

## NEW YORK CITY DEPARTMENT OF CORRECTION

### Notice of Adoption of Chapter 1 of Title 39 of the Rule of the City of New York

Notice is hereby given in accordance with Section 1043(f) of the New York City Charter (“Charter”) and pursuant to the authority granted to the Department of Correction (“Department”) by Sections 389 and 623 of the Charter, a notice of public hearing and opportunity to comment on the Department’s proposal to amend Title 39 of the Rules of the City of New York was published in the City Record on May 8, 2019, and a public hearing was held on June 13, 2019. The Department now adopts the amendments as set forth below.

#### **Statement of Basis and Purpose**

The adopted rules amend the rules of the Department of Correction, codified in Title 39 of the Rules of the City of New York:

- New provisions are added to the list of Sex Offenses (Section 1-03(c)(23)) in compliance with the federal Prison Rape Elimination Act and federal rules promulgated thereunder, and to conform to amendments made by the Board of Correction to the Board’s rules (Title 40 of the Rules of the City of New York);
- New offenses are added to the list of offenses under Disrespect of Staff (Section 1-03(c)(10)) to specifically cover acts of sexual harassment towards staff.

The changes to the Rules of Conduct provisions add certain definitions to the list of inmate misbehaviors that constitute disciplinary offenses, in order to account for changes in federal law, and changes in technology; and to conform rules governing hearings to State Commission of Correction rules, including providing for hearing facilitators.

The following is a summary of the new rules.

#### **Amendments to Section 1-03(c)(10) add prohibited conduct provisions under Disrespect for Staff to include acts that constitute sexual harassment towards staff**

These sections create new graduated offenses for inmates who act inappropriately towards staff by engaging in conduct of a sexual nature towards staff. Such conduct includes making sexual advances towards staff, or acting in verbal or nonverbal ways that are sexually

derogatory or offensive towards staff, including but not limited to making sexually suggestive remarks, jokes, innuendos, comments, gestures; leering; and displaying sexually explicit material on Department property.

### **Amendments to Section 1-03(c)(23) (Prohibited Conduct, Sexual Offenses)**

The amendments to subparagraphs 122.10, 122.11, and 122.13 in Paragraph 23 (Sex Offenses), and the addition of new subparagraph 122.14, are made in part in response to U.S. Department of Justice regulations (Title 28 of the Code of Federal Regulations, §§ 115.5 et seq.) adopting national standards to prevent, detect, and respond to prison rape as required by the Prison Rape Elimination Act ("PREA") of 2003 (Title 34 of the United States Code, §§ 30302 et seq.). This section expands and clarifies existing sex offenses by prohibiting, among other things, sexual abuse against another person; kissing, embracing, and hand-holding by inmates; and making sexual advances or verbal comments of a derogatory or offensive nature including but not limited to sexually suggestive remarks, jokes, innuendos, comments, and gestures.

In addition to the amendments listed above,

- Section 1-03(b), Definitions, is amended to eliminate the numbering of the definitions and to alphabetically insert the following new definitions: "Department ID," "sexual abuse," "sexually explicit material," and "staff."
- Section 1-03(c), Prohibited Conduct, is amended to make the following changes:
  - Section 1-03(c)(2), the offense of Assault and Fighting, is amended to add the assault offenses of gang assault and Security Risk Group assault; both shall be Grade I offenses.
  - Section 1-03(c)(4), the offense of Contraband, is amended to put the razor rules all in one location; to add manufactured chemical compounds that are not facility-issued as contraband (e.g., synthetic marijuana); to add types of devices to the prohibition on telecommunication and recording devices; and to clarify that credit cards, debit cards, and gift cards are contraband.
  - Section 1-03(c)(6), the offense of Creating a Fire, Health or Safety Hazard, is amended to add a prohibition on using food warmers as personal cooking devices.
  - Section 1-03(c)(17), the offense of violating Identification Procedures, is amended to reflect that inmate ID cards have been replaced by other forms of Department identification; to expressly prohibit tampering or destruction of inmate ID; and to provide for the penalty of restitution without reference to a particular cost if inmate ID is tampered with or destroyed.
  - Section 1-03(c)(24), the offense of Smuggling, is amended to add the Grade I offense of smuggling manufactured chemical compounds that are not issued by the Department.
- Section 1-04, Hearing Procedures, is amended to eliminate the reference to close custody, which is no longer used by the Department; the amendments to protective custody are made to clarify the process for placement.

## The Adopted Rules

New material is underlined.

