



NEW YORK CITY DEPARTMENT OF CORRECTION
Joseph Ponte, Commissioner
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September 4, 2015

Stanley Brezenoff, Chair
NYC Board of Correction
51 Chambers Street, Room 923
New York, NY 10007

Re: Request for a Limited Variance to BOC Minimum Standards § 1-17(d)(2) Punitive Segregation

Dear Mr. Brezenoff:

Pursuant to §1-15(b)(1)(i) of the New York City Board of Correction's ("Board") minimum standards, the New York City Department of Correction ("Department") requests a limited variance to §1-17(d)(2) and the second sentence of §1-17(d)(1)¹ of the Board's Minimum Standards (Punitive Segregation) to allow the Department, in highly exceptional circumstances presenting safety and security concerns, to waive the requirement that inmates be immediately released from punitive segregation for seven (7) days after they have been held in punitive segregation for thirty (30) consecutive days. This limited variance is requested for ninety (90) days, pending the Board's consideration of the Department's petition for rule changes to the minimum standards. The Department requests that the variance take effect immediately.

This variance request is vital to addressing specific incidents of violence occurring during the required minimum 7-day period of release following thirty (30) consecutive days in punitive segregation. In the limited circumstances described, the Department cannot achieve full compliance with the current provisions as set forth in §1-17(d)(2) and the second sentence of §1-17(d)(1) at this time, as doing so would seriously compromise the safety and security of inmates and staff.

The Department is committed to overall punitive segregation reform that serves the best interests of both inmates and staff. Over the past several months, the Department has undertaken extensive efforts to ensure compliance with new time limitations on punitive segregation while maintaining overall facility safety. However, while most inmates released from punitive segregation have been returned to general population housing and remain there without incident, a small number of inmates have been involved in violent incidents that have endangered the safety of inmates and staff immediately following their release from punitive segregation. This experience has demonstrated that if an inmate commits a violent act within the seven (7) days that they are released or while confined in punitive segregation, it is critical that the Department have reasonable flexibility to remove that individual from a general population setting or keep the inmate in punitive segregation - to do otherwise jeopardizes everyone's safety.

¹ The second sentence of §1-17(d)(1) states "In no event may an inmate be held in punitive segregation longer than thirty (30) consecutive days."

The requested waiver of the seven (7) day release period would be narrowly applied to those inmates that commit violent or multiple infractions that would have qualified the inmates for pre-hearing detention had they not just served the maximum thirty (30) consecutive days in punitive segregation. Such infractions would be limited to those demonstrating that an inmate's removal from the general population is necessary to protect other persons from physical harm, including stabbing or slashing, assault resulting in death or serious injury, sexual assault, and escape or attempted escape. Additionally, the Chief of the Department would approve all waivers in writing and would state the reason why retaining the inmate in punitive segregation is necessary to ensure the safety of inmates and staff. The Department would immediately provide the Board and the relevant healthcare provider with a copy of the Chief's approval.

Our research of past infractions patterns reflects that there would only be a small pool of candidates who would meet the eligibility criteria which the Chief might consider for return to punitive segregation within the seven (7) days of discharge. For the period covering March through August 10th, there were 231 releases from punitive segregation in which the inmates had completed thirty (30) consecutive days. Of those 231 releases, only nine (9), roughly 4 percent of the releases, involved Grade 1 infractions. These Grade 1 infractions included assaults on staff, inmate on inmate assaults, and inmate fights that resulted in injuries. The violent nature of the infraction, any past violent infraction history, and considerations about the immediate ability of the Department to safely house the inmate elsewhere would influence what subset of that 4 percent would warrant waiving the requirement. These factors would guide the Department's determination as to whether the inmate's release from punitive segregation would endanger inmates and staff. To date, several inmates might have been approved to return to punitive segregation under these criteria, including:

- One inmate, a known SRG leader, was released from punitive segregation on April 29th. Three (3) days later, the inmate assaulted another inmate with a broken wooden brush, causing neck and arm wounds, but could not be returned to punitive segregation before seven (7) days had elapsed. The inmate continues to commit violent infractions.
- One inmate was released from punitive segregation on May 29. Five (5) days later, he slashed an inmate, but could not be returned to punitive segregation at that time, due to the two (2) remaining days he was required to be held outside of punitive segregation. On the following day, he assaulted and injured an officer – a potentially avoidable injury, had the inmate been appropriately housed following the violent assault on the previous day. The inability to appropriately respond to the inmate's action endangered staff and inmates alike.

