

CORRECTIONS

THE COMMISSIONER

Restrictive Housing

Adopted Amendments: N.J.A.C. 10A:1-1.1 and 2.2; 10A:3-2.3; 10A:4-1.3, 1.4, 4.1, 5.1, 7.2, 9.1, 9.2, 9.7, 9.8, 9.17, 9.18, 9.21, 10.1, 10.3 through 10.6, 10.8, 10.10 through 10.15, 10.17, 10.18, 11.3, and 11.7; 10A:5-1.3, 2.6, 3.1, 3.2, and 7.1; 10A:9-2.13, 4.8, and 4.9; 10A:14-1.7; and 10A:18-2.21, 3.11, 4.16, 5.9, and 6.5

Adopted Repeals: N.J.A.C. 10A:4-5.3, 6, 9.22, and 10.2

Proposed: June 6, 2016, at 48 N.J.R. 915(a).

Adopted: November 30, 2016, by Gary M. Lanigan, Commissioner, Department of Corrections.

Filed: November 30, 2016, as R.2017 d.007, **without change**.

Authority: N.J.S.A. 26:3D-57, 30:1B-6, 30:1B-10, 30:4-123.47.c, 52:27EE-26, and 53:1-20.17 et seq.; and P.L. 2007, c. 204.

Effective Date: January 3, 2017.

Expiration Dates: November 9, 2022, N.J.A.C. 10A:1;
February 9, 2022, N.J.A.C. 10A:3;
May 4, 2018, N.J.A.C. 10A:4;
September 11, 2022, N.J.A.C. 10A:5;
April 24, 2022, N.J.A.C. 10A:9;
August 26, 2021, N.J.A.C. 10A:14; and
October 27, 2022, N.J.A.C. 10A:18.

Summary of Public Comments and Agency Responses:

A summary of the timely submitted comments and the Department of Corrections' ("Department" or "DOC") response follows. The number(s) in parentheses embedded in each comment identifies the commenter(s) listed below.

Comments were received from the following:

1. Alexander Shalom, Esq. for American Civil Liberties Union of NJ (ACLU), T'ruah, the Rabbinic Call for Human Rights and the National Religious Campaign Against Torture;
2. Joint Comments from Jean Ross, Esq. and Lawrence Hamm for People's Organization for progress along with Bonnie Kerness of AFSC Prison Watch Project;
3. Frank Crivelli, Esq. and Donald Barbati, Esq. on behalf of New Jersey Law Enforcement Supervisors Association (NJLESA);
4. Debra Wentz, Ph.D. for New Jersey Association of Mental Health and Addiction Agencies, Inc. (NJAMHAA); and
5. S. Anthony Franklin, Northern State Prison.

The comments related to the amendments proposed include a number of topics many of which are repeated by one or more commenters. The Department has grouped related comments into major topics as they appear below and provided responses to each of the topics.

1. COMMENT: Commenters commend the DOC for precluding detention, "the most restrictive punishment imposed in New Jersey" and firmly support the DOC's efforts to limit the exposure inmates have to administrative segregation. The commenters further applaud the limitations placed on the use of administrative segregation and emphasize that establishing presumptively concurrent sentencing will create a more just system. (1)

RESPONSE: The Department appreciates the commenter's acknowledgement for its efforts toward creating a more just system by precluding detention and limiting inmates' exposure to administrative segregation.

2. COMMENT: Commenters recognized a number of amendments that will result in positive changes including quicker disciplinary hearings, transfers, and appeals processes which will help to reduce the amount of time that individuals could be unnecessarily held in segregation. (1)

RESPONSE: The Department, again, expresses appreciation for the commenters' recognition of the significant changes incorporated in these amendments. The Department hopes that the commenters' mistaken notions that isolated/solitary confinement exists in DOC facilities and that administrative segregation is isolated/solitary confinement have been clarified with the additional information imparted in these responses.

3. COMMENT: Commenters purport that isolated/solitary confinement will continue to exist as part of administrative segregation, the management control unit, temporary close custody, and protective custody, as well as county jails, and they should also be included in these amendments. For that reason, commenters opine that the amendments are insufficient.