Deleted material is [bracketed.]

1. Section 1-03(b) of title 39 of the Rules of the City of New York (“RCNY”) (Prohibited Conduct, Definitions) is hereby amended by removing the number before each definition, and inserting the following new definitions alphabetically within the list of definitions:

“Department ID” shall mean any form of Department-issued tag, card, wristband, or other object that serves to identify an inmate.

“Sexual abuse” means sexual abuse as defined in the Prison Rape Elimination Act.

“Sexually explicit material” is any printed or displayed material that shows the frontal and or rear nudity of any person, including but not limited to: the fully exposed female breast(s) and/or the genitalia of any gender; sexual excitement; sexual conduct, sexual intercourse; or sadomasochistic abuse.

“Staff” shall include, but not be limited to, uniformed and civilian Department staff, medical staff, contractors and their employees or volunteers.

2. Section 1-03(c) is amended by the addition of the following text to appear above Paragraph (1):

An inmate who violates a rule listed in any subsection of Section 1-03(c) as a “Grade I” offense shall be guilty of the stated Grade I offense; an inmate who violates a rule listed in any subsection of Section 1-03(c) as a “Grade II” offense shall be guilty of the stated Grade II offense; and an inmate who violates a rule listed in any subsection of Section 1-03(c) as a “Grade III” offense shall be guilty of the stated Grade III offense

3. Section 1-03(c)(2) of title 39 of RCNY (Prohibited Conduct, Assault and Fighting), is hereby amended by inserting, under the heading “Grade I,” and below subparagraph 101.14, new subparagraphs 101.15 and 101.15.1, to read as follows:

101.15: An inmate is guilty of the Grade I offense of Gang Assault on an inmate when the inmate, while acting in concert with two or more inmates, injures, spits on or throws any object or substance at any other inmate.

101.15.1: An inmate is guilty of the Grade I offense of Security Risk Group Assault when the inmate injures, spits on or throws any object or substance at any other inmate based on either inmate’s Security Risk Group status or motivated by a Security Risk Group related purpose.

4. Section 1-03(c)(4) of title 39 of RCNY (Prohibited Conduct, Contraband), is hereby amended to read in its entirety as follows:

Grade I:

103.05: Inmates shall not possess any tobacco-related products including, but not limited to, cigarettes, cigars, loose tobacco, chewing tobacco, rolling paper, matches and lighters.

103.07: Inmates shall not sell, exchange or distribute tobacco-related products including, but not limited to, cigarettes, cigars, loose tobacco, chewing tobacco, matches and lighters.

103.08: Inmates shall not make, possess, sell or exchange any amount of alcoholic beverage.

103.10: Inmates shall not make, possess, sell or exchange any type of contraband weapon. Any object that could be used as a weapon may be classified as a weapon.

103.10.5: Inmates shall not possess or transport a Department-issued razor outside the housing area.

103.10.6: Inmates shall return all Department-issued razors after shaving is completed, in accordance with Department or facility procedures. Razors shall be returned in the same condition as received; for example, blade and handle shall be intact.

103.10.7: Inmates shall not possess more than one Department-issued razor.

103.11: Inmates shall not make, possess, sell, give or exchange any amount of narcotic, narcotic paraphernalia, or any other controlled substance, or a manufactured chemical compound that is not facility issued.

103.12: Inmates shall not make, possess, sell, give or exchange any type of escape paraphernalia. Where there is the likelihood that an item can be used to aid an escape, it may be classified as escape paraphernalia. Keys, possession of identification belonging to another person, or fictitious person, transferring an inmate's identification to another, possession of employee clothing, or any other articles which would aid in an escape, or which suggest that an escape is being planned, are contraband.

103.12.5: Inmates shall not possess any type of electronic telecommunications and/or recording device or instrument or any part of such device or instrument, which is designed to transmit and/or receive telephonic, electronic, digital, cellular or radio communications; [device or any part of such instrument designed to have] record or capture sound and/or [image] images; [recording or capturing capabilities]; or charge the power of any such device or instrument. Such devices shall include, but shall not be limited to, cameras (digital or film), video recorders, [and] tape or digital recording devices, electronic storage devices, phone chargers, battery chargers, A/C adapters, A/C cables. [The term "telecommunication device" shall include, but not be limited to, any type of instrument, device, machine or equipment which is designed to transmit and/or receive telephonic, electronic, digital, cellular or radio signals or communications or any part of such instrument, device, machine or equipment as well as any type of instrument designed to have sound, or image recording abilities and shall include, but

not be limited to, a) cellular or digital [phone] phones, [a pager] paggers, [a two-way radio] two-way radios, text messaging devices, or modem equipment or [device] devices. [(including a modem equipment device), a camera, a video recorder and a tape or digital recording device, or any other device that has such capabilities.] (Radios sold in commissary are excluded from this prohibition.)

