

Governors' Adjudications

SELF HELP TOOLKIT

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JUSTICE BEHIND BARS

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PRISONERS' ADVICE SERVICE

THE INDEPENDENT LEGAL CHARITY PROVIDING INFORMATION AND REPRESENTATION TO PRISONERS

Governors' Adjudications

SELF HELP TOOLKIT

Where are the full rules on Adjudications?

For all adjudications started on or after 1 February 2019 the rules are contained in PSI 05/2018 on '**Prisoner Discipline Procedures**' (usually known as the 'Discipline Manual').

References to pages and paragraphs will be to those in the PSI unless otherwise stated. Please note that there may be more than one number in the PSI for a paragraph so you will need to take note of, firstly, the page number and, secondly the paragraph on that page eg p39; 2.76.

What is a Governor's Adjudication?

When you are placed on report (usually known as being 'nicked'), the prison must hold a hearing to decide whether you are guilty (or not) of a disciplinary offence under Prison Rule 51. This hearing is called an adjudication.

There are two types of Adjudication. One is known as a Governor's Adjudication, the other, as an Independent Adjudication. In both cases, an initial hearing will be in front of a Governor/Director (or a senior member of prison staff). That Governor will then decide whether s/he can deal with the matter.

You are entitled to get legal advice for both kinds of adjudication, but you can only get legal representation at the hearing for an Independent Adjudication (further details below).

A Governor can impose a range of punishments including loss of earnings or privileges and cellular confinement but cannot impose additional days of imprisonment ('added days'). If, at the first hearing, the Governor/Director considers the charge(s) you face might be serious enough to result in a punishment of added days, then s/he will adjourn the case for it to be heard by an Independent Adjudicator (IA). IAs are visiting magistrates. They can impose up to a total of 42 additional days' imprisonment for each finding of guilt arising from a single incident (p39; 2.76).

With what offence(s) can I be charged?

The full list of disciplinary charges is set out in Prison Rule 51. You can find full guidance on the charges, including what needs to be proven before you are found guilty, in PSI 05/2018.

When I am placed on report – what will happen?

You should be served with a notice of report form DIS 1 (often referred to as a 'nicking sheet') for each charge. This should give details of the charge and the circumstances when it was allegedly committed. This should be in enough detail for you to understand what is being alleged. The wording of each charge should reflect the wording of the Prison Rule under which it is laid. Unless there are exceptional circumstances, you must get the DIS 1 form within 48 hours of the alleged offence(s) being discovered and at least two hours before the start of the adjudication – this deadline of 48 hours applies even during weekends and/or public holidays (p 8; 2.13).

When will the hearing take place?

The hearing will take place on the day after you are charged, but not normally on a Sunday or public holiday. When you are informed, you should also be given a written (and, if necessary, oral) explanation of the adjudication procedure and a form for providing your statement (form DIS 2) [p9; 2.16].

Before the hearing, you should ask to be provided with copies of all paperwork relating to the charge – which must be provided to you or your representative without delay, unless the case is being investigated by the police (p10; 2.22).

Will I be able to prepare my defence?

You should be given at least two hours before the hearing to prepare your defence. As well as the charge sheet and form DIS 2, you should be given access to PSI 05/2018, other documents and reference books available in the prison library, even if you have been placed in the segregation unit. The PSI should be in the prison library. **If you have time you can contact PAS and we can send you a copy and advise you over the phone.** In any event, it should be available in the hearing room for consultation by all parties, if required.

When preparing your defence, go through the following steps:

1. Have the procedural guidelines been followed?

- a. *Did you get form DIS 1 within the 48 hour timeline?*
- b. *Were you given at least two hours to prepare your defence?*
- c. *Has the hearing been opened no later than the day after the charge being laid?*

This is because failure to follow procedures may lead to the charges being dismissed or a guilty finding being quashed on appeal.

2. Then, check the list of charges under Prison Rule 51 in the PSI.

- a. Consider carefully the elements of each charge you face.
- b. What elements are needed to prove the charge?
- c. Has each element been proved?

It may be that there is insufficient evidence to establish each element of the alleged offence. If this is the case you should submit that the charge cannot be proved and that the charge should be dismissed.

3. **Do you have a defence? If the charge can be proved, you may have a defence**, such as self-defence. If you have a defence, then include this in your statement. Make sure to check the defences available for that charge.
4. If you decide you have no defence to the charge(s), you should know that you will receive credit (in the form of a more lenient punishment) if you plead guilty.

Can I have assistance from a solicitor?

