

facility safety or goals. Such manner or form shall include, but shall not be limited to, the consideration of confidential reports. If the request for witness testimony is granted, the inmate or counsel substitute shall provide to the Disciplinary Hearing Officer or Adjustment Committee the proposed witness questions for review.

(c) Based upon the review as established in (b) above, the Disciplinary Hearing Officer or Adjustment Committee may take the testimony in a manner or form which is determined to be necessary to protect correctional facility/unit safety, security, orderly operation, or goals. The Disciplinary Hearing Officer or Adjustment Committee may disallow any questions that may:

1. Be unduly hazardous to the correctional facility/unit safety, security, orderly operation, or goals;
2. Be irrelevant;
3. Be repetitive;
4. Be meant to harass or retaliate;
5. Be for some malicious purpose; or
6. Reveal confidential information.

(d) The Disciplinary Hearing Officer or Adjustment Committee shall direct all remaining questions to the witness. The inmate or counsel substitute may request additional follow-up questions as set forth in this section.

(e) If the Disciplinary Hearing Officer or Adjustment Committee denies the request of the inmate or counsel substitute to call a witness(es), have access to certain information, or to ask certain questions, the reasons for the denial shall be specifically set forth on form 259A Adjudication of Disciplinary Report.

(f) The New Jersey Department of Corrections has a penological interest to ensure correctional facilities are operated in a safe, secure and orderly fashion; therefore, the Department prohibits all forms of violence among inmates. The Disciplinary Hearing Officer or Adjustment Committee will allow an inmate to raise self-defense to a prohibited act involving the use of force among inmates; however, the inmate claiming self-defense shall be responsible for presenting supporting evidence that shall include each of the following conditions:

1. The inmate was not the initial aggressor;
2. The inmate did not provoke the attacker;
3. The use of force was not by mutual agreement;
4. The use of force was used to defend against personal harm, not to defend property or honor;
5. The inmate had no reasonable opportunity or alternative to avoid the use of force, such as, by retreat or alerting correctional facility staff; and

6. Whether the force used by the inmate to respond to the attacker was reasonably necessary for self-defense and did not exceed the amount of force used against the inmate.

(g) When self-defense is raised by an inmate, the Disciplinary Hearing Officer or Adjustment Committee may consider any other condition or evidence that would cause the force that was used by the inmate to be deemed unreasonable, such as, but not limited to, any use of force that would interfere with or otherwise undermine the safe, secure or orderly operation of the correctional facility.

Amended by R.1996 d.237, effective May 20, 1996.

See: 28 N.J.R. 1464(a), 28 N.J.R. 2555(b).

In (a) inserted disciplinary preceding hearing.

Amended by R.2004 d.293, effective August 2, 2004.

See: 36 N.J.R. 1867(a), 36 N.J.R. 3551(a).

Rewrote the section.

Amended by R.2006 d.398, effective November 20, 2006.

See: 38 N.J.R. 3121(a), 38 N.J.R. 4867(a).

In the introductory paragraph of (a), inserted "(as this term is defined at N.J.A.C. 10A:4-1.3)".

Amended by R.2007 d.198, effective July 2, 2007.

See: 39 N.J.R. 834(b), 39 N.J.R. 2538(a).

In (e), inserted ", have access to certain information.", substituted "form 259A" for "the" following "on" and deleted "form" from the end; and added (f) and (g).

Case Notes

Denying prisoner accused of threatening corrections officer access to the testimony of an alleged eyewitness violated his statutory right to call witnesses at disciplinary hearing, and thus, to the extent eyewitness's written statement informed the findings and conclusion reached by the hearing examiner, those determinations were flawed. *Jones v. Department of Corrections*, 359 N.J.Super. 70, 819 A.2d 1.

Hearing officers must record their reasons for refusing to call witness. *McDonald v. Pinchak*, 139 N.J. 188, 652 A.2d 700 (1995).

Disciplinary proceeding would be remanded to Department of Correction to clarify and amplify record. *McDonald v. Pinchak*, 139 N.J. 188, 652 A.2d 700 (1995).

10A:4-9.14 Confrontation and cross-examination

(a) The opportunity for confrontation and cross-examination of the accuser(s) and/or the State's witness(es), if requested, shall be provided to the inmate or counsel substitute in such instances where the Disciplinary Hearing Officer or Adjustment Committee deems it necessary for an adequate presentation of the evidence, particularly when serious issues of credibility are involved.

(b) The Disciplinary Hearing Officer or Adjustment Committee may refuse confrontation and cross-examination when confrontation and cross-examination is determined by the Disciplinary Hearing Officer or Adjustment Committee to be:

1. Unduly hazardous to the correctional facility/unit safety, security, orderly operation, or goals;
2. Irrelevant;
3. Likely to produce repetitive testimony;
4. Harassing or retaliatory against another;

5. For some malicious purpose;
6. A request to call a witness who is a confidential informant;
7. A request to call a witness who is not employed or no longer employed by the Department of Corrections;
8. A request to call a witness who is not in the custody of the New Jersey Department of Corrections; or
9. A request to call an unavailable witness, as defined in this chapter. An unavailable witness may be asked to submit a written statement answering cross-examination questions in lieu of an in-person appearance.