103.12.6: Inmates shall not possess any contraband with intent to sell or distribute such contraband.

103.12.7: [An inmate is guilty of the offense of Possession of Contraband Grade I when such inmate possesses] Inmates shall not possess money whose value exceeds twenty (20) dollars in cash [or], checks, credit cards regardless of the credit available on the card, or debit or gift cards regardless of the value stored on the card. Money confiscated as contraband will be deposited in the City's treasury and will not be returned to the inmate.

#### Grade II:

103.13: Inmates shall not sell or exchange prescription drugs or non-prescription drugs. Inmates shall not possess prescription drugs that they are not authorized by medical staff to possess.

103.13.5: Inmates shall not possess prescription or non-prescription drugs in quantities in excess of that authorized by medical staff. Inmates are not authorized to possess expired prescription medication or drugs.

103.13.6: Inmates are not authorized to possess any drug that by prescription, or by medical order, must be ingested in view of Department and/or medical staff.

[103.13.7: Inmates shall not possess more than one Department-issued razor.]

103.14: Inmates shall not make, possess, sell, exchange, use or display any item that identifies the inmate as a member or associate of a Security Risk Group [or of a gang]. Articles of religious significance that are Security Risk Group identifiers shall only be considered contraband if they are displayed. Incidental or inadvertent exposure of the item (for example, while showering, saying the rosary or other religious observance, dressing or undressing or sleeping) shall not be considered "display" under this rule.

103.15: An inmate is guilty of the offense of Possession of Contraband Grade II when such inmate possesses money [not in excess of] having a value of up to and including twenty (20) dollars, [or] in the form of cash or checks [or credit cards]. Money confiscated as contraband will be deposited in the City's treasury and will not be returned to the inmate.

#### Grade III:

103.16: Inmates shall not possess unauthorized hobby materials, art supplies or tattooing equipment, or writing implements.

103.17: Inmates shall not possess unauthorized amounts of jewelry, clothing, food, or personal property.

103.18: Inmates shall not possess unauthorized amounts of City-issued property.

103.19: Inmates shall not possess any other unauthorized items not specifically listed within this section.

5. Section 1-03(c)(6) of title 39 of RCNY (Prohibited Conduct, Creating a Fire, Health or Safety Hazard), is hereby amended by the addition of a new subparagraph 105.25, to read in its entirety as follows:

105.25: Inmates shall not use a food warmer as a personal cooking device.

6. Section 1-03(c)(10) of title 39 of RCNY (Prohibited Conduct, Disrespect for Staff) is hereby amended to read in its entirety as follows:

10) Disrespect for Staff; Sexual Harassment towards Staff

**Grade I:**

109.10: [Inmates shall not physically resist staff members.] An inmate is guilty of the Grade I offense of Disrespect for Staff if the inmate physically resists a staff member, including by pulling or twisting away.

109.11: [Inmates shall not harass or annoy staff members by touching or rubbing against them.] An inmate is guilty of the Grade I offense of Disrespect for Staff/Sexual Harassment towards Staff if the inmate harasses or annoys a staff member by touching the staff member.

109.11.5: An inmate is guilty of the Grade I offense of Sexual Harassment towards Staff if the inmate engages in unwelcome physical conduct of a sexual nature, including but not limited to: patting, rubbing, kissing, grabbing, pinching or touching of staff.

**Grade II:**

109.12 [Inmates shall not verbally abuse or harass staff members, or make obscene gestures towards any staff members.] An inmate is guilty of the Grade II offense of Disrespect for Staff/Sexual Harassment towards Staff if the inmate verbally abuses or harasses a staff member, or makes obscene gestures towards any staff member.

109.13: An inmate is guilty of the Grade II offense of Disrespect for Staff/Sexual Harassment Towards Staff when the inmate, in the plain view of staff, intentionally touches the inmate's own body with or without exposing the genitals, buttocks or breasts, in a manner that demonstrates it is for the purpose of sexual arousal, gratification, annoyance, or offense, and that any reasonable person would consider this conduct offensive.