For a Governor's Adjudication, you can get legal advice before the hearing but you do not have a right to be legally represented at the hearing. At the first hearing you **can ask for the matter to be adjourned for you to get legal advice**. You will usually be granted an adjournment for a week to do so. Unfortunately, since December 2013, there is no legal aid for such advice so most prison law solicitors no longer provide it. However, **PAS still gives free advice on adjudications. You can contact us on our telephone advice line or write to us. If you write, please mark your letter 'Urgent – legal advice for adjudication' at the top.**

You have a right to be legally represented at hearings which are in front of an Independent Adjudicator. Legal Aid is still available for this.

Can I be represented at the hearing by a solicitor?

As stated above, you do not have a right to legal representation at a Governor's Adjudication unlike at an Independent Adjudication (see below for further details about IAs). However, in very **exceptional circumstances**, you may be allowed representation at a Governor's Adjudication. You may also request that you are allowed a 'McKenzie friend' (who does not need to be legally qualified, and can be another prisoner) to support you at the hearing. The adjudicator must consider any such request taking into account what is known as the 'Tarrant principles'. The criteria established by the Tarrant principles which the Governor/Director must consider are the following:

- (i) how serious is the charge and the potential punishment;
- (ii) whether any points of law are likely to arise;
- (iii) is the particular prisoner capable of presenting his/her own case;
- (iv) will there be any procedural difficulties;
- (v) the need for reasonable speed;
- (vi) the need for fairness.

Any other reason(s) put forward by you to persuade the Governor that you need legal representation or a 'McKenzie friend' should also be taken into account. Further details on each element of the 'Tarrant principles' are set out in p27-8; 2.14-2.19.

If the request for legal representation is refused, the reasons must be recorded on the record of the hearing (form DIS 3).

Also, your solicitor should be granted facilities to interview you and, if they are willing, other witnesses before the hearing. Similar facilities may be granted to McKenzie friends as far as possible, though there may be limits on this (eg. if the McKenzie friend is another prisoner) (p28; 2.17).

Will the adjudication paperwork be disclosed to my legal adviser (or legal representative)?

You or your legal representative can request a copy of all adjudication paperwork and, unless it is being investigated by the police, it must be provided without delay (p26; 2.9).

On the other hand, if CCTV recordings form part of the evidence to be presented at the hearing, they will not be copied or sent to anyone. Arrangements should be made for you, and any legal representative or adviser, to view the evidence at the prison. (Of course, failure to allow such evidence to be viewed is likely to lead to any finding of guilt being quashed p26; 2.11). If there is CCTV evidence, you can ask to see it before the hearing and ask for it to be played at the hearing.

What is the role of the adjudicator?

The adjudicator must decide whether you are guilty of the offence(s) with which you are charged on the basis of the evidence available at the hearing. In order to do so s/he will hear evidence from the reporting officer and any witnesses, as well as from you and any witnesses you ask for. In addition, s/he must also take into account any written or other physical evidence (eg witness statements, drug test reports, CCTV recordings, items alleged to have been found, etc).

The adjudicator is required to make a complete record of the hearing on form DIS 3. This need not be a word for word account, but should record all the main points as well as the reasons for any decisions made. Form DIS 3 is important as it will be relied upon in any subsequent review (including a judicial review) of the outcome, and a case may stand or fall based on the information recorded.

The adjudicator must then weigh up all the evidence and decide whether or not each charge has been proved beyond reasonable doubt. If you are found guilty, s/he will go on to determine the appropriate punishment. If you are found not guilty, the adjudicator will dismiss the charge(s) against you.

What happens at the hearing?

You, along with the reporting officer and any other witnesses, should attend the hearing. Hearings should be conducted in a private room set aside for the purpose. The room should include seating and tables for the adjudicator, yourself

and any legal representative or McKenzie friend, any escort(s), and for the reporting officer or other witness(es).

You and any escort(s) should enter the hearing room before the reporting officer and witness(es), and leave the room after the reporting officer and witness(es), to avoid any suggestion that evidence may have been given to the adjudicator in your absence.

Only one witness should be in the hearing room at a time. Of course if the reporting officer wishes to question a witness they will necessarily both be in the room at the same time. However, the adjudicator should ensure that the reporting officer and other witness(es) do not give evidence at the same time.

What is the procedure?

The adjudicator will open the hearing by confirming your identity and asking if you have received the form DIS 1 and DIS 2. The charge(s) will then be read out and you will be asked a series of questions:

1. Do you understand the charge?
2. Do you understand what is happening?
3. Do you want legal advice or help during the hearing before proceeding further?
4. Have you had enough time to think about what you want to say and to prepare a defence?
5. Have you received any witness statements?
6. Have you made a written statement/reply?
7. Will you be calling any witnesses?
8. How do you plead - guilty or not guilty? (If you refuse to plead or enter an equivocal plea, a plea of not guilty should be entered.)

