings is rare; witnesses are extremely rare; and the

case worker meets with the board just before the meeting starts and this is not provided for in the Regulations. The board sends its recommendations to the Superintendent who passes on them and then forwards them to the Commissioner, although this is not provided for in the Regulations.

Most meetings regarding placement in segregation are perfunctory and there is a lack of a semblance of fairness. The Master adopted as true the testimony of attorney Patricia Garin who testified that the notice her client received referred to two Departmental Orders, but she was not informed of the substance of those Orders or of any other procedure which would be followed at the meeting and that she was not able to determine what the Orders contained. She testified that at the meeting she asked the chairperson for a copy of the Orders and was told that it was her responsibility to obtain them. Attorney Garin testified that she was not given any notice that the meeting would be conducted pursuant to any procedures other than those referred to in the Orders. She said that she spoke with her client's case worker who declined to discuss the case with her, would not let her see her report, and indicated that she was not allowed as a matter of policy to discuss her recommendations with anyone prior to the hearing. She was allowed to see her client's file on the morning of the meeting, but it did not contain any material dated after February of 1985 (the meeting was held in June of 1986). The case worker told Attorney Garin that she was not aware of any information that was more current. The case worker also declined to discuss the case when the attorney asked what the important issues would be, what might prevent her client from being placed in the general population, and what kind of things would be relevant to his being placed in the DSU. Attorney Garin also asked to have her client's case workers (most recent and current) attend the meeting as witnesses and she was referred to the Deputy Superintendent who told her that witnesses are not called at DSU meetings as a matter of policy. During the meeting Attorney Garin asked to have the prisoner's current case worker, who was present, as a witness and she was told that the case worker (from whom the board had already received information) would not be allowed to make any statements and that the attorney would not be allowed to question her. The case worker had met with the board for about twenty minutes before the meeting began. The attorney's request to tape record the proceeding was denied and she

was told that the denial was a matter of policy. She was also told that as a matter of policy counsel is not allowed to question the client. The board asked four to six questions and then Attorney Garin was allowed to make a statement, but the client was not. The board gave its decision orally and the Commissioner provided a written decision about a month later. The two months the prisoner had spent in Awaiting Action status at Cedar Junction were credited to the two years he was to spend in the DSU, but not the eleven months he had spent in that status at Norfolk. This was based on the similarity of conditions between Cedar Junction DSU and Awaiting Action status.

Attorney Garin later attended the initial 90 day review meeting regarding her client. The notice of that meeting was essentially the same as the first notice. She was not informed about the issues which would be considered and was not allowed to tape record the hearing. However, the (different) case worker did say what his recommendation would be and that he did not see why her client was in the DSU. Again, the board and the case worker met separately before the meeting officially began. Attorney Garin's requests to question the case worker and for a summary of what the case worker had said were denied. The board's decision was the same as that from the first meeting. The board also stated that it did not have the power to reduce the time by more than six months. Attorney Garin received the Commissioner's form about a month after the meeting.

An inmate waiting for an initial hearing is confined in the Awaiting Action area which is upstairs in the West Wing. Inmates there need not wear the jumpsuit required of those downstairs in the DSU and may have their lights on two hours longer per day than may those in the DSU. Time spent in Awaiting Action is credited to any time assigned for a DSU sentence.

Inmates in segregation usually pass from the West Wing to the East Wing and some go to Phase II at Norfolk. Those in the West Wing downstairs are the greatest security risks and are the most carefully guarded. Services, such as education, counselling, psychiatric therapy and exercise are offered on a one-on-one basis. Those in the East Wing downstairs have small group education sessions, counseling, psychiatric therapy and exercise opportunities. The authorities encourage inmates to go from the West to the

East wing. All inmates in segregation eat in their cells. The privileges of all inmates in segregation are narrow.

Those prisoners in segregation may include inmates who have committed murder in prison, who have committed assault and battery (with or without weapons) on inmates and/or staff, who have been involved in prison riots, possessed guns or explosives, taken hostages, or escaped.

Those prisoners held in the DSU are permitted to exercise three times per week, not daily as required by the Regulations; there is no indoor exercise area for west wing prisoners; employment is not offered; and those in the west wing must wear a jumpsuit while out of their cells, except for exercise and court appearances (the requirement makes it more difficult to hide contraband and was begun in 1983 after an inmate in the west wing suffered from an overdose of drugs).

The Master determined that the most serious deviation from the law arises in the 90 day review process because of the Commissioner's philosophy that those reviews are primarily for an interchange with the inmates, not to decide if the inmate is ready to leave segregation. Projected release dates which are set at the initial hearing remain paramount; conditions required to be set at the 90 day review hearings are sometimes not put in writing; conditions are not always set at the second 90 day review hearing; the conditions usually include keeping the cell clean, remaining disciplinary report free, receiving counseling, and painting the cell as required; and the worthwhile Phase II program at Norfolk is frequently delayed to near the end of the projected release date.

The Master considered it to be understandable that the Commissioner might feel that an inmate who had complied with the conditions for a period of 180 days was not, on that basis alone, ready to reenter the general population; but stated that the Regulation did not support such an interpretation.

In his "General Findings" the Master stated: "...if the

Regulations were administered as written, and a little more use of discretion at hearings was forthcoming, all phases of placement in segregation at Cedar Junction would meet any and all constitutional requirements."

The Master also presented "Proposed Rulings" which include the following:

Pre-hearing detainment on the upper level of the West Wing does not violate any constitutional rights;

An inmate should be present throughout the hearing, except as specifically provided for in 103 CMR 420.13 (h) which pertains to the presentation of information, other than information from an informant (which is considered to be confidential) such as a psychiatric report. (That provision of the Regulation dated 1/1/78 does not appear in the version of 7/10/87.)

The jumpsuit requirement for the inmates in the lower West Wing is neither unreasonable nor arbitrary.

The Regulation concerning 90 day reviews should be administered as written.

Programs for segregated inmates should provide for employment wherever possible.

Exercise should be in compliance with the Regulations (103 CMR 421.10 (2)(c) requires a daily exercise and recreation period of at least one hour in the unit or outdoors or at another designated place). Indoor exercise should be available for lower West Wing inmates.

Notices should contain: a verbatim recital of 103 CMR 420.13 and 421.07 and .08 which govern proceedings for reclassification to a higher custody status, transfers to a DSU, and review of DSU status (the 103 CMR 420 dated 7/10/87 provides less information.); information about obtaining postponements of proceedings; and the specific reason for the proceeding.

Tape recording equipment should be available at

Cedar Junction.

The Superintendent at Cedar Junction should not be involved in any way in reviewing the recommendations of the board concerning placement and retention in segregation.

The 90 day reviews as presently administered violate 103 CMR 421.08 which govern review of DSU status.

