

MEMORANDUM

TO: DSU Administrator, DSU Board Members, DSU Inmates.
THROUGH: Nancy White, Associate Commissioner/General Counsel
FROM: Charlie Wyzanski
RE: Hoffer v. Fair, et al.
DATE: 12/20/1993

After a review of the procedures and operation of the DSU in the wake of the Court-approved DSU regulations, 103 CMR 430.00 et seq., a number of clarifications and changes are in order. Please make sure that the following are implemented:

1. Witnesses

Prior to the implementation of 103 CMR 421 (12/15/91), witnesses in DSU Board hearings were "extremely rare".¹ When a caseworker was present she was allowed to make a statement but was not subject to questioning by the inmate or his attorney.

Today, ~~the~~ caseworker must be present in all cases. The caseworker makes an oral presentation of the key issues for consideration and the inmate or his counsel is then allowed to confront and cross-examine the caseworker via the Chairman of the DSU Board. However, like other witnesses, caseworkers are not permitted to share information with the Board unless the inmate or his representative is present. Caseworkers are not permitted to join the Board during executive session or during deliberations.

On some occasions, the inmate seeks to call additional witnesses. The Court-approved regulations permit an inmate such additional witnesses unless such testimony would be hazardous

¹ Plaintiffs' Compliance Report at 4.

to personal safety or institutional security, irrelevant to placement or retention of the inmate in the DSU, or simply cumulative or repetitive. 103 CMR 421.13(2) (12/15/89).

We have properly excluded inmate witnesses where the inmate has failed to specify his purpose or indicated that he wishes to reargue the merits of the referring disciplinary ticket. There are some occasions, however, where the inmate simply wants to show that, regardless of whether he agrees with the disciplinary board findings, the circumstances of the disciplinary offense do not show that he is a threat to staff, inmates, property, or the safe operation of a DOC facility.

Such testimony would not be "cumulative or repetitive [because] contained in the record of a prior DSU or disciplinary hearing, or . . . capable of having been introduced at a disciplinary hearing." 103 CMR 421.13(2)(c) (12/15/89). Rather, it should be admissible evidence, so long as it is either qualified opinion or fact. Thus, to illustrate, an inmate who has been found guilty of assaulting another inmate in the chow hall may introduce evidence from his counselor that he has come to understand and control his temper, and from the reporting officer that the other inmate had precipitated the fight and been sanctioned more severely.

In those cases where considerations of security or cost make the attendance of a witness unworkable, an inmate should be permitted to introduce an affidavit from the witness. If the DSU Board, for its own purposes, subsequently decides the witness should be questioned in person, another hearing may be scheduled.

Of course, an inmate in segregated confinement will find it difficult if not impossible to obtain an affidavit. The DSU Chairman should undertake to transmit the inmate's request for an affidavit, making it clear that it must be returned by the hearing date as specified. In the case of staff, a staff evaluation form should be used. In the case of an inmate, a sample affidavit is attached for illustrative purposes.

In those instances where the Key Issue Sheet includes a recommendation or opinion of DOC staff who are not before the Board, the inmate may request and should be granted the opportunity to question that person or persons.

2. Conditions in DSU

The Court-approved regulations anticipate individualized consideration of "rehabilitation" of DSU inmates in order that they might return to general population. Although resources are as limited in DSU as in general population, all efforts should be made to tailor programming to the inmate's particular needs. Specifically, the regulations envision consideration of the normal range of program activities — employment, education, counseling, visitation, religious services, avocations, exercise, recreation and furloughs.

Every effort should be made to provide appropriate education and counseling. For example, personal tutoring may be provided, if necessary for an inmate to finish a B.A. already begun in general population.

Work and program opportunities should be provided whenever feasible, especially to assess whether an inmate is ready for less restrictive confinement, or as part of an inmate's transition to a less restrictive phase, such as in East Wing.

3. Statement of Reasons

Many of the DSU Hearing reports explain the decision to confine an inmate in the DSU with little more than a reference to the "seriousness of the referring incident" and the inmate's prior institutional history. This is an inadequate explanation, both to the inmate and to the Commissioner who has to decide whether to uphold the recommendation.

Thus, for example, if an assault was particularly severe, facts should be provided which explain it as such. If it is the inmate's third such assault or if a prior placement in the DSU did not improve the inmate's "adjustment", that too should be noted. In all cases, the statement of

reasons must be specific as to the individual prisoner, and must be included in the written record of the hearing and Commissioner's review.

4. Setting A Conditional Release Date

DSU Boards have more often than not recommended conditional release dates that go well beyond the next 90-day review.² Instead, at every 90-day review it is incumbent upon the reviewing DSU Board to reconsider the situation afresh. Unlike our new DDU, the DSU was not intended as punishment but rather as a management tool. It is obviously impossible to predict whether someone will remain a management problem for years at a stretch. We have a better chance at prediction if, at least, we re-evaluate the prisoner every 90 days.

To assure the inmate and others that the Board is looking at the inmate afresh at each 90-day review, the language of the Board's report should reflect it. Rather than speaking in terms of "reduction" of an earlier conditional release date, the Board, where appropriate, should simply set a new one. It should make note again of all the factors that still apply from the last hearing and specifically refer to any developments or changes in the inmate's conduct since then. In particular, the Board should specify those conditions which have and have not been met since the last hearing, and, if appropriate, why failure to meet certain conditions necessitates continued retention in the DSU, and which conditions should be met by the next review.

With the advent of the DDU, DSU referrals should ordinarily not exceed six (6) months. Serious misconduct will merit punishment terms in the DDU, and the DSU can be reserved for those who pose a management problem for largely unintentional reasons, i.e., mental disorders, self-destructive behavior, etc.

² We have successfully argued that the Commissioner of Correction is authorized to set a conditional release date "for such period as he may determine." Goodman v. Commissioner of Correction, No. 88-P-1025, pp. 4-5 (Mass. App. Ct. May 11, 1989); see G.L. c.127 sec.39; 103 CMR 420.

5. Awaiting Action

Awaiting Action status in DSU as elsewhere must, by definition, be temporary. In 1992, however, inmates were held in this status for an average of more than 35 days before a Disciplinary Report was issued and then an additional 55 days, on average, before a Hearing.

The delay in filing of a Disciplinary Report can be excused only in those cases where an investigation is being actively and diligently pursued. We cannot delay an inmate's release from AA status in the vague hope that a witness will come forward or some evidence surface.

From now on, an inmate must be released or a Disciplinary Report issued within 15 days after placement in restrictive confinement unless the Commissioner's Office is explicitly advised of the particular reasons that an investigation requires more time and the steps to be taken and by when. A sample of the form to be filled out for an extension is attached. The hearing must ordinarily be scheduled within 15 days of issuance of the disciplinary report.

Prisoners should not be held in a departmental segregation unit unless they have had a hearing which has approved such placement. A prisoner who is being held in awaiting action in restrictive confinement should receive a DSU hearing within 15 days of placement in such confinement. However, in extraordinary circumstances, a prisoner who has been placed in such confinement pending investigation of a disciplinary offense may receive a DSU hearing within 30 days.