All replies should be recorded on form DIS 3. If your answer to questions 3 or 4 is 'no', the adjudicator should explain this to you.

In particular, arrangements should be made to provide appropriate assistance to you if you have difficulty understanding the proceedings or presenting your case due to disability or insufficient knowledge of English.

What if the time limits have not been complied with?

At the outset of the hearing, the adjudicator should confirm that the charge has been properly laid (in accordance with the Prison Rules) and that the time limits in relation to laying the charge and opening the hearing have been properly met. You should be informed of any errors and offered an opportunity to make representations. As stated above, if the time limits have not been met, there may be grounds for the charge to be dismissed. Minor errors are likely to be insignificant, but more serious errors may lead to the charge not being proceeded with. The adjudicator must decide whether to continue would result in any unfairness or injustice to you.

What if I have made a written statement or reply?

If you have prepared a written statement, it should be attached to the record of the hearing (form DIS 3). It will be read out by you when you come to give evidence and/or at the mitigation stage (if you are found guilty)

Who gives evidence?

The adjudicator will first hear the evidence of the reporting officer. You should be provided with an opportunity to cross-examine him/her. The adjudicator may also ask questions. If you wish to question a reporting officer, who is not present or available via a video link, the hearing should be adjourned until the officer is available. If you do not wish to question a reporting officer who is not present, the officer's written evidence in the notice of report is likely to be accepted.

Other witnesses may be called in support of the charge, if the adjudicator agrees their evidence is relevant. However, they cannot be compelled to give evidence. If they do give evidence, these witnesses may be questioned by you, the adjudicator or reporting officer. Written evidence may be accepted in the absence of the witness if you have no questions.

If prison officers are required to attend the hearing, they do so as part of their duties and can be compelled to give evidence. If prisoner witnesses are required to attend the hearing, they will do so without loss of pay. However, they cannot be compelled to give evidence.

You should be given the opportunity to ask questions of any witness who gives evidence at the hearing. Questions should be relevant to the current charge. The adjudicator will intervene if questions stray into irrelevant areas or are abusive. Adjudicators should assist you if you have difficulty framing relevant questions or to clarify matters.

After a witness has completed their evidence, they should not discuss the case with those waiting to give evidence; nor should they have an opportunity to do so.

What if I have witnesses?

You can ask for witnesses to assist your case. The adjudicator will want to know what evidence each witness you ask for is expected to give. Unless the adjudicator considers your witness' evidence is unlikely to be relevant or will only confirm what has already been established as true, the witness should be allowed to attend.

The names of each witness you wish to call should be recorded. If you do not know their names, you should tell the adjudicator. You can point out that case law confirms that the prison has a duty to assist you to find witnesses, as well as to

inform you of any witnesses whose presence staff are aware of but you may not have been.

If the adjudicator refuses to allow you to have a witness his/her reasons for this decision should be recorded. There should be proper grounds for any such refusal – ie not simply administrative convenience, or because the adjudicator already believes that you are guilty (p26; bullet point 3 and also p35; 2.52).

Can written evidence be accepted?

Yes, if all parties accept the statement and have no questions. In some circumstances, circumstantial and hearsay evidence are permissible, although direct evidence should be treated as preferable. MDT confirmation test results are accepted as evidence, even though the scientist who performed the test is not required to attend. Any such evidence should be described on form DIS 3.

What if evidence of further offences is disclosed in the hearing?

If such evidence is disclosed then charges may be laid in respect of those offences within 48 hours of their discovery. If during the hearing it appears that the current charge cannot be sustained (eg because the elements of the charge cannot be proved beyond a reasonable doubt) but a **different** offence has been committed, the original charge may be dismissed or not proceeded with. Instead a new charge may be laid (within 48 hours of its discovery). For example, a fight charge may be 'replaced' with an assault charge. However, a different charge cannot be substituted for the original one by amending it during the hearing.

Can I request an adjournment?

Yes. For example, as stated above, if you want legal advice, you can request an adjournment to have a chance to get it or if you want time to search for witnesses or obtain particular evidence. However the decision to grant an adjournment is the adjudicator's. S/he will decide whether to grant one and for how long. Reasons for refusing an adjournment request must be noted (p6; 1.17).

For how long can the hearing be adjourned?

There is no fixed limit for how long adjournments may be. However, if the case is not concluded within six weeks after it was opened, the adjudicator should consider whether or not it is in the interest of justice for it to continue.