I have reviewed the Master's Final Report, the transcript of the hearings before the Master, Plaintiffs' Memorandum Regarding the Master's Final Report, and Defendant's Objections and Request for Additional Findings. The subsidiary finding appearing on page five stating that: "In 1986 the Superintendent referred only 8 prisoners to the Board." is not warranted by the evidence. Commissioner Fair testified on February 25, 1987 that there were six "superintendent referrals to the DSU boards" in 1986 (Feb. 25, 1987, p. 50). In addition, I do not find testimony to support the statement ("b") on page seven that "No tape recording machinery is available at the prison for the prisoners' use at hearings." The remaining subsidiary findings are not clearly erroneous, mutually inconsistent, unwarranted by the evidence or otherwise tainted by error of law. Mass. R. Civ. P. 53(h)(1). These remaining subsidiary findings, therefore, are confirmed.

I do not adopt the Master's General Finding in which he stated that all phases of placement in segregation at Cedar Junction would meet any and all constitutional requirements if the regulations were administered as written and more

discretion were exercised at the hearings. For reasons set forth below, I conclude that the mandate of the Constitution of the Commonwealth would not be fulfilled.

In their Memorandum, the Plaintiffs supplement their comments about the Master's findings with requests for rulings regarding certain alleged violations of substantive and procedural due process; and concerning the placement of awaiting action prisoners, the wearing of jumpsuits, and conditions in the D.S.U.s. I discuss these issues below. The Commissioner presents objections to a "Proposed Ruling" regarding indoor exercise; to a general finding concerning administration of the regulations and their relationship to the nature and extent of the plaintiffs' due process rights; and to subsidiary findings that "most hearings for initial segregation are perfunctory." and that "there is a lack of a semblance of fairness." I focus on the first two below, but not the third because I have concluded, with the exceptions noted above, that the subsidiary findings are appropriately supported. The Commissioner also submitted nearly three hundred "Proposed Additional Findings", most of which pertain to the DSU Phase Program. Those proposed findings do not bear a sufficiently close relationship to the issues discussed below to warrant having the Master consider making additional findings.

III. REQUESTED RELIEF

In their Claims for Relief in their Amended Complaint, the plaintiffs assert that

1. The Commissioner's "placing of inmates in DSUs without prior disciplinary or classification hearings, without written findings, with legally insufficient written findings, and by findings not based upon reliable and credible evidence" violates their rights to due process under the Massachusetts Constitution", under G.L. c. 127, § 39 and c. 12, §§ 11H-11I, and under 103 CMR 420, 421, and 430.
2. The Commissioner's establishment of a system of "contract classification" governing confinement, retention, and release from the DSUs violates those same rights, statutes, and regulations, plus 103 CMR 464.
3. The failure to provide the plaintiffs with adequate opportunities for exercise and recreation "and with the other programs and services provided for by law" deprives them of "their rights to due process . . . and to be free from cruel or unusual punishments, in violation of article 26 of the Declaration of Rights"; 105 CMR 450.310, 103 CMR 421 and 464; and G.L. c. 12, §§ 11H and 11I.
4. The Commissioner's "clothing directives have deprived the plaintiffs of property and other rights without due process of law, in violation of articles 1, 10, and 12 of the . . . Declaration of Rights; violate plaintiffs' rights under article 26 . . ." and 105 CMR 450.301 "and unlawfully burden the plaintiffs' exercise of their rights under the Massachusetts Constitution, statutes, and regulations.

The plaintiffs later amended their amended complaint to allege that the "contract classification" system referred to above (see #2) violates their rights under G.L. c. 30A, §§ 2 and 5. They have also sought to amend their requests for relief to include reasonable compensatory and punitive

damages "in an unspecified amount". The plaintiffs subsequently filed a motion to strike an affidavit attached to the Commissioner's Objections.

In their Memorandum Regarding the Master's Final Report the plaintiffs request that the Court:

1) Declare that defendant has failed to provide plaintiffs with procedural due process.

2) Enjoin defendant from placing or retaining plaintiffs in DSU conditions absent compliance with the requirements of procedural due process at initial placement hearings and at thirty and ninety day review hearings, to wit:

a) Three days advance written notice of a DSU hearing, which notice shall include a description of the DSU board and its powers, a thorough description of the procedures to be followed at the hearing, and the substantive reason for the hearing.

b) Assistance of a case worker during all phases of the DSU process.

c) An opportunity to meet with a case worker prior to the hearing, at which time the case worker shall inform the prisoner of all information relevant to the hearing, and shall allow the prisoner to review permissible portions of his institutional file.

d) Assistance of a case worker at the DSU hearing, and representation by the caseworker where the prisoner is not otherwise represented.

e) Attendance during all phases of the DSU hearing, including the case worker's presentation of information, except as provided for in 103 CMR 420.13(g), (h).

f) The right to tape record the hearing, except where the board sets forth in writing the reason why tape recording the hearing would interfere with the process.

g) Written reasons for excluding a prisoner from portions of the hearing, in conformance with 103 CMR 420.1;13(g), (h).

h) The right to present staff and prisoner witnesses, except where the board sets forth in writing the reason why permitting a particular witness to attend the hearing would interfere with the process.

i) The right to testify with the aid of counsel at the hearing.

j) Oral notification of the complete substantive basis for the board's recommendations.

k) A written report from the deputy commissioner for classification and treatment setting forth the complete substantive basis for the board's recommendations.

l) A written decision from the commissioner setting forth the complete substantive basis for his decision.

3) Declare that defendant fails to provide plaintiffs with substantive due process.

4) Enjoin defendant from placing or retaining prisoners in DSU conditions absent the requirements of substantive due process, to wit:

a) the posing of a substantial threat to the safety of others; or

b) the posing of a substantial threat of damaging or destroying state property; or

c) the posing of a substantial threat of interrupting the operation of a state correctional facility if confined in any area of any state correctional institution; and

_____ d) provide that placement in the DSU for committing a specific punishable offense is subsequent to a valid finding of guilt with respect to the offense; and

e) the prisoner shall be immediately released if at any time he no longer requires confinement in the DSU;

5) Enjoin defendants from setting conditions of release which are unrelated to the substantive requirements for DSU confinement and which are not susceptible of being complied with within ninety days.

6) Enjoin defendant from setting projected release dates which are greater than ninety days.

7) Declare that 103 WAL 421 is not a valid regulation, and is in violation of G.L. c. 30A.

8) Enjoin defendant from enforcing 103 WAL 421.

9) Declare that confinement in the upper tier of

10 Block constitutes confinement to the DSU.

10) Enjoin defendant from placing prisoners in the upper tier of 10 Block absent compliance with the procedural and substantive requirements for placing and retaining a prisoner in the DSU.

11) Enjoin defendant from failing to provide prisoners in the DSU with at least one hour of exercise and recreation per day, said exercise to be provided outdoors if the weather permits, and otherwise to be provided indoors.

12) Declare that the jumpsuit requirement in the DSU is irrational and arbitrary as applied.

13) Enjoin defendants from enforcing a jumpsuit requirement on prisoners in the DSU, or, in the alternative, enjoin defendants from enforcing a jumpsuit requirement on prisoners in the DSU absent a showing of reasonable individualized cause.