(c) If the request for confrontation/cross-examination is granted, the inmate or counsel substitute shall provide proposed questions to the Disciplinary Hearing Officer or Adjustment Committee for review.

(d) Based upon the review as established in (c) above, the Disciplinary Hearing Officer or Adjustment Committee may take testimony in a manner or form which is determined to be necessary to protect correctional facility/unit safety, security, orderly operation, or goals. The Disciplinary Hearing Officer or Adjustment Committee may disallow any questions that may:

1. Be unduly hazardous to the correctional facility/unit safety, security, orderly operation, or goals;
2. Be irrelevant;
3. Be repetitive;
4. Be meant to harass or retaliate;
5. Be for some malicious purpose; or
6. Reveal confidential information.

(e) The Disciplinary Hearing Officer or Adjustment Committee shall direct all remaining questions to the accuser and/or the State's witness. The inmate or counsel substitute may request additional follow-up confrontation/cross-examination questions, based on the testimony given by the accuser and/or the State's witness, following the procedure as set forth in this section.

(f) If the Disciplinary Hearing Officer denies the request of the inmate or counsel substitute to call a witness(es) or ask certain cross-examination questions, the reasons for the denial shall be specifically set forth on Form 259A, Adjudication of Disciplinary Report.

Amended by R.2004 d.293, effective August 2, 2004.
See: 36 N.J.R. 1867(a), 36 N.J.R. 3551(a).

Rewrote the section.

Amended by R.2006 d.398, effective November 20, 2006.
See: 38 N.J.R. 3121(a), 38 N.J.R. 4867(a).

Section was "Confrontation and cross examination". In (a), substituted "cross-examination" for "cross examination"; in the introductory paragraph of (b), substituted "confrontation and cross-examination" for "said"; and in (f), substituted "Form 259A" for "the" and deleted "form" following "Report".

Petition for Rulemaking.
See: 40 N.J.R. 4360(a).

Case Notes

At disciplinary hearing, prisoner was entitled to confront and cross-examine corrections officer who accused prisoner of threatening him with bodily harm, and Department of Correction's violation of that right deprived prisoner of the fundamental opportunity to develop his defense by revealing weaknesses in accusation against him either on basis of accuser's credibility or otherwise; hearing officer's decision was based on a credibility finding favorable to corrections officer, which was a determination that could not be fairly reached without affording prisoner opportunity to address the credibility issue effectively. *Jones v. Department of Corrections*, 359 N.J.Super. 70, 819 A.2d 1.

Due process violated in disciplinary proceeding; information developed from confidential informants. *Hyson v. Neubert*, D.N.J.1993, 820 F.Supp. 184.

Where inmate was charged with a disciplinary infraction by virtue of conduct directed to or at a corrections officer and the matter turned on the credibility of the officer or inmate, the inmate, upon request, was entitled to confrontation and cross-examination of the officer, at least in the absence of any reasons that justify an exception as a matter of prison security. *Decker v. New Jersey Department of Corrections*, 331 N.J.Super. 353, 751 A.2d 1094 (N.J.Super. 2000).

In prison disciplinary hearing to address charges that inmate forged another inmate's signature on court documents, inmate was provided insufficient access to proofs against him, which included report of administrative investigation, handwriting samples of both inmates and handwriting and typeface analyses conducted by internal affairs unit, to satisfy requirements of due process. *Wakefield v. Pinchak*, 289 N.J.Super. 566, 674 A.2d 621 (A.D.1996).

Regulation provides more protection than Fourteenth Amendment. *McDonald v. Pinchak*, 139 N.J. 188, 652 A.2d 700 (1995).

Supreme Court would remand prison disciplinary proceeding. *McDonald v. Pinchak*, 139 N.J. 188, 652 A.2d 700 (1995).

Hearing officer in prison disciplinary proceeding has broad discretion to refuse a request for cross-examination and confrontation; denial of request for cross-examination of various individuals involved in drug-trafficking investigation was proper. *Negron v. Department of Corrections*, 220 N.J.Super. 425, 532 A.2d 735 (App.Div.1987).

10A:4-9.15 Evidence required

(a) A finding of guilt at a disciplinary hearing shall be based upon substantial evidence that the inmate has committed a prohibited act.

(b) Evidence relied upon in making a determination shall be specified on the Adjudication of Disciplinary Report form.

1. In any case in which the Disciplinary Hearing Officer or Adjustment Committee's decision of guilt is based on evidence which includes confidential information, adjudication shall contain:

i. A concise summary of the facts on which the Disciplinary Hearing Officer or Adjustment Committee concluded that the informant was creditable or his or her information reliable; and

ii. The informant's statement (either in writing or as reported) in language that is factual rather than a conclusion, and based on the informant's personal knowledge of the matters contained in such statement.