If the adjudicator decides it would be unfair to continue, it should either be dismissed or recorded as 'not proceeded with'. If the adjudicator decides it would not be unfair to continue, the reasons for the decision should be recorded on form DIS 3 and the case should resume. Consideration should be given to natural justice whenever any further adjournments are requested.

Can the hearing proceed in my absence?

If you refuse to attend the hearing, or the adjudicator refuses to allow your attendance (eg on the grounds of disruptive behaviour), you should be warned that the hearing will normally proceed in your absence.

If you are unable to attend the hearing owing to illness or a court appearance elsewhere, the adjudicator may open the hearing and adjourn it until you are available. The adjudicator must note any refusal to adjourn for this reason (p6; 1.17). If you are not able to attend because you are ill, Healthcare may be asked to advise when you are likely to be fit enough to attend. The adjudicator must note any medical concerns or if they conclude there are no medical concerns (also p10; 2.27 and p23; 3rd bullet point, 1.32). If you or anyone else states that you **refused to attend** the adjudicator must note this down and the source of the information (p33; 2.42).

In accordance with natural justice, the adjudicator should take this into account when deciding whether or not it would be fair to continue in your absence. The adjudicator must note why they concluded that proceeding in your absence was just and fair in all the circumstances (p24; 2.3).

What does the Adjudicator have to note on the Record of the Hearing?

An adjudicator must note adequate reasons for all significant decisions clearly and legibly on the Record of Hearing as follows (p6; 1.17) which include:

1. All **salient** points and reasons for decisions (p24; 2.6);
2. In establishing fitness to plead and/or whether you need any assistance, the adjudicator should note any **medical** concerns, action taken, advice given, and the adjudicator's decision and reasons must be noted on the record of hearing and explained to you. If there are **no medical concerns** a note must be made to this effect (p10; 2.27 and p23; 3rd bullet point, 1.32);
3. Where applicable, any decision that it is **unfair to continue** (also p29; 2.22 and also p35-36; 2.56);
4. Where applicable, noting reasons why you **refused to attend** and source of information (p33; 2.42) and why the adjudicator concluded that proceeding with the hearing in **your absence** was just and fair in all the circumstances (also p24; 2.3);
5. Where applicable, any reasons why a case was **not prosecuted** and if a case is referred to an IA, **reasons for referring to the IA** [quoting 'seriousness of the offence may **not** be enough'] (also p29-30; 2.27);
6. Where applicable, note the name of **witnesses** you wish to call, the nature of the evidence they are expected to give and including reasons why the adjudicator has accepted or refused a witness to be called (bullet point 3 on p26; also p35; 2.52);
7. Granting or **refusing legal representation or a McKenzie friend**;
8. Reasons for granting or **refusing adjournments**;
9. Finding **guilt beyond reasonable doubt**;

10. Appropriate **punishments** – including reasons for any departure from local guidelines and evidence in relation to mitigation for departing from normal sentence (also p37; 2.62);
11. If the charge is **dismissed or not proceeded with**, this must be recorded and the prisoner informed of the outcome and reasons for the dismissal. (p11; 2.30).

If you are in a hearing and something is being discussed that should be noted down, ask the adjudicator to note the matter down by reference to the above. Failure by an adjudicator to follow the procedures may allow you to appeal against a decision of guilt and/or a sentence.

What if I am found guilty?

If a charge has been found proven, the adjudicator will consider the appropriate punishment(s). Full details of the punishments available for each offence are listed in PSI 05/2018. Before deciding on a punishment, the adjudicator must take into account the following, amongst other things:

- i) the circumstances and seriousness of the offence;
- ii) local punishment guidelines in relation to that type of offence;
- iii) the type of prison you are in, the effect of the offence on local discipline and good order, and the need to deter further similar offences by you and other prisoners;
- iv) your previous disciplinary record;
- v) the likely effect of the punishment on you, your age and remaining time to release;
- vi) any guilty plea, ensuring that you were not pressured into the plea and that the decision is based on evidence rather than simply the plea;
- vii) any mitigation you may offer.

The adjudicator may adjourn the decision to get further information about the above. S/he can suspend punishments or make them consecutive or concurrent to each other or activate any previously suspended punishments. However, any punishment should be in line with the punishments listed in the Prison Rules and be proportionate to the offence.

Any punishment other than a caution may be suspended for up to six months. An individual punishment may not be partially suspended, but if more than one punishment is given for a single offence some may be activated immediately and others suspended.

If punishments are imposed consecutively, the adjudicator should have regard to totality – i.e. the total punishment should not be excessive for the offences taken as a whole.