Commenters urged the DOC to either eliminate administrative segregation or alter conditions in administrative segregation to prevent prisoners from experiencing extended periods of isolation and exclusion from rehabilitative resources. (1 and 2)

RESPONSE: The Department disagrees that these amendments are insufficient, as they are focused on restrictive housing and inmate discipline. The Department does not employ isolation or solitary confinement practices in its facilities as a matter of general practice. It is important to

note that an inmate may be confined in a location in isolation when medically necessary or to ensure the safety and security of the inmate themselves, other inmates, or correctional officers and staff. Restrictive housing also includes Administrative Segregation, Management Control Unit (MCU), Temporary Close Custody (TCC), and Protective Custody (voluntary and involuntary), as noted by the commenters and the administrative segregation rules are the primary focus of these amendments. MCU, TCC, and Protective Custody and county correctional facilities are outside the scope of this rulemaking. With respect to county correctional facilities, it should be noted that each of the individual 21 New Jersey counties govern the day-to-day operations of their correctional facilities as they are most familiar with the unique aspects of their facilities and inmate populations.

The Federal government and the Association of State Correctional Administrators (ASCA) recognize the importance and challenges associated with managing inmates who pose a serious threat to the safe and secure operation of correctional facilities. Therefore, ASCA developed 13 principles for restrictive housing as a guideline to assist correctional facilities in their restrictive housing practices. The DOC utilized the 13 ASCA principles to develop its internal policies and procedures regarding restrictive housing. In fact, the Department received favorable feedback from ASCA prior to the implementation of the most recent changes to the administrative segregation process. The Department bases these amendments on corrections best practices and standards that are founded not only on empirical evidence but, more importantly, the practical experiences of penal experts.

4. COMMENT: Commenters suggested that the Department should develop rules for transitioning inmates from solitary confinement to general population and ensure careful

classification and placement of transitioning prisoners. They stated that the amendments do not provide for regular contact with medical professionals or other DOC staff and inmates are deprived of meaningful human contact the vast majority of the time they are in administrative segregation. (1 and 2)

RESPONSE: The Department has initiated an increase in therapeutic activities for inmates assigned to administrative segregation units, which house inmates who have violated DOC policies. The out-of-cell activities include access to substance abuse programming, education, chaplaincy, and social services. It is important to note that these inmates will still have access to medical services, individualized social services visits, telephone privileges, and visits from the community. Newly promulgated procedures created and communicated clear expectations for inmates to follow in order to be considered for reassignment to general population. They included an opportunity for successful participation in therapeutic activities and positive behavior that could ultimately reduce time served on any given sanction. Even as these inmates are transitioned to general population, their behavior and progress are closely monitored. The goal of this process is to effectively transition the inmates back to general population while taking appropriate measures to ensure the safety of staff, as well as inmates.

5. COMMENT: Commenters suggested that the regulations should do more to structure a fair and proportional disciplinary sanctioning process guiding the discretion of hearing officers and providing hearing officers with explicit instructions in the application of sanctions. The commenters suggested that use of aggravating and mitigating factors found in criminal sentencing (N.J.S.A. 2C:44-1) should be used by the disciplinary hearing officers when sentencing. Some commenters stated that they are not clear why certain categories of offenses

may be suspended by the Adjustment Committee or hearing officer, and others may only be suspended by an administrator or designee. (1 and 5)

RESPONSE: The Department disagrees with the commenters with respect to the guidance provided and the factors that must be considered by the disciplinary hearing officers.

Disciplinary hearing officers are guided by: (1) the administrative rules found at N.J.A.C. 10A:4-9.17(a); (2) N.J.A.C. 10A:4-9.17(b) through (e) for the factors to be considered to individualize sanctions; (3) N.J.A.C. 10A:4-9.24(a), which requires the hearing officer to articulate the reason disciplinary action is being taken; (4) N.J.A.C. 10A:4-5.1, which sets the parameters of the sanctions; (5) internal management procedures; and (6) pre-service and in-service training on all new policies, procedures, rules, and/or regulations. Moreover, the disciplinary process is not required or intended to replicate the criminal justice system and the comment referencing the criminal code is not applicable.