IV. ADMINISTRATIVE SEGREGATION

Intent

In order to appropriately assess the requirements of statutory and constitutional law governing DSU placement, periodic reviews, conditions, and release from the units, it is essential to examine both the basis for and the essence of the confinement. Insight may be derived from scrutiny of a variety of sources.

When asked during cross-examination before the Master why people are placed in a DSU, the Commissioner responded:

"Because they committed offenses and they have demonstrated behavior and have evidence (sic) and other factors that I testified yesterday that would require them to be placed separate from the population so we could exercise additional controls over them." (Tr. Feb. 26, 1987, p. 8)

The Commissioner had testified that:

"Segregation classification means that due to severe acting out behavior or a severe aggressive behavior or severe escape attempt, an individual has demonstrated that they are unable or unwilling to conform to a lesser security environment and they, therefore, are required to be placed in an environment with a great deal of supervision and restriction."

(Tr. Feb. 25, 1987, pp. 16-17)

While explaining the difference between a segregation placement and a disciplinary sanction, Commissioner Fair testified:

"Well, the disciplinary sanction is a penalty for a specific behavior or misconduct and a segregation placement is a process through which an individual has demonstrated through past behaviors that they require

additional levels of supervision and security. So that it is a means of predicting future behavior based on past behavior and also a means of preventing serious misconduct in the future.

(Tr. Feb. 25, 1987, p. 17)

He described the DSU board's role in the initial classification as that of making a prediction, based on past behavior, of whether the individual will continue to be involved in negative behavior and could benefit from a more secure setting and increased supervision. (Tr. Feb. 25, 1987, p. 22). The Commissioner said that when making a final decision on DSU placement he looks to see if the person could benefit from the maximum supervision and maximum security set-up." (Tr. Feb. 25, 1987, p. 24).

Thus; the Department considers DSU placement to be a means of providing a greater measure of control over an inmate. DSU placement appears to be considered as one possible response to disciplinary infractions, but not as punishment for those infractions..

This conclusion is consistent with the directive of 103 CMR 421.07 that an inmate not be transferred to a DSU for committing a specific punishable offense unless a disciplinary board has already found him guilty of a specific offense and imposed a sanction, and the Commissioner has made a finding that the resident poses a substantial threat to the safety of others, of damaging or destroying property, or of interrupting the operation of the

facility if confined in the general population.

In addition, Dr. George Camp testified before the Master that in his opinion segregation is not punishment; it restricts movement and does not deprive an inmate of programs or services; that inmates are limited in their opportunities to go to programs and services, but they are not cut off from them. (Tr. March 3, 1987, pp. 88-89).

In summary, DSU placement is described in terms which indicate it is intended to provide increased supervision and control of selected inmates, not to discipline them. Although not expressed so clearly as it might be, DSU placement is presented as a supplement to and not a substitute for the disciplinary processes. Nevertheless, it is important to review not only the program's intent, but also its impact.

Impact

Consideration of some of the regulations which govern operation of the DSUs, and a comparison of regulations governing DSU transfer with those pertaining to disciplinary proceedings, yields a perspective on departmental segregation's impact on the inmates. It also contributes to a determination of what is required by statutory and constitutional law.

A DSU is an area for the confinement of an inmate "whose continued retention in the general population ... is detrimental to the program facility." 103 CMR

421.06(4), dated 12/31/86. The Commissioner testified that segregation is the highest level of security. (Tr. Feb. 25, 1987; p. 17). Transfer to a DSU is governed by 103 CMR 421.07 which provides:

(1) A resident may be transferred to a departmental segregation unit after a finding by the commissioner that the record of the resident or other reliable information indicates that:

- (a) The resident poses a substantial threat to the safety of others; or
- (b) The resident poses a substantial threat of damaging or destroying property; or
- (c) The resident poses a substantial threat of interrupting the operation of the state correctional facility if he is confined in the general population of any state correctional facility.

(2) Notwithstanding any rule or regulation of the department to the contrary, a resident shall not be transferred to a departmental segregation unit for committing a specific punishable offense unless a disciplinary board has found him guilty of such specific offense and imposed a sanction pursuant to 103 CMR 420.00 (Disciplinary Process, Rules and Regulations), and the commissioner has made a finding in accordance with 103 CMR 421.07(1). This shall be the case regardless of whether the specific punishable offense has been referred to outside law enforcement agencies for investigation and possible prosecution of the resident.

(3) Upon receipt of a request from a superintendent to the commissioner to transfer a resident to a departmental segregation unit, the rules set forth in 102 CMR 420.13(2) (Guidelines for the Operation of the Reclassification Process -- Intra-Facility and Interfacility), shall be followed in determining whether to authorize the transfer of the resident to such unit; except that 103 CMR 420.13(2)(c) shall not be applicable.

The Department's regulations for Segregation Units (103 CMR 421, 12/31/86) provide in Section .10 for the availability of medical and psychiatric services, for each inmate to receive at least two showers each week, for the sending of laundry at least weekly, for a daily exercise and recreation period of at least one hour within the unit or outdoors, for three meals each day, for visits, and for access to religious counseling or discussions and attendance at religious services within the unit or other designated

places. Procedures for correspondence, reading material, and canteen are to be the same as for those in the general population. Section .11 provides for counseling sessions to be arranged on request of the inmate; that education programs may include individual tutoring, correspondence courses, and participation, if appropriate, in education programs at other places; that employment programs may include working within the unit and, if appropriate, in other designated places; and that inmates may apply for furloughs.

The Master's subsidiary findings regarding life in the DSU which are summarized in Section II show the stark contrast between these stated goals and the reality of existence for an inmate incarcerated in the DSU. In addition, the regulations do not specifically permit participation in such activities as Correctional Industries, State School/Hospital Programs, Work Release, Education and Training Release, and Avocational programs (compare 103 CMR 455, 457, 464, 465, 477). The opportunity to participate in religious services is not so broad as for the general population (see 103 CMR 471).

The disciplinary proceeding regulation, 103 CMR 430.09 (3) (5/29/87), specifies that the following factors shall be considered by the disciplinary officer when designating an offense as a minor or a major matter: the threat to institutional security, ~~RECORD~~ **APPENDIX**, the extent of the

harm done, and mitigating circumstances. Those cases which involve little or no threat to the well-being of others, to property, or to the security of the institution are ordinarily designated as minor matters. 103 CMR 430.09(4). Thus, cases which would usually be designated as major matters involve factors similar to those specified in 103 CMR 421.07(1) as warranting transfer to a DSU.

Major sanctions under the disciplinary proceeding regulation, 103 CMR 430.25 (3), include: isolation for a specified time not to exceed fifteen days for one offense and no more than thirty days for all violations arising out of one incident; recommended good time forfeiture; and all minor sanctions (reprimand, loss of privileges, restrictions, restitution, extra work). A purported regulation which provides the estimated time of DSU placement based on the severity of the offense (103 WAL 421) specifies time periods ranging from six months for "threatening" or "interfering with a correction officer" to ten years for murder (the plaintiffs' challenge to the regulation is discussed below). Thus, it is possible that the time an inmate might spend in a DSU may greatly exceed the length of time provided in a disciplinary sanction. ¹✓

The nature of the time an inmate spends in the DSU, while perhaps not quite so severe as that served in isolation, is characterized by significant restrictions. As

¹For example, in one case the disciplinary board imposed a

a result, an inmate who is disciplined for a major matter might find the impact of the related time he spends in a DSU to be more harsh than the impact of the major sanction. Thus, while the intent of the DSU program may be to achieve a greater degree of supervision and control, its impact is usually more severe than the underlying disciplinary sanction. In those instances, at least, confinement in a DSU may be perceived as being an extension of the disciplinary process.