The punishment and the reasons will be recorded on form DIS 3. They must be explained to you. You must also be told about the procedure and time limits for requesting a review of the guilty finding and/or punishment – see below.

Access to adjudication paperwork

After your adjudication has concluded, you are entitled to a copy of the form DIS 3 (adjudication transcript/record of hearing) and should request a copy of this for your records.

What happens if the adjudicator refers the charge to an Independent Adjudicator (IA)?

If after opening the hearing, the adjudicator decides at any stage that the charge should be referred to an IA, the hearing should be adjourned. This is usually because the offence is so serious that the adjudicator believes his/her powers of punishment are not sufficient (as stated above, a governor cannot impose 'added days'). Your case will be listed for a new hearing when the IA next attends the prison. It must take place within 28 days of the date of referral. The adjudicator must note if a case is referred to an IA, along with **reasons for referring to the IA** [quoting 'seriousness of the offence may not be enough'] (p29-30; 2.27).

You always have a right to be legally represented at hearings and should request assistance from a solicitor.

What happens if the adjudicator refers the charge to the police?

If, after opening the adjudication, the adjudicator considers that the charge is serious enough to be referred to the police for further investigation, the hearing should be adjourned until the outcome of any police investigation is known. The case should not be referred to the IA at this stage, since the time limit for an Independent Adjudicator to open a hearing may expire before the police/CPS reach a decision.

You should be kept informed of any progress at suitable intervals. If a prosecution goes ahead, the adjudication will not proceed as this would be double jeopardy. If a prosecution does not go ahead, the adjudication may resume provided the delay in reaching a decision on any prosecution has not made it unfair to proceed, or the adjudication would rely on the same evidence that was known to the CPS which they had decided would not support a prosecution. If a case was **not prosecuted**, the adjudicator must note down reasons (p29-30; 2.27);

Can I appeal against a Governor's Adjudication?

You can appeal against a finding of guilt at Governor's Adjudication. You do this by completing form DIS 8, which requests a review of the adjudication. Make sure that you get a copy of the adjudication paperwork beforehand: you are entitled to this. You must submit an appeal within six weeks of the completion of the hearing. If you want some advice on writing your appeal, contact the PAS advice line or write to us. The prison must forward your appeal form to the **Briefing and Casework Unit (BCU)**. The BCU will consider the review request and make a recommendation to a Deputy Director of Custody or the Director of High Security who will then decide the appeal.

The reviewer may:

- a) Uphold the adjudicator's decision;
- b) Mitigate the punishment (ie reduce it to something less severe); or
- c) Quash the finding of guilt and punishment.

If your appeal is unsuccessful, you can complain to the Prison and Probation Ombudsman within three months of the reviewer's decision. The Ombudsman can make a recommendation to Her Majesty's Prison and Probation Service (HMPPS) which, although not binding, will usually be accepted.

Can I seek judicial review of a Governor's Adjudication?

In very limited circumstances you could apply for judicial review of a Governor's Adjudication. You will need legal advice about this. Grounds for judicial review are very limited and a claim must be lodged within three months of the date of the decision under challenge. You may be entitled to legal aid for such an application. You should consult a solicitor specialising in prison law regarding your eligibility for legal aid and/or the prospects of success of any judicial review claim. However if permission for judicial review is granted and the court finds in your favour, the court may order the adjudication be quashed.

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JUSTICE BEHIND BARS

PAS offers free legal advice and information to prisoners throughout England and Wales regarding their rights, conditions of imprisonment and the application of the Prison Rules.

We pursue prisoners' complaints about their treatment in prison by providing advice and information and, where appropriate, taking legal action.

Examples of issues we can advise on include: parole, temporary release, indeterminate sentences, categorisation, adjudications, sentence calculation, licence and recall, discrimination, resettlement and healthcare matters. We also provide advice on Family Law to female prisoners and on Immigration Law to prisoners with issues relating to detention or deportation.

If you have something that you'd like to discuss with one of our Caseworkers, you can:

Write to us at
Prisoners' Advice Service
PO Box 46199
London EC1M 4XA
(Mark your envelope Legal Mail Rule 39 in all correspondence with PAS)

Call us Monday, Wednesday or Friday
between 10am and 12.30pm or 2pm and 4.30pm,
or Tuesday evening between 4.30pm and 7pm
on
020 7253 3323

We produce the Prisoners' Legal Rights Bulletin, three times a year. This shares information about key cases and changes in Prison Law.
It is free to prisoners. To sign up for this, please write to the address above.



www.prisonersadvice.org.uk

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