STATEMENT OF TERI B. HIMEBAUGH, ESQ.

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I have been asked to discuss the new grievance procedure that the Department of Corrections has recently issued. Some of you know me solely from my reputation as a plaintiff's civil rights attorney and a Board member of the ACLU. However, before you dismiss what I have to say as simply liberal rhetoric, you should also know that I received a commendation for my work on the Third Circuit Task Force on Counsel for Indigent Litigants. I have assisted the U.S. District Court in developing programs designed specifically to reduce the number of prisoner cases that are filed and to find new ways for cases to be handled with judicial economy and fundamental fairness at the same time. This has included, at the request of the Department of Corrections, helping assess the feasibility of a video conferencing program with the courts. My income is not substantially derived from prisoner litigation. My intent therefore, in presenting testimony here today is simple - to see to it that the procedures that the Department of Corrections follows are fundamentally fair and just and are enforced.

The Department of Corrections apparently shares in this goal. The stated policy of the new procedure is to "outline a fundamentally fair hearing process...". It is my opinion that the new grievance procedure succeeds in being fundamentally fair in some respects and falls seriously short in others.

I believe that the provision in the policy, which calls for off the record informal resolution of grievances, is a major step toward ensuring prompt, cost effective and fair outcomes to many grievances. The provision providing that pre-hearing confinement is

not to be routinely used affirms the constitutional principle that a person is innocent until proven guilty. The new policy also clearly defines and puts the inmate on notice of the disciplinary repercussions at stake.

I am, however, deeply concerned however about other provisions which I believe lack fundamental fairness.

The start with, under the new policy, inmates charged with misconducts are not permitted any inmate legal assistance at the hearing unless they do not speak or read English or understand the charges. There are however a significant number of inmates who, while they speak and read a limited amount of English, are for all intents and purposes functionally illiterate or who have varying degrees of mental illness that makes it particularly difficult for them to understanding prison procedures and communicate their case effectively to the hearing examiner. They should be permitted broad access to inmate assistance.

While the policy requires that the hearing examiner detail in a written post hearing summary the facts relied upon in reaching the guilty finding, it has been my experience that hearing examiners most often only state in support of their findings that they found the correctional officer's report to be more credible. How can a determination of credibility be made on the basis of an unsworn document only? There is rarely any summarization of the facts relied upon or the reasons why they believed the correctional officer's report was more credible than the inmate's version. This type of decision cannot be effectively reviewed on appeal. The DOC policy therefore must be more uniformly enforced.

While the new policy provides on its face fundamentally fair deadlines and procedures for appeal, my concern relates to the manner in which the Department of Corrections has applied these provisions. When an inmate files a grievance it is assigned a tracking number. Many inmate grievances are rejected on minor technical grounds and sent back to the inmate without a tracking number assigned. Without the tracking number the grievance appeal is not technically filed and therefore, it is not processed. By the time that the inmate receives the rejected grievance back, has corrected the technical deficiencies and resubmitted it, his deadline for filing the grievance, which is only 15 days, has expired and he is precluded for that reason from filing the grievance. The Department of Corrections has stated that inmate grievances are down over the last five years by nearly 50%. However, that figure fails to take into consideration all the grievances that never received tracking numbers.

This is also a critical issue in that if an inmate is unable to exhaust his administrative grievance remedies he is precluded under the Prison Litigation Reform Act from later pursuing any related civil action. The DOC practice therefore subverts the intent of the Prison Litigation Reform Act and unconstitutionally denies inmates access to the court system. This practice leaves the Department of Corrections open to expensive, time consuming litigation likely to go before the United States Supreme Court arguing that the exhaustion requirements of the Prison Litigation Reform Act do not apply to Pennsylvania prisons because the grievance procedures are futile.

Of particular concern to me is the recent statement by Mr. Bitner, Chief Hearing Examiner, that it is the Department of Correction's position that Sandin v. 0'Conner decided by the U.S. Supreme Court in 1995 specifically authorizes them to institute a

new burden of proof at misconduct hearings: lowering it from a need to show "substantial evidence" in order to find guilt to only the need to produce "some evidence". I have closely reviewed Sandin and I have several observations.

The underlying facts presented in Sandin which form the basis for the United States Supreme Court determining that there is not a due process liberty interest at stake in Hawaiian prisons, are substantially distinct from the situation in Pennsylvania's prisons. In Sandin, prisoners in Hawaii's general population were already subject to lock down up to 16 hours per day. The Court specifically relied on this fact and held that therefore lock down in disciplinary custody was not an atypical or significant hardship on the inmate. In Pennsylvania, however, inmates in general population are not routinely on lock down status. That is the exception, not the rule. Therefore, to place an inmate in 23 hour per day lock down in disciplinary custody in Pennsylvania imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life. The argument can be made that there is therefore a state created due process right, which requires all of the procedural safeguards set out in Wolf v. McDonnell.