It further appears that the commenters may have misunderstood the suspended sanction process. In short, some sanctions may be suspended, or held in abeyance, in certain circumstances allowing an inmate to demonstrate good behavior and compliance with all facility rules during the period of suspension. At the end of 60 days, the disciplinary hearing officer may find it appropriate to set aside the sanction with no time served in administrative segregation. If additional infractions are committed during the suspension period, the disciplinary hearing officer may find it necessary to have the inmate serve the original sanction, in addition to the sanction(s) imposed for the additional incident(s).

The suspension of sanctions for infractions in Categories A and B requires review by the Administrator and the Administrator's authorization. Categories A and B include lists of the most serious and severe prohibited acts that pose the most danger to inmates, staff, and

Department facilities. By requiring the Administrator to authorize suspension of sanctions in these categories, the Department is requiring a higher level of oversight for such decisions with respect to infractions that pose the greatest threat to the safety and security of persons and operations in correctional facilities. When an inmate's actions are directly attributable to mental health, the inmate is provided with appropriate treatment and the charges are dismissed.

6. COMMENT: Some commenters stated that the reorganization of prohibited acts into Categories A through E will help guide hearing officers and will increase transparency in the hearing process. Other commenters stated that reclassifying prohibited acts from the current system to a five-tier system with limitations on disciplinary segregation will make discipline predictable. They also contended that the new classification will make punishment predictable, thereby, weakening and/or removing the deterrence factor that encourages inmates not to break the rules. (1 and 3)

RESPONSE: The Department agrees that reorganization of prohibited acts will help guide hearing officers and will increase transparency in the hearing process; the Department sees this as one of several positive outcomes of the amendments. Reclassifying and rebalancing sanctions makes discipline more predictable and that was the Department's intention in creating the five new Categories (A through E) of prohibited acts and corresponding sanctions. The Department disagrees that the new classification will weaken the deterrence effect that administrative segregation has on inmates.

7. COMMENT: Several commenters suggest that the DOC should further shorten the maximum administrative segregation sentence length, limit the time a prisoner may be subject to

involuntary isolated confinement, extend the use of alternative sanctions to as many as possible, and ensure that administrative segregation is a sanction of last resort. Other commenters urge the Department to address clear standards for placing people in isolated confinement, contain conditions of isolated confinement that serve the legitimate purposes of isolation, but minimize the potential for harm, and they should incorporate a least restrictive alternative criteria. (1 and 2)

To the contrary, other commenters emphasize that limiting the use of administrative segregation and the time frames associated with administrative segregation will have negative consequences by establishing predictable punishment, and weakening safety and security in correctional facilities. (3)

RESPONSE: The Department disagrees with the remarks regarding the long-term effects of administrative segregation. Those remarks are applicable to the long-term effects of solitary confinement as evidenced in the commenters' own source references. The commenters' remarks again carry forward the mistaken premise that administrative segregation is isolated/solitary confinement and the Department again emphasizes that the New Jersey Department of Corrections does not employ isolation or solitary confinement practices in its facilities as a general practice, unless medically necessary. In any event, the DOC does not impose isolation or solitary confinement as a sanction for disciplinary infractions.

The Department disagrees with the suggestion to use alternative sanctions to administrative segregation for as many individuals as possible. Sanctions for infractions of prohibited acts are imposed based on the severity of offense. In addition, the Department gives due consideration to the overall danger an inmate poses, as well as the health of each individual inmate when administrative segregation sanctions are applied for violations of prohibited acts. The

amendments address administrative segregation sanctions with a finding of guilt for the commission of a prohibited act(s).

In some cases, certain alternative sanctions are applied, when appropriate. Administrative segregation is used to segregate inmates when they can no longer be housed in general population and have been found guilty of disciplinary infractions. While they may be segregated from the general population, inmates in administrative segregation are afforded health care, mental health care, social services, chaplaincy services, visits, telephone privileges, educational opportunities, secured e-mail access, and electronic media.

With respect to the comment asserting that the amendments make discipline predictable please see the Response to Comment 4.