Furthermore, an inmate faced with a disciplinary proceeding in a major matter has a measure of procedural protection which exceeds that available to one awaiting an initial DSU transfer hearing. For example, 103 CMR 430.11 (1) provides for the service of a request for representation and/or witness form and (2) entitles an inmate to a continuance for good cause; 430.12 (1) specifically provides for representation by a law student or an attorney, (2) affords an inmate unable to obtain representation the assistance of a staff member in certain circumstances, and (3) states that an inmate "shall" be permitted to record the hearing; 430.13 (2) permits an inmate to challenge the impartiality of a board member; 430.14 (4) indicates that an inmate may call and question witnesses or present other evidence subject to

sanction of fifteen days isolation and recommended DSU placement for two years and the Commissioner approved the recommendation. Weichel v. Commissioner of Correction, 25 Mass. App. Ct. 957 (1988).

certain restrictions and (5) provides for the attendance of the reporting staff person, subject to certain limitations; 430.15 (1) requires that certain findings regarding an informant and his information be made and put on the record; 430.16 (1) requires that findings be based on substantial evidence; 430.17 (1) contains specific requirements of the written decision; and 430.18 and 430.19 permit a more flexible and detailed review process. These protections are not available in either 103 CMR 420.13 dated 1/1/78 or in any subsequent regulation applicable to DSU transfers. Although the protections in 103 CMR 430 are not more extensive in all respects, they do illustrate that it is possible that one may have less procedural protection although confronted with the possibility of serving a lengthy period in a highly restrictive DSU.

Thus, although the theory underlying departmental segregation is expressed in terms of control and administration, the reality usually is experienced as restriction and discipline. This demonstrable duality significantly shapes the decisions which follow. Consequently, Departmental segregation, with an impact which may well exceed that of a disciplinary proceeding, ought to be governed by procedures which require no less than that required in disciplinary proceedings.

V. DSU PLACEMENT AND REVIEW

Due Process

Although those imprisoned no longer have available many of the rights and privileges of the ordinary citizen, inmates may claim the protections of the Due Process Clause and may not be deprived of life, liberty, or property without due process of law. See Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974). However, these rights are subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. Id. at 556. The touchstone of due process lies in the protection of the individual—against arbitrary action by government. Id.

The United States Supreme Court has stated that liberty interests protected by the Fourteenth Amendment may arise from two sources - the Due Process Clause itself and the laws of the States. Hewitt v. Helms, 459 U.S. 215, 223-227 (1976). The Court rejected the respondent's argument that the Due Process Clause created an interest in being confined to a general population cell instead of in the more austere and restrictive administrative segregation quarters. Id. at 466-467. The Court also considered the fact that Pennsylvania had used language of a mandatory character, requiring that certain procedures "'shall', 'will', or 'must' be employed," and providing that confinement in administrative segregation would not occur in the absence of specified substantive predicates such as "the need for

control,' or 'the threat of a serious disturbance'". Id. at 471-472. The Court was persuaded that the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demanded a conclusion that the State had created a protected liberty interest. Id. at 471-472.

This inquiry, however, need not focus on whether the inmates have a liberty interest arising from the federal Due Process Clause or one created by the form of the Commonwealth's relevant statutes and regulations. ² Instead, it is appropriate to consider the nature and commands of the Constitution of the Commonwealth.

The provisions comparable to the Due Process Clause of the Federal Constitution are Part II, c. 1, § 1, art. 4, of the Massachusetts Constitution, and arts. 1, 10 and 12 of its Declaration of Rights. See Pinnick v. Cleary, 360 Mass. 1, 14 n. 8 (1971). Due Process is a protean concept which imports different procedures in different situations or circumstances. See Haverhill Manor, Inc. v. Commissioner of Public Welfare, 368 Mass. 15, 24 (1975). In some circumstances our guarantee of due process has impelled us to go further than the U.S. Supreme Court. See Moe v. Secretary of Administration & Finance, 382 Mass. 629, 649 (1981), and cases cited. Article 12 "is one of the great landmarks of human freedom It is an additional

✓ Nevertheless, I note that 103 CMR 421.07 was determined in

shield to protect rights declared in art. 10.'" See Pugliese v. Commonwealth, 335 Mass. 471, 424 (1957), emphasis added. The concept that each person possesses a measure of liberty which is recognized by, rather than created by, the Constitution of the Commonwealth is expressed in art. 10 which states, in part: "Each individual . . . has a right to be protected . . . in the enjoyment of his . . . liberty" In addition, art. 1 announces that "All people . . . have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties" Chief Justice Shaw wrote that the portion of art. 12 which specifies that no person shall be deprived of his liberty "but by . . . the law of the land" is to be considered "as the adoption of one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright." Jones v. Robbins, 8 Gray 329, 342 (1857). This inquiry, therefore, may focus immediately on determining how the Commonwealth is obligated to respect and protect that liberty which an inmate retains, rather than on whether the Commonwealth creates liberty.

The nature and extent of the reduction of liberty from Parenti v. Ponte, 727 F.2d 21, 25 (1984), to have created a liberty interest.

that experienced in the general population to that experienced in the DSUs is, as noted earlier, significant. The Master characterized the privileges of all segregated prisoners as being "narrow". The restrictions transcend mere physical restraint. Moreover, they are not one-time, but continuing.

This substantial diminution of liberty, coupled with the fact that the impact of DSU confinement may be more severe than that of a major disciplinary sanction, compels application of due process requirements under the Constitution of the Commonwealth (based on separate, adequate, and independent grounds) to DSU placement and review.

As a result, there is no need to follow the federal form of analysis which focuses on such questions as whether a statute contains mandatory language; creates an expectation; limits discretion; or establishes an entitlement. See, for example, the discussion in Board of Pardons v. Allen, 107 S.Ct. 2415 (1987). That approach has been criticized for reaching this paradoxical result:

"(W)here the legislature has limited a prison administrator's discretion, there will probably be four different types of safeguards against arbitrary decisions: the standards . . . , (related) administrative procedures . . . , judicial review . . . , and judicial consideration of whether the legislature's procedures are constitutionally sufficient. But where the legislature has provided no standards, neither may the courts. In such an instance, there may be no

standards, no procedures, and no judicial review. This is backwards; judicial protection of the right to fair treatment is most necessary where the legislature has provided none. ³✓

Thus, if the Supreme Judicial Court were to render the applicability of the Commonwealth's Constitution contingent upon whether certain steps had been taken to restrict administrative discretion, it would not serve as an incentive to the curtailing by the legislature or by administrators of that discretion.