Additionally, the Hawaiian prison regulation involved in Sandin required that there be "substantial evidence" before the hearing examiner could make a finding of guilt. The United States Supreme Court, however, never reached nor addressed the issue of whether or not this was an appropriate standard. In fact, the Supreme Court specifically stated that there was no holding on whether a finding of guilt could be made in the absence of substantial evidence. Sandin at pg. 7. Therefore, it is inappropriate for the Department of Corrections to cite this case as authoritative of their right to impose this new, lower, burden of proof.

If anything, the dicta in Sandin reaffirms the constitutional principle that the state officials' actions cannot be arbitrary. As stated by Chief Justice Rehnquist, under the Eighth and Fourteenth Amendments, "prisoners retain protection from arbitrary state action even within expected conditions of confinement..." A standard of proof, however, which requires only "some evidence" in order to find guilt is by definition and through practice arbitrary.

Consider this very likely scenario: an inmate is charged with an infraction. The correctional officer who charged the inmate with the offense isn't present to testify or to be questioned at the misconduct hearing. The correctional officer's report is therefore admitted as the sole evidence against the inmate. The report is by its nature unsworn and contains hearsay.

The inmate testifies on his own behalf. He may have witnesses, who, if they are permitted under the strict limits of the policy to testify, would attest under oath to facts that would establish that the officer's report was unfounded or not credible. They would be subject to cross-examination by the hearing examiner so that a determination of their credibility could be accurately made.

However, none of the evidence presented by the inmate has to even be considered by the hearing examiner. Since the burden of proof is only "some evidence" of guilt, the correctional officer's report is by itself sufficient for a guilty finding despite all the evidence that may be presented to the contrary. The hearing examiner need not balance the weight or substantiality of the evidence.

There is no way under those circumstances that an inmate could possibly be found **not** guilty. Such a standard of proof permits the hearing examiner to enter a guilty finding

based solely on unsworn hearsay. The finding can't be based on a fair determination of the weight of the evidence or the correctional officer's credibility in that he was not present to be questioned or for his demeanor to be assessed. This opens Pandora's box to arbitrary abuse in the guise of "discretion".

I anticipate that the Department of Corrections will argue that since the grievance appeal procedure provides for internal review by the Department of Corrections, that there is a system in place to curb any arbitrary abuse of discretion. Even if one discounts the fact that this permits the fox to guard the hen house, since all that is required is "some evidence" of guilt there is no necessity that the weight or credibility of the evidence be examined on appeal. Therefore, the reviewing officials have no option but to always affirm the hearing examiner decision. The grievance appeal process becomes a sham without substance. The arbitrary and prejudicial effect on the inmate is further compounded by the fact that inmate grievance decisions are not judicially reviewable. The end result is a lack of fundamental fairness and justice. We can and we must do better.

Thank you for your time and attention.

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EDUCATION

LL.M	American University, Washington College of Law, International Law: International Protection of Human Rights, 1989; thesis on Changes in Soviet Human Rights Law
J.D.	New England School of Law, 1988; thesis on International Liabilities of Remote Sensing from Outer Space
B.A.	Tufts University, Soviet and East European Studies, 1985; thesis on Comparative Communistic Theory

PROFESSIONAL EXPERIENCE

Private Practice
Sole Practitioner (1990 to 1992 and 1995 to present)
Pomerantz, Lewis & Associates (1992 to 1995)

Responsible for all aspects of development and litigation of civil cases including but not limited to those involving discrimination, police misconduct, employment/unemployment, prisoner's rights, sexual harassment, defamation, contract, personal injury, social security disability, medical malpractice, products liability and domestic relations.

Criminal defense on adult and juvenile felony, misdemeanor, summary offenses and parole violation hearings. Draft and argue PCRA, Superior, Supreme Court and Federal appeals.

Consultation to businesses/conduct training seminars on employee/employer rights, FMLA, sexual harassment, employee handbooks, unemployment benefits, discrimination.

Practice before the U.S District Court, U.S. Court of Appeals, Court of Common Pleas, Superior and Supreme Court, Merit Systems Protection Board, Unemployment Compensation Board of Review, Pennsylvania and Philadelphia Human Relations Commissions, Equal Employment Opportunity Commission, Board of Licensees and Inspections and the Inter-American Commission on Human Rights (OAS)

Legal Support Network Coordinator, Mid-Atlantic Region
Amnesty International (1988 to 1992)

Serve on the National Legal Support Network Steering Committee

Develop national campaigns (Treaty Ratification, Refugee and Asylum etc.)

Draft Major proposals, funding requests and budgets

Collaborate on amicas briefs to the U.S. Supreme Court and INS in death penalty and asylum cases

Plan and implement major teaching and fundraising functions including Refugee and Asylum Awareness Week, Refugee Roundtable, International Fair Trial Symposium and Regional Law School Writing Competition

Supervise attorneys' and interns' work

Special Assistant to the Associate Director
Washington, D.C. Department of Human Rights
1989 to 1990

Argue employment, housing and public accommodation discrimination cases before the Commission on Human Relations

Collaborate on drafting of precedent setting legislation on affirmative action, domestic partnership and drug testing in the workplace

Investigate cases of discrimination

Draft Mayor's Memoranda, Monthly Reports to Federal and District Agencies, Training Materials, Determinations, Rulings on Appeal, Data Requests, Motions and Orders