109.14: An inmate is guilty of the Grade II offense of Disrespect for Staff/Sexual Harassment Toward Staff when the inmate requests, solicits or otherwise encourages a staff member or any other to engage in sexual activity, or makes repeated and unwelcome sexual advances or verbal comments of a derogatory or offensive nature, including but not limited to: sexually suggestive remarks, jokes, innuendos, leering, comments, and gestures.

109.15: An inmate is guilty of the Grade II offense of sexual harassment towards staff when the inmate refuses to remove sexually explicit material the inmate has affixed, posted or displayed on Department property after being asked to do so by staff.

**Grade III:**

109.16: An inmate is guilty of the Grade III offense of sexual harassment towards staff when the inmate affixes, posts or displays any sexually explicit material on Department property, including walls, windows, or lighting fixtures.

7. Section 1-03(c)(17) of title 39 of RCNY (Prohibited Conduct, Identification Procedures) is hereby amended to read in its entirety as follows:

17) Identification Procedures

**Grade III:**

115.10: Inmates shall carry and display their Department ID [cards clipped onto the outermost garment] at all times when outside their cell or sleeping quarters.

115.11: Inmates shall promptly produce their Department ID [cards] at the direction of any staff member.

115.12: Inmates shall report the loss of their Department ID [card] promptly to appropriate staff members. Inmates shall be charged restitution [a fee of \$6.00] for a new Department ID [identification card with or without a clip. There will be no charge for the clip alone].

115.13: Inmates shall not intentionally tamper with or destroy their Department ID.

8. Section 1-03(c)(23) of title 39 of RCNY (Prohibited Conduct, Sexual Offenses) is hereby amended to read in its entirety as follows:

23) Sex Offenses

**Grade I:**

122.10: [Inmates shall not force or in any way coerce any person to engage in sexual activities.] An inmate is guilty of a Grade I Sex Offense when the inmate forces, coerces or attempts sexual abuse against another person, or engages in sexual abuse of a person who is unable to consent or refuse.

**Grade II:**

122.11: [Inmates shall not voluntarily engage in sexual activity with any other person.] An inmate is guilty of a Grade II Sex Offense when the inmate engages in sexual activity with another inmate. All contact between inmates is prohibited, including kissing, embracing, and hand-holding.

122.12: [Inmates shall not expose the private parts of their body in a lewd manner.] An inmate is guilty of a Grade II Sex Offense when the inmate exposes the private parts of the inmate's body in a lewd manner.

**Grade III:**

122.13: [Inmates shall not request, solicit or otherwise encourage any person to engage in sexual activity.] An inmate is guilty of a Grade III Sex Offense when the inmate requests, solicits or otherwise encourages any other inmate to engage in sexual activity, or makes repeated and unwelcome sexual advances or verbal comments of a derogatory or offensive nature, including but not limited to, sexually suggestive remarks, jokes, innuendos, comments, and gestures.

122.14: An inmate is guilty of a Grade III Sex Offense when the inmate, in the plain view of any person other than staff, intentionally touches oneself with or without exposing their genitals, buttocks or breasts in a manner that demonstrates it is for the purpose of sexual arousal, gratification, annoyance or offense, and that any reasonable person would consider this conduct offensive.

9. Subparagraph 123.10 of Section 1-03(c)(24) of title 39 of RCNY (Prohibited Conduct, Smuggling) is hereby amended to read as follows:

123.10: Inmates shall be guilty of Grade I smuggling if, by their own actions or acting in concert with others, they smuggle weapons, drugs or drug-related products, manufactured chemical compounds that are not facility issued, alcohol, tobacco or tobacco-related products, or escape paraphernalia into or out of the facility.

10. Section 1-04 of title 39 of RCNY (Hearing Procedures) is hereby amended as follows:

## § 1-04 Hearing Procedures

[This section sets forth hearing procedures.]

(a) General procedures.

(1) When you are placed [against your will] in any of the most restrictive security categories, [including punitive segregation] (other than Pre-Hearing Detention, which is addressed in subsection (b) below), you will be given written notice of:

- (i) The reasons for the designation.
- (ii) The evidence relied upon. The Department is not required to provide you with the source of confidential information.
- (iii) The right to a hearing before an impartial Adjudication Captain appointed from the Adjudication Unit.
- (iv) Your rights at the hearing.

(b) Disciplinary hearing procedures.

(1) Pre-Hearing Detention (PHD). When you are placed in Pre-Hearing Detention (PHD) prior to your disciplinary hearing,

(i) You will be issued a Notice of Pre-Hearing Detention within twenty-four (24) hours of the placement, which will state the reason for the placement in PHD.