8. COMMENT: Some commenters stated that administrative segregation causes trauma in many individuals, and there is no evidence presented suggesting that health professionals are able to identify individuals who will experience long-lasting mental health consequences as a result of administrative segregation. These commenters also suggested that N.J.A.C. 10A:5-3.17 should be amended to provide an automatic evaluation by the Mental Health Unit before subjecting an inmate to administrative segregation, as well as timely reviews while in administrative segregation. The commenters also stated that administrative segregation should never be used to discipline mentally ill individuals or other vulnerable populations and the Department should develop a standard for a mental health exemption from administrative segregation. (1 and 2)

In contrast, some commenters stated that empirical evidence has failed to yield conclusive results that disciplinary detention has a long-lasting deleterious effect on inmate mental and/or physical health. It is for this reason, amongst others, the Department's proposed

changes will do nothing more than create an environment in its correctional institutions that will promote inmate misconduct, thereby leading to weakened safety and security. These commenters also suggested the DOC amendments are made due to social pressures by inmate advocacy groups and criticizes the merits, validity, and basis of such advocacy group studies. (3)

RESPONSE: The Department agrees that automatic health screenings of special needs inmates should be conducted prior to inmate placement in administrative segregation and notes that this practice has been an integral component of internal management procedures and Departmental processes. Special needs inmates -- those inmates that meet the criteria of a disorder that interferes with the inmate's ability to meet the functional requirements of prison life without mental health treatment -- are reviewed every 21 days. Notably, medical and psychiatric services are available on a daily basis and medical and psychiatric emergencies shall be attended to immediately. (see N.J.A.C. 10A:5-3.7) Moreover, whenever it appears that an inmate is suffering from an emotional or psychiatric disturbance, arrangements shall be made for a psychiatric or psychological evaluation. Of constant and paramount concern to the Department is the safety and security of its staff and all individuals placed in its care. The Department disagrees that the amendments will promote inmate misconduct and weaken safety and security, as well as the suggested motivations behind these amendments. These amendments are founded in corrections best practices and the ASCA guiding principles. Furthermore the merits, validity, and basis of any external studies are not within the purview of the Department.

9. COMMENT: Commenters stated that the amendments do not protect "vulnerable populations," including youth, the elderly, people with mental illness or developmental disabilities, pregnant women, or LBGQTQ prisoners and the Department should exempt

“vulnerable population” from isolated confinement. (2)

RESPONSE: The Department disagrees with the commenters’ suggestion. To arbitrarily classify inmates in “vulnerable populations” would restrict the appropriate assessment and classification of inmates, thereby jeopardizing the safe and orderly running of institutions. In addition to reviews by classification and medical staff, the DOC evaluates each individual inmate on a case-by-case basis prior to assigning him or her to a restrictive housing unit. This evaluation, performed by a mental health professional, is based on criteria including behavior, mental capacity, and threat to the institution. A general exclusion based on age or other arbitrary classifications would pose a significant threat to the safety of others or the interruption of the orderly operation of a correctional facility. Importantly, the Department is implementing a medical exception for a health-related administrative segregation exemption for pregnant women and will further amend the administrative rules to reflect this change once completed, in a future rulemaking.

The amended rules at N.J.A.C. 10A:4-5.1 allow for the disciplinary hearing officer to refer inmates committing infractions in Categories A through E to the Mental Health Unit, as necessary and appropriate. If a medical or mental health professional determines that the inmate is not appropriate for administrative segregation placement in connection with Category A and B infractions, other sanctions will be applied.

10. COMMENT: Commenters praised and applauded the DOC for removing self-mutilation as a prohibited act and treating it as a mental illness, noting that individuals suffering from mental illness should not be punished for behavior caused by their illness. (1, 2, and 4) On the other hand, another group of commenters pointed out that self-mutilation can be associated with

organized gang activity, such as branding and the carving of gang symbols. (3)

RESPONSE: The Department agrees with all of the commenters that self-mutilation can be associated with both a mental health manifestation and that it can also be representative of gang markings similar to branding. Gang-related branding can be classified as, a Category B infraction of prohibited act number *.010 and/or prohibited act number *.011, participating in an activity(ies) related to a security threat group, or possession or exhibition of anything related to a security threat group. In addition, other charges may apply based on the nature and extent of the infraction.