Conduct fact-finding hearings, depositions, conciliations and press conferences

Serve as Acting Supervisor of other divisions and supervise internship program

Investigate and process disciplinary and other employee performance issues within the Department

LICENSURE

Member of the Bar of the Commonwealth of Pennsylvania

PROFESSIONAL APPOINTMENTS

Chair of the Phil. Bar Association, Legal Referral Information Service, 1992-1993

Co-Chair International Human Rights Section of the Phil. Bar Association, 1992 -1994

President /Trustee, Philadelphia Bar Association Human Rights Fund, 1993 -1994

Board of the American Civil Liberties Union, Philadelphia, 1993 to present

Member of the U.S. District Court Prisoner Civil Rights Panel Steering Committee, 1995 to present

Member of the Third Circuit Task Force on Provision of Legal Services to the Indigent, 1998 to present

"Who's Who" 2000-2001, Strathmore Publications.

INVITED SPEAKING PRESENTATIONS

Carter Conference on Human Rights, 1989; "U.S. Foreign Policy and Ratification of Human Rights Treaties"

D.C. Commissioner's Orientation, 1990; "The D.C Human Rights Act"

Amnesty International Regional Conference, 1989; "Ratification of Human Rights Instruments"

George Mason Law School, 1989; "Human Rights Perspectives for the 90's"

National Law Center, 1989; "Comparative Death Penalty Law"

Educator's Conference on Genocide, 1990; "The Convention on the Elimination of Torture"

Amnesty International Regional Conference, 1990; "Refugee and Asylum Concerns in the United States"

Amnesty International Regional Conference, 1990; "International Death Penalty Law"

Georgetown University Law School, 1990; "Careers in Human Rights Law

Amnesty International Philadelphia Conference, 1991; "International Human Rights Abuses Against Women and the Convention on the Elimination of Discrimination Against Women

Amnesty International Regional Conference, 1991; "Alternative form of Participation within Amnesty International

Philadelphia Town Meeting, 1991; "Cultural, Political and Economic factors which Influence a Countries' Human Rights

Philadelphia Bar Association, 1991; "The Convention on the Elimination of Discrimination Against Women"

Board of Governors, Philadelphia Bar Association, 1991; "The Need for a Bar Resolution on the Women's Convention"

Amnesty International Regional Conference, 1991; "Women in Human Rights"

Amnesty International Regional Conference, 1991; "Student Participation in the Women's Campaign"

Human Rights Education Conference, Slippery Rock University, 1991; "U.S. Ratification of Human Rights Treaties"

ActionAIDS Service Staff Briefing, 1991; "Legal Issues for clients with AIDS"

Villanova University, 1991; "Women's Convention"

Amnesty International New Jersey Regional Conference, 1991; "Women in Human Rights and the Women's Convention"

Villa Victoria High School, 1992; "Women in Human Rights and the Women's Convention"

Johns Hopkins Law School, 1992:" The Convention on the Elimination of Discrimination against Women"

Univ. of Pennsylvania Federalist Society, 1992: "Debate on the Treaty on the Rights of the Child"

MOVE rally, August 1992 "Ramona Africa and the Case before the Inter-American Commission on Human Rights"

Environmental Protection Agency, 1993 "Modern Day Genocide"

Disciplinary Board, Supreme Court of Pennsylvania, 1993 Ethical Issues for the Practitioner in Civil Rights Litigation"

Procedure and New Legislation", vol. 8, No. 2, Winter, 1991

Himebaugh, T., Amnesty International Legal Support Network Journal "Capital Habeas Reform: The Powell Commission and Pending Legislation", vol. 8, No. 1, Fall, 1990

Himebaugh, T., Amnesty International "Death Penalty Issues and Guide", Fall, 1989

Himebaugh, T., Amnesty International "Refugee and Asylum Washington D.C. Community Project Report", Spring, 1989

Himebaugh, T., Amnesty International "Refugee and Asylum Law Materials", Fall, 1988

INTERVIEWS

Asylum "Asylum Concerns and Agenda in Washington D.C., vol. 1, No.3, Winter, 1989

Washington College of Law Bulletin "The 1977 D.C. Human Rights Act", Fall, 1989

Channel 10 News "HUD Housing Eviction, Spring, 1991

Channel 10 News "On Magistrates Recc.for R. Africa suit"

Profiles "On the release of Ramona Africa", May, 1992

Profiles "Hate Crime Legislation", July, 1992

Philadelphia Inquirer, "Police Misconduct and Unlawful Searches in Philadelphia", July 12, 1992

Legal Intelligencer, April 21, 1993, "Bar Sponsored Program for South African Attorneys"

Channel 6 "Visions" "Bar Sponsored Program for South African Attorneys, April 1993

The Philadelphia Inquirer Mark Fazlollah, Use of Pepper Spray by Police and possible legal repercussions,January, 1997

The Pittsburgh Gazette, Hair Drug Testing Research in State Prisons, June, 1998

REFERENCES

Paul Kazaras, Philadelphia Bar Association Ethics Counselor
Alan Denenberg, Esq.