When an inmate is released from punitive segregation for the seven (7) day period and commits a violent infraction, such as slashing an inmate or an assault on staff resulting in a serious injury, it is critical that immediate punitive action is taken to address the dangerous behavior. The Department's intent is to utilize these waivers to take immediate action to move the inmate into a secure housing area, such as punitive segregation, to protect other inmates and officers from physical harm. Often, other housing units such as administrative segregation may provide a safe solution when these issues arise. However, in a small number of cases, these alternative housing options, with additional security measures and restrictions, may not appropriately address the threat of violence and protect the safety of inmates and staff. For example, administrative segregation is a general population unit and allows inmates to freely mingle with other inmates and staff. By contrast, punitive segregation is the only type of unit that provides for complete separation. In these limited circumstances, an inmate may need to be separated from other inmates for safety purposes, in which case punitive segregation may be the only viable solution.

Enhanced Supervision Housing (ESH) also may not be an appropriate solution in these situations. ESH is a non-punitive unit designed to house inmates who, after deliberative review and a due process hearing, are deemed to pose a credible threat to the safety and security of the facility. ESH is a rehabilitative unit geared towards addressing the root causes of violence and minimizing idleness. ESH is not intended as a reactionary unit for the short-term placement of an inmate who has recently engaged in violent behavior, and it is deliberately not a substitute for punitive segregation. This distinction is further evidenced by requirements set forth in the provisions granting the option to override the 60-day within 6 months punitive segregation maximum.² Those provisions specifically state that an inmate should not be removed from punitive segregation and placed in ESH when doing so would endanger inmates or staff. This illustrates the understanding that a certain small category of inmates would be appropriate for continued placement in punitive segregation but would not be suitable for consideration in ESH. Further, ESH, unlike punitive segregation, allows for inmates to freely move outside their cells among and in close proximity to other inmates and officers for seven (7) hours a day.

In keeping with the logic that currently permits an override of the 60-day maximum stay in punitive segregation within a six (6) month period when an immediate threat is posed by the inmate, the Department asks that an override option be implemented to allow inmates to remain in punitive segregation beyond thirty (30) consecutive days based on similar safety concerns. In the months following the adoption of the punitive segregation reforms in which the Board granted the Department the authority to override the 60-day maximum, of the ninety (90) inmates in punitive segregation reaching that limit, the Department has utilized its authority to approve thirty-five (35) overrides. Of those thirty-five (35) overrides, the majority, sixty-nine (69) percent, were for assaults on staff (resulting in a range of injuries) and seventeen (17) percent were for slashings. If the requested variance is granted, the seven (7) day release override option would be applied in an equally, if not more limited, manner.

The Department acknowledges that punitive segregation is not the appropriate answer to every infraction, and not only does the Department remain committed to seeking appropriate alternatives, but it has now put in place mechanisms to prevent any systematic overuse of punitive segregation. In fact, the average number of inmates serving punitive segregation over the last several months has decreased by 63 percent from the preceding calendar year. The request for an override of the seven (7)-day required time between punitive segregation stays does not seek to set aside those mechanisms.

Further, the Department recognizes the important purposes motivating the provisions of the minimum standards that establish time limitations on punitive segregation, particularly the goal of safeguarding the mental health of inmates. For that reason, the Department intends to implement alternative mental health protections where strict compliance with the 7-day break is not possible. For example, the mental healthcare provider will provide daily mental health rounds to all punitive segregation inmates who are affected by this variance. Further, over the coming month, the Department plans to achieve full compliance with the minimum standards by working with the Board to develop permanent solutions to this important challenge, including permanent rulemaking where necessary.

² NYC Board of Correction Minimum Standards §1-17(d)(3) “An inmate may not be held in punitive segregation for more than a total of sixty (60) days within any six (6) month period, unless, upon completion of the sixty (60) days, the inmate continues to engage in persistent acts of violence, other than self-harm, **such that placement in enhanced supervision housing, provided for in section 1-16 of this chapter, would endanger inmates or staff.** In such instances, the Chief of the Department must approve extension of the inmate’s punitive segregation placement...”

It is imperative that the Department be equipped with the various tools necessary to immediately respond to violent acts and prevent foreseeable additional incidents. We therefore ask that the Board take up for immediate consideration the requested limited variance.

Thank you for your consideration and attention to this matter.

Sincerely,

A handwritten signature in cursive script that reads "Joseph Ponte".

Joseph Ponte