11. COMMENT: Several commenters suggested that the DOC should adopt a clear definition of the term “incident” in the context of the imposition of sanctions per incident instead of per infraction, emphasizing that it should be made clear to the hearing officers what to do if two separate incidents occur. (1, 2, 3, and 5)

RESPONSE: The Department disagrees that the term “incident” must be defined. It is intended that incident be applied in the literal sense. If, for example, an inmate violates multiple prohibited acts in Category A at the same time during a single incident then the amendments limit inmate exposure to no more than 365 days of administrative segregation per incident. Given the literal application of the word “incident,” the commenters’ remark about “what to do if two separate incidents occur before the disciplinary committee has considered either one” is self-explanatory by virtue of the fact that if there were two separate incidents, the inmate would be charged and sanctioned on each separate incident.

12. COMMENT: Commenters suggested that the Department should eliminate all forms of

disciplinary detention, administrative segregation, and every other form of restrictive housing as it would result in a cost saving for the Department. (1 and 3)

RESPONSE: The Department has eliminated the disciplinary detention sanction, which was the most restrictive sanction and disagrees with the commenters' suggestion to eliminate all forms of restrictive housing. This comment is beyond the scope of the amendments.

13. COMMENT: Commenters stated that proposed regulations also do not incorporate sufficient case-by-case review, institutional monitoring, or public reporting. Commenters also suggested the Department should adopt monitoring and review standards for the internal and Special Investigation Division (SID) investigations used to make decisions to impose isolated confinement. (1 and 2).

RESPONSE: The Department disagrees. Case-by-case reviews of individuals considered for placement in restrictive housing are conducted and behavioral progress is monitored while in restrictive housing. Each inmate's individual and unique capabilities, strengths and weaknesses, behaviors, personal limitations, special needs, restrictions, gang affiliations, and age are taken into consideration when making all housing decisions as set forth in internal management procedures. This is especially so, when restrictive housing is being considered for individuals that commit infractions and threaten the safety and security of DOC facilities and the persons residing and working within them.

Institutional monitoring and review standards for the internal and SID investigations are integral components of Departmental practices and a matter of high security and, therefore, the topics are outside the scope of this rulemaking along with public reporting.

14. COMMENT: Commenters suggested that clinicians authorized to impose or continue restrictive housing classifications must demonstrate credible qualifications. Furthermore, the commenters suggest that the Department consider monitoring the initial and review procedures used to impose restrictive housing. (2)

RESPONSE: The Department disagrees, as the administrative rules set forth in N.J.A.C. 10A provide a framework for internal Departmental policies and internal management procedures. Disciplinary hearing officers impose sanctions and, thus, are not clinicians. Sanctions are imposed with the input of medical and mental health staff. The qualifications of disciplinary hearing officers and/or clinicians are not subject to rulemaking in the same manner that the qualifications of all DOC staff are not a matter of Title 10A rulemaking.

15. COMMENT: Commenters stated that the Department's decision to make these modifications is based on social pressures from inmate advocacy groups and will create an environment that will promote misconduct, thereby, leading to weakened safety and security. (3)

RESPONSE: The Department disagrees with the commenter in the assertion that these amendments are made due to pressures from advocacy groups and that they will lead to weakened safety and security. Of constant and paramount concern to the Department is the safety and security of its staff and all individuals placed in its care. In short, the Department based these amendments on corrections best practices/standards that are founded not only on empirical evidence but, more importantly, the practical experiences of penal experts.

16. COMMENT: Commenters suggest that the Department should review the effectiveness of disciplinary detention as a penal management tool as order and safety is imperative in the

successful operation of prisons. Safety of custody staff, civilian staff, and the inmates themselves should be paramount and for these reasons the DOC needs to examine the social impact that the amendments will have on its employees, its inmates as a collective group, and society in general. (3)

RESPONSE: The Department notes that of constant and paramount concern to the Department is the safety and security of its staff and all individuals placed in its care and stresses that the elimination of detention as a sanction does not obliterate the Department's tools used to discipline and rehabilitate inmates that fail to obey DOC rules. The former disciplinary detention sanction was the most restrictive sanction. Restrictive housing can effectively exist without detention and when coupled with appropriate due process and rehabilitation programs results, in a greater number of inmates readied and then released back into general population.

Federal Standards Statement

The adopted amendments are promulgated under the authority of the rulemaking requirements of the Department of Corrections as established at N.J.S.A. 30:1B-6 and 30:1B-10. The adopted amendments and repeals are not subject to any Federal statutes, requirements, or standards; therefore, a Federal standards analysis is not required.

Full text of the adopted amendments follows:

TEXT