Professor Herman also highlights the fact that having an "entrance requirement" that is geared to the wording of applicable legislation means that other relevant factors such as the significance of the interest that is involved, the impact of the decision on the individual, and the critical role that various procedures might play in the decision at issue are ignored. ⁴✓ She condemns this as an abdication of judicial responsibility and suggests that while it may or may not be the job of federal courts to monitor the fairness of state administrative proceedings, it definitely is the job of state courts. ⁵

The critique by Redish and Marshall also touches a central issue:

³✓Herman, "Prisoners and Due Process Litigation" in Prisoners and the Law 5-9 (Robbins Ed. 1987).

⁴✓Id. at 5-7.

⁵✓Id. at 5-8, 5-10,

"If all aspects of due process are open to legislative definition, then of what possible value is the constitutional guarantee of due process The Bill of Rights and the Fourteenth Amendment both embody counter-majoritarian principles de-emphasizing legislative authority. But their unique role is forfeited if they hinge on that very legislature to define their scope. What need for a provision which merely dictates that legislative determinations must be obeyed? To understand due process of law in this manner is to write it out of the Constitution." ⁶✓

In addition, if the availability of due process protection were contingent upon the positive act of a majority, then some of those who might benefit from that protection, such as prisoners, might also frequently be unable to generate the support of a majority.

Our application of due process is guided by an _____ understanding that liberty is neither solely created by the state nor only extended by a transient majority. ⁷✓

Determining the Process Due

In Tedford v. Massachusetts Housing Finance Agency, 390 Mass. 688, 698 (1984), the Court considered the plaintiffs' contention that they were entitled, under art. 10 of the Declaration of Rights, to an adjudicatory hearing before their rents were raised. The Court used the analysis of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), to resolve the plaintiffs' state constitutional

⁶Redish and Marshall, Adjudicatory Independence and the Values of Procedural Due Process, 95 Yale L.J. 455, 467-468 (1986).

⁷This view also alleviates a problem pointed out by Chief Justice Rehnquist in Hewitt v. Helms (459 U.S. 460, 471 [1983]):

claim. Id. n. 11 ^{8/} Citing Mathews v. Eldridge, 424 U.S. 319 (1976), the Court stated that in determining what process is due it would balance the competing interests of the tenants and the MHFA. Id. at 698. The Mathews Court had said that its prior decisions indicated that identification of the requirements of due process generally required consideration of three factors: the private interest that would be affected; the risk of an erroneous deprivation of such interest through the procedures used and the probable value of any additional safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens that the proposed requirements would entail. Mathews v. Eldridge, supra at 335.

Application of this federal formula has also been significantly criticized. It has been asserted that the U.S. Supreme Court entered a "'mechanical' due process phase" with its Mathews decision; that this ignores any "'noninstrumental'" interests that the individual or society may have in procedure for procedure's sake; and that it releases courts of the burden of finding that a governmental

"It would be ironic to hold that when a State embarks on such desirable experimentation it . . . opens the door to scrutiny by the federal courts, while states that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause."

^{8/}The court did not hold that it was required to employ that

interest overrides a clear constitutional safeguard.⁹

Professor Mashaw warns that weighing the benefits of increased accuracy against the costs of procedural formality permits general utility to be the measure of Bill of Rights protections; but he contends that the possibility that the general good will overwhelm individual rights describes the need for those protections.¹⁰ He would not, however, reject the utility - maximizing approach, but would encourage focusing on the extent to which a utilitarian approach could yield a justification for individual rights.¹¹ Utilitarian interest-balancing also has been criticized for transforming the right to due process from a constitutional limit on the power of government into merely an institutional check on whether the state's procedural policies promote the general welfare.¹² It is also conceivable that an analysis which focuses on increased costs, delayed decisions and prevention of time-consuming and frivolous litigation, when coupled with the requirement that the individual's interest must outweigh that of the government, may render the individual's entitlement to

analysis, nor do I make such a determination in this proceeding.

⁹Redish and Marshall, supra note 6, at 471-473.

¹⁰Mashaw, Administrative Due Process: The Quest for A Dignitary Theory, 61 B.U. L. Rev. 885, 898 (1981).

¹¹Id. at 910.

¹²Note, Specifying the Procedures Required By Due Process:

procedural safeguards dependent on a showing that it is in the community's best interests that the procedure be accorded. ^{13/}

It is, therefore, appropriate to consider other factors which may be used to inform an application of the Mathews test. This is not an all-inclusive list because relevant factors will vary according to the circumstances. First of all, there is extensive literature suggesting that the effects of the process on the participants, not just the rationality of the results, ought to be considered. ^{14/} A critical factor is said to be the degree to which the decisional processes preserve and enhance human dignity and self-respect. ^{15/} This is certainly essential, particularly for those who will be returning to society. Professor Mashaw suggests that dignitary values include:

equality - to assure equal respect and equal voice;
predictability, transparency, and rationality - to permit persons to engage in rational planning about their situations, to provide adequate notice of the issues and evidence and how the decisional process works, and to provide a guarantee (usually by explanation of the basis for

Toward Limits on the Use of Interest Balancing, 88 Harv. L. Rev. 1510, 1511 (1975).

^{13/}Id. at 1523-1524.

^{14/}Mashaw, supra note 10, at 886 notes 5-12.

^{15/}Id.

the decision) that the issues, evidence, and processes were meaningful to the outcome; participation - in a meaningful manner; and privacy. ^{16/} Procedure can serve instrumental goals, such as promoting more accurate decisions; intrinsic ones, such as promoting a sense of fair treatment; as well as rehabilitative ones. ^{17/} Judge Friendly once listed eleven possible constitutional requirements of a fair hearing: an unbiased tribunal, notice of the proposed action and grounds asserted for it, an opportunity to present reasons why the proposed action should not be taken, the right to call witnesses, knowledge of the evidence against the person, decisions based only on evidence presented, the right to counsel, the making of a record, a statement of reasons for the government's position, public attendance, and judicial review. ^{18/} These factors are appropriate guides to determining what is required, as is the observation that sound procedures may give the decision-maker a broader range of information, reveal honest mistakes, expose irrational decisions or impermissible reasons for decisions, promote the consistency of decisions, and inspire confidence that decisions are reached

^{16/}Id. at 899-906. See also Redish and Marshall, supra note 6, at 483-491.

^{17/}Herman, supra note 3, at 5-8 and n. 50.

^{18/}Searchinger, The Procedural Due Process Approach to Administrative Discretion, 95 Yale L.J. 1017, 1023-1024 n. 28 (1986).

fairly. ^{19/} Moreover, as Judge Easterbrook has pointed out, substance and procedure are intimately related; the procedures used can determine how much substance is achieved and by whom; and they can serve to measure how much the substantive elements are worth. ^{20/}

This background contributes to an understanding of what procedures are required here and why. Although certain procedures can contribute to the accuracy of the decision and the recognition of other values, any weighing process will be somewhat subjective. In addition, while it may be easy to recognize the administrative burden and fiscal costs of adopting particular procedures, it also may be difficult to calculate as clearly the benefits of those procedures. Nevertheless, a concept of liberty which is not so dependent on state creation and majority will, coupled with a view of due process which recognizes a broad range of interests, can generate a system in which it is more likely that issues will be explored in the best interests of society, the inmates and penal institutions.