(ii) You will have the opportunity to respond to the Notice of Pre-Hearing Detection, verbally, or in writing in a designated space on the Notice form.

(iii) [the] The infraction hearing will be completed within three (3) business days of your transfer to PHD whenever possible, but you shall not be held in PHD for more than seven (7) business days. If the hearing is not held in such time, you must be released from PHD. [If the infraction hearing cannot be completed within three (3) business days, the Adjudication Captain will assess whether it is likely that a hearing will be completed within another three (3) business days. PHD placement may be extended once for a maximum of another three (3) business days. If the hearing is not completed within that time the Chief of Facility Operations or his/her designee shall determine whether you should be placed in Close Custody.]

(2) Disciplinary Infraction Hearings. If you are not placed in PHD, the infraction hearing will take place within three (3) business days after you receive written notice,

unless any further delay is justified in accordance with disciplinary due process [Directive 6500R-B III.C 2. Hearings] Your hearing may be held in absentia (that is, without you present) only [under the following circumstances:] if the following occurs: (i) [You] you are notified of the hearing and refuse to appear; or (ii) [You] you appear and are extremely disruptive, causing a situation[, which] that is unduly hazardous to institutional safety[, and necessitating] that necessitates your removal from the hearing room [thus constituting a constructive refusal to appear. When either of these situations arises] If your hearing is held in absentia, the justification for holding the hearing in absentia shall be clearly documented in the Adjudication Captain's decision.

(3) At your hearing, you have the following rights:

(i) To personally appear;

(ii) To make statements;

(iii) To present material, relevant, and non-duplicative evidence;

(iv) To have witnesses testify at the hearing, provided they are reasonably available and [attending] their attendance at the infraction hearing will not be unduly hazardous to the institutional safety of correctional goals.

(v) If you are non-English speaking, illiterate, blind, deaf, have poor vision, are hard of hearing, or if your case is very complicated, you have a right to be helped by a "hearing facilitator" (not a lawyer). The hearing facilitator shall be designated by the chief administrative officer, or the chief administrative officer's designee, at least twenty-four (24) hours prior to the hearing. The hearing facilitator may assist you with:

(aa) Interviewing witnesses;

(bb) Obtaining evidence and/or written statements;

(cc) Providing assistance at the disciplinary hearing;

(dd) Providing assistance understanding administrative segregation decisions;

(ee) Providing assistance understanding the evidence relied on by the hearing officer and the reasons for action taken;

(ff) Providing assistance understanding the waiver of any rights; and

(gg) Providing assistance in filing an appeal.

(vi) If you do not understand or are not able to communicate in English well enough to conduct the hearing in English, you have a right to an interpreter in addition to a hearing facilitator.

(vii) You have a right to appeal [an adverse] a decision against you.

(viii) You have a right to have the hearing recorded.

(c) [Close Custody and Close Custody/Protective Custody] Protective Custody

(1) If you are transferred to [close custody (CC), including] protective custody [(CC/PC)] (PC), the Department will determine within two (2) business days whether you should continue in such housing. If you do not consent to a decision to continue [CC or CC/PC] PC placement, you will be provided with written notice as set forth in 39 RCNY §1-04(a) (1).

(2) The hearing will be held no sooner than 24 hours and no later than three (3) business days after you receive the written notice of your [Close Custody security designation] PC housing placement, unless an adjournment is required or for one of the reasons set forth in Directive [6006R-C III. E. 8] 6007R-A.

(3) The Adjudication Captain will recommend whether you should remain in [CC or CC/] PC to the [Chief of Facility] Operations Security Intelligence Unit (OSIU) in writing within one (1) business day after the hearing. You will receive a copy of the decision [of the Chief of Facility Operations or designee] from OSIU.

(4) If you are placed in [CC or CC/PC] PC the Department will review your [case] placement thirty (30) days after OSIU initially determined the assignment and then every [twenty-eight (28)] sixty (60) days thereafter to see if you should remain in [CC or CC/PC] PC. You will be notified in writing of the results of that review.

(5) If you request a hearing you will have the following rights:

- i. To personally appear;
- ii. To be informed of the evidence against you that resulted in the designation, subject to limitations regarding confidential information to protect another person's safety or facility security;
- iii. The opportunity to make a statement;

- iv. To call witnesses subject to the Adjudication Captain's discretion;
- v. To present evidence;
- vi. The right to a written determination with reasons.

[(d) *Miscellaneous.*

(1) If you are illiterate, if your case is very complicated, or a pre-hearing transfer has restricted access to potential