^{19/} Comment, Entitlement, Enjoyment, and Due Process of Law, Duke L.J. vol. 1974, 89, 116.

^{20/} Easterbrook, Substance and Due Process, 1982 The Supreme Court Review 85, 112-113.

The Required Procedures

Transfer to a DSU is governed by 103 CMR 421.07 (12/31/86, set out in Section IV). Subsection (3) directs that the rules in "102 (sic) CMR 420.13(2) . . . be followed in determining" whether to transfer an inmate to a DSU. The version of that regulation dated 1/1/78 contained a detailed set of procedures for reclassification proceedings. However, 103 CMR 420.13 dated 7/10/87 merely provides:

Whenever an inmate has been approved for transfer through the appropriate classification process, he/she shall be transferred in accordance with 103 DOC 461. Inmate Transfer Policy. Nothing in these regulations is intended to limit, in any way, the discretion of the Commissioner to transfer an inmate pursuant to M.G.L. c. 127, S. 97A, M.G.L. c. 125, Appendix A, or other applicable laws.

The Inmate Transfer Policy of 103 DOC 461 defines a transfer as "The act of moving an inmate from one correctional facility to another . . . within Massachusetts" 103 DOC 461.06(16). It does not specifically refer to a transfer to a DSU. However, 103 CMR 420.13 dated 7/10/87 cancels all previous regulations regarding inmate classification which are inconsistent. 103 CMR 420.03. Thus, if the version of 103 CMR 420.13 dated 1/1/78 is considered not to be inconsistent with that dated 7/10/87, then an extensive set of reclassification procedures may remain applicable to transfer to a DSU. Nevertheless, neither the present nor

the past regulations requires that range of procedures which due process under the Constitution of the Commonwealth demands for transfer to or retention in a DSU.

As a result, the Commissioner is ordered to respond within sixty days from the date of this order to the question whether the regulations now applicable to hearings before the disciplinary board (103 CMR 430.11 through 430.20, dated 5/29/87), and as modified to incorporate the features specified below, should govern proceedings which consider transfer to DSUs and to proceedings which review, every ninety days, the status of inmates in the DSUs. The proposed modifications to 103 CMR 430.11 through 430.20 should include (but not be limited to) provisions, as follows:

1. That written notice of the meeting be given to the inmate, and upon request to his representative, at least three days before the meeting.
2. That the notice contain a description of the board and its powers, the procedure to be followed at the meeting, the reason for the meeting, and the time and place for the meeting. The notice shall also inform the inmate of the information on which the board may rely so that the inmate may prepare to discuss that information.
3. That a case worker or case manager attend all such meetings and assist the inmate.
4. That the inmate have the right to discuss with a

- case manager and his representative all matters relevant to the meeting and that the case manager make available to the inmate or to his representative those portions of his correctional facility file that may be disclosed.
5. That the inmate be permitted to request that the board record the meeting and that the board then be required to do so.
 6. That the inmate be allowed to confront and cross-examine adverse witnesses when permitting him/her to do so would not be unduly hazardous to personal safety or institutional security. If the confrontation or cross-examination of any witness is denied the prisoner, a written statement of reasons shall be incorporated in the board's report.
 7. That the board explain in writing on the record why, if applicable, it suppressed evidence tending to impeach an informant's credibility.
 8. That the inmate be permitted to file a written statement of his objections to any recommendation of transfer to or retention in a DSU as part of the appeal process.
 9. That the appeal process be structured so as to involve the Deputy Commissioner for Classification and Treatment (or someone in a similar capacity) as in 103 CMR 420.13(m)(n) and (p), dated 1/1/78.
 10. That the board explain on the record why it excluded the inmate and/or his representative from any portion of the

hearing.

11. That the inmate be given oral notification by the board of its recommendation.
12. That the Commissioner give the inmate a written explanation of his decision.
13. That 103 CMR 430.11 through 430.20 be modified to delete inappropriate references, such as those to the "disciplinary board" (where used for DSU purposes, and to charges and punishment, as in 430.14(1-3)).

VI. DEPARTMENTAL SEGREGATION UNITS

Conditions

The court has had few opportunities to construe these statutes:

G.L. c. 127, § 32 -

The superintendents of the institutions under the supervision of the department of correction shall treat the prisoners with the kindness which their obedience, industry and good conduct merit.

G.L. c. 127, § 39 (in part) -

At the request of the superintendent of any correction institution of the commonwealth, the commissioner may authorize the transfer, for such period as he may determine, to a segregated unit within any correctional institution of the commonwealth, of any inmate whose continued retention in the general institution population is detrimental to the program of _____ the institution.

The court, however, has had an occasion to apply G.L. c. 127, § 32 to inmates held in protective custody, although not for disciplinary infractions. Blaney v. Commissioner of Correction, 374 Mass. 337 (1978). The purpose of § 32, the Court stated, is "to assure equal treatment, as far as may reasonably be, for prisoners who are not being disciplined." Id. at 341. The Court also indicated that "Protective custody inmates ordinarily should not be extended any less 'kindness' than the general population." Id. The Single Justice had "acknowledged that the status of protective custody inmates might require that their treatment be 'modified negatively' for reasons of special security." Id.

If DSU placement is not an integral component of the

institution's internal punishment process, but an aspect of administration and control, as the Commissioner testified, then it is appropriate to apply § 32 which the Court in Blaney stated is intended "to assure equal treatment, as far as may reasonably be, for prisoners who are not being disciplined." Id. The Single Justice whose judgment was affirmed in Blaney "acknowledged that the status of protective custody inmates might require that their treatment be 'modified negatively' for reasons of special security." Id. Similarly, the treatment of those in the DSUs may be "modified negatively" according to the basis for their placement in the DSU.

Thus, a fundamental issue is that of determining in what way(s) and to what extent the superintendents' obligation to "treat the prisoners with the kindness which their obedience, industry and good conduct merit" may be modified for those in the DSUs. There is no apparent basis for modifying conditions so that they are barely distinguishable from, or are substantially similar to, those imposed upon inmates being punished for disciplinary infractions. Moreover, the statutory language directs that the treatment bear a relationship to the conduct of the inmates. Thus, the length of time an inmate spends in the DSU is to be based, in significant part, upon the reason for the initial placement. However, a distinction may be made in the conditions of DSU confinement to whether the

inmate is placed there because he poses a substantial threat to the safety of others; a substantial threat of damaging or destroying property, or a substantial threat of interrupting the operation of the facility. To vary the treatment of prisoners within the DSUs according to the reason for their placement, as well as their conduct while there, is consistent with the intent of G.L. c. 127, § 32 and would not conflict with the Commissioner's expressed need to provide increased control. For example, an inmate who is placed in a DSU because of a finding by the Commissioner that he poses a substantial threat of damaging or destroying property need not necessarily be subjected to the same restrictions on activities and privileges as one who is found to pose a substantial threat to the safety of others. In addition, the Commissioner could extend to all DSU inmates enhanced opportunities to demonstrate that they too are deserving of access to an increased range of activities and privileges during their DSU confinement. Thus, the Commissioner could offer enhanced levels of activities and privileges to be made available to inmates in the DSUs depending on the reason for their being in the DSU and their conduct therein. These levels could be used by the review boards as a means of encouraging the movement of inmates through phases of the DSUs, thus leading to return of the prisoner to the general population. These conclusions are consistent with the intent of G.L. c. 127, § 39 which

empowers the commissioner to authorize the transfer to a segregated unit, for such period as he may determine, of any inmate whose continued retention in the general population is detrimental to the program of the institution. That section also specifies that segregated units shall provide regular meals, fully furnished cells, limited recreational facilities, rights of visitation and communication by those properly authorized, and other privileges the commissioner establishes.

The Commissioner, therefore, is ordered to submit within sixty days of the date of this order, a plan or plans for a DSU program with an expanded range of activities and privileges reflecting the direction of G.L. c. 127, § 32; and to indicate whether 103 CMR 421.10(2) should be revised to provide for at least three showers per week not two; to specify that the inmates shall receive the same bedding supplies and laundry services as those in the general population; to specify that the inmates be provided with an opportunity to exercise outside of their cells at least one hour a day five days per week, outside if weather permits; for 103 CMR 421.10(3) to require that the meals served be the same as those served to the general population; and for 103 CMR 421.11(1) to emphasize rehabilitative programs. ²¹✓

²¹✓ See for example, Sample Guidelines for the Development of Policies and Procedures for Use in Adult Correctional Institutions and Adult Local Detention Facilities, pp. 240-241, American Correctional Association (1987);

Release

The preceding analysis of liberty and due process under the Massachusetts Constitution, coupled with the review of G.L. c. 127, §§ 32 and 39 and the Commissioner's testimony, provide both a background and a basis for an examination of the matter of release from a DSU. It may be difficult to determine when an inmate transferred to a DSU would no longer be a threat to the program of the institution if returned to the general population. Nevertheless, that consideration serves as a constraint on the Commissioner's determination of the length of time that an inmate should be confined in a DSU. G.L. c. 127, § 39. Moreover, that difficulty should not preclude the review process from generating a meaningful inquiry which yields a thoughtful recommendation to the Commissioner.

The procedure described in 103 CMR 421.08(2), dated 12/31/86, may provide protection from the type of arbitrary action proscribed by due process because the board, if it does not recommend release, is to recommend the date on which the inmate "shall begin to be released" if conditions recommended by the board are fulfilled by the inmate. The

Model Correctional Rules and Regulations, American Correctional Association (1979); Standards for Adult Local Detention Facilities, American Correctional Association (1981); Federal Standards for Prisons and Jails, U.S. Department of Justice (1980). See also Cooper v. Gwinn, 298 S.E.2d 781 (1981) (Court adopted definitions, prepared by American Correctional Assoc. and Commission on Accreditation for Corrections, as standards).

Commissioner is empowered to set a date and conditions, with reasons, for not approving the board's recommendations. Commissioner Fair testified that the ninety-day reviews are to assure that individuals do not get locked into the system; that it is a mechanism for providing an inmate "feedback on (his) . . . conduct and behavior and program involvement over the past ninety days and . . . an opportunity for a formal exchange of information and communication by the inmate to the administration." (Tr. Feb. 25, 1987 p. 33). When asked if the boards have in mind releasing the inmate from the DSU, the Commissioner responded: "Well, . . . that's certainly something that they may recommend, the primary function that they're performing is to review the progress that's been made . . . and to provide feedback" (Tr. Feb. 25, 1987 p. 34).

If the spirit of 103 CMR 421.08 is adhered to; if the procedures are supplemented by a modified version of the disciplinary proceeding regulations discussed above; and if the treatment of the DSU inmates is adjusted in accordance with the intent of G.L. c. 127, § 32, then the review process may become a more critical aspect of an inmate's being released from a DSU.

The American Correctional Association's Correctional Law Project reported that both court decisions and professional standards require periodic reviews of administrative

segregation status. ^{22/} Their model suggests review of the status of such inmates every thirty days and that the review consider the original reason for segregating an individual in light of his adjustment and behavior in the DSU. ^{23/} The commentary acknowledges that no court had attempted to definitively identify every conceivable criteria that could be applied, but it does suggest that such factors should reasonably relate to the purposes of segregation and provide guidance to the inmate. ^{24/} It lists as criteria which some courts had suggested were relevant:

1. The inmate's disciplinary record;
 2. The inmate's past criminal record;
 3. Prison records from past institutionalizations;
 4. Psychological make-up;
 5. Involvement in criminal activity while at the prison;
 6. Attitude toward authority;
 7. Institutional record on work assignments;
 8. Adjustment to institutional programs;
 9. Willingness and ability to house with other inmates;
 10. Record of violent reactions to stressful situations;
- and

^{22/} Model Correctional Rules and Regulations, American Correctional Association, 11 (1979).

^{23/} Id.

^{24/} Id.

11. Habitual conduct or language of a type expected to provoke or instigate stressful, perhaps violent situations. ²⁵✓

The use of specific criteria can enable a review board to probe below the surface of a label, such as "risk to security," and give an inmate an individualized examination which may then provide some guidance to the inmate and a more complete record for the Commissioner's consideration.

The Commissioner's authority to compel the transfer of an inmate to a segregated unit for such period as he may determine is, as noted, constrained by the requirement that the inmate's continued retention in the general population would be detrimental to the institution's program. G.L. c. 127, § 39. That authority is also restricted by a fundamental facet of due process - protection against arbitrary action by government. Neither the decision to place an inmate in a DSU nor a decision regarding the length of time he is to remain may ignore those factors.

The Commissioner is directed to submit within sixty days of the date of this order, a draft of regulations (to supplement those required in Section V) which would reflect the requirements of G.L. c. 127, §§ 32 and 39; the due process demands of the Constitution of the Commonwealth; and the consensus, if any, of those in the corrections

✓
291d.

profession regarding review and release of inmates in administrative segregation. The draft should include provision for:

1. frequent periodic reviews after transfer of an inmate to a DSU;
2. suggested factors for the board to consider;
3. a recommendation from the board, each time, for release of the inmate or of a date on which the inmate shall be released if the inmate meets the conditions set by the board;
4. approval by the Commissioner of the recommendation or a written explanation of his refusal accompanied by his designation of a release date and any related conditions, as well as a statement why the retention of the inmate is for administrative not disciplinary reasons;
5. release upon reaching the recommended date and meeting the specified conditions; and for
6. conditions which acknowledge that placement and retention are not disciplinary and thus are specifically related to the administrative reason for the placement in the DSU.

VII. OTHER ISSUES

Awaiting Action Status

The plaintiffs have asked that the Commissioner be enjoined from placing inmates in the upper tier of the West Wing or Block 10 in the absence of compliance with the requirements for placing and retaining an inmate in the DSU; and that the Court declare that such confinement constitutes confinement to the DSU.

The Master found that an inmate may be placed in this "awaiting action" area while waiting for an initial hearing; that it is really pre-hearing detention; that the inmate need not wear the jumpsuit and may have his lights on two hours longer than those in the DSU downstairs; and that the time is credited to whatever time he is assigned in segregation. The Master also pointed out that placement was governed by 103 CMR 420.13(2)(b, m).

In an opinion for the Court, Kenney v. Commissioner of Correction, 393 Mass. 28, 33-34 (1984), I wrote that the placement of an inmate in a DSU cell for the commission of specific disciplinary offenses before he had been found guilty, before sanctions had been imposed, and before the Commissioner had found that he posed a substantial threat to the institution could not be justified by a claim that he was in awaiting action status. It would follow, therefore, that placement in the awaiting action area under near-DSU conditions, rather than in a DSU cell, may not be a

substitute for placement in the DSU according to the applicable regulations. See Rovce v. Commissioner of Correction, 390 Mass. 425, 429-430 (1983).

Placement on awaiting action status is governed by 103 CMR 430.21(1) which provides:

At the discretion of the Superintendent or his/her designee, and subject to any applicable review requirements, an inmate who is under investigation for a possible disciplinary offense, or who has been charged with or found guilty of a disciplinary offense, may be placed on awaiting action status at the institution where he/she is then confined. Such status may include more restrictive ~~confinement~~ as deemed appropriate by the Superintendent or his/her designee.

It is understandable that more restrictive confinement may be appropriate in some instances and that the time required to complete an investigation and determine what action to take may vary.

The Commissioner is ordered to specify within sixty days from the date of this order those circumstances which would warrant "more restrictive confinement" and of what nature; and to indicate what circumstances might warrant holding an inmate in this status for a period in excess of fifteen days.

103 WAL 421

The plaintiffs also argue that 103 WAL 421 which specifies "Estimated Time of DSU Placement" for a variety of offenses such as murder, "assault on staff with weapon," creating a disturbance, and extortion is a regulation and was implemented without compliance with the requirements of G.L. c. 30A, § 2 and 5. The Master, in his "Proposed Rulings", described it as a "valid policy statement", a "guideline only", which does not violate G.L. c. 30A. I

have chosen to defer action on this issue pending a later examination of the operation of the periodic (ninety day) review of the status of DSU inmates. As I suggested at our November 1987 hearing, it may be unnecessary to reach that question if the periodic reviews are meaningful in the context of DSU release.

. Jumpsuits

I also defer action on the plaintiffs' request that I enjoin the defendants from enforcing the jumpsuit requirement on DSU inmates. I will wait for the Commissioner's response to the request to provide more specific material regarding treating DSU inmates according to the reason for their placement in the unit and their conduct therein.

VIII. OVERVIEW

This inquiry and the related actions are guided by a respect for the distinctive nature of liberty and due process under the Constitution of the Commonwealth; by a recognition of the fact that issues concerning dividing our prison population into classes have been with us at least since 1818 ^{26/} and by a hope that, to some extent, those who are employed in and those who are confined to our prisons have complementary, not competing objectives. In deferring action on some issues while soliciting further information and suggestions from the parties, I seek to avoid intruding on executive branch functions while encouraging the parties to join as partners in this enterprise wherever possible. At the same time, I am aware that "a discretionary assessment of a multiplicity of imponderables, entailing primarily what a man is and what he may become rather than simply what he has done." ^{27/} lies at the core of many of these issues.

^{26/}In 1818 the legislature decided that the prison population would be split into classes according to deportment, with each class to be lodged and employed separately. Hirsch, From Pillory to Penitentiary: The Rise of Criminal Incarceration in Massachusetts, 80 Mich. L. Rev. 1179, 1259 (1982).

^{27/}See, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 10 (1979).

ORDER AND JUDGMENT

It is hereby ordered and adjudged that:

1. The subsidiary findings of fact in the Master's Final Report, subject to the two exceptions noted in section II are adopted and confirmed.
2. The appointment of the Master is continued until further order of the Court.
3. The Commissioner is ordered to file with the Court and with counsel for the plaintiffs, monthly reports for the period April 1 through August 31, 1988 indicating:

The name, length of stay to date, and the reason for the placement of each inmate in awaiting action status during that month; and copies of all recommendations and decisions regarding initial DSU placement and those from all DSU ninety-day reviews. The parties should anticipate a hearing on this material in the fall of 1988.

4. The Commissioner is ordered to file with the Court, within sixty days of the date of this order:
 - a. A response to the question whether the regulations applicable to hearings before the disciplinary board (103 CMR 430.11 through 430.20, dated 5/29/87) should be modified at

least as proposed in section V, in order to generate a new set of regulations applicable to meetings on DSU placement and ninety day reviews.

- b. A plan for an enhanced DSU phase program characterized by differing levels of privileges and activities to be made available to inmates based on the reason for their placement in the DSU and their conduct therein.
- c. Comments on whether 103 CMR 421.10(2) should be revised to provide for at least three showers per week, to specify that the inmates shall receive the same bedding supplies and laundry services as those in the general population, to specify that the inmates be provided with an opportunity to exercise outside of their cells at least one hour a day five days per week, outside if weather permits; for 103 CMR 421.10(3) to require that the meals served be the same as those served to the general population; and for 103 CMR 421.11(1) to emphasize rehabilitative programs.
- d. A draft of regulations, in addition to those requested in "a", which would improve the

nature and functioning of the DSU periodic review process (as discussed in Section VI).

e. Identification of those factors which would warrant a "more restrictive" type of awaiting action confinement, the nature of that more restrictive awaiting action confinement, and the circumstances which would warrant holding an inmate in this status for a period in excess of fifteen days.

5. The plaintiffs may file with the Court within seventy-five days of the date of this order any comments on the material filed by the

Commissioner.

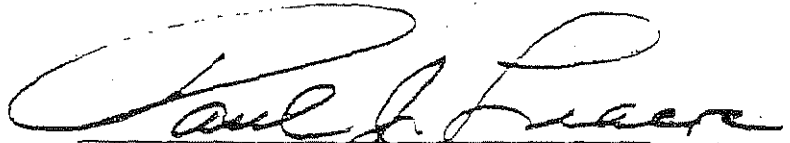
6. The plaintiffs' request to strike the affidavit of Michael T. Maloney is allowed.

7. The Commissioner's request for additional findings is denied.

8. Action on the plaintiffs' request to amend the complaint with claims for compensatory and punitive damages is deferred.

9. The Court retains full jurisdiction to supervise performance under this order, to modify the order, and to vacate it if, in the future, conditions should warrant such action. Any party, on

reasonable notice and for adequate cause, may
request modification of this order.

A handwritten signature in cursive script, appearing to read "Paul J. Liacos".

Paul J. Liacos
Associate Justice
Supreme Judicial Court

Entered: *March 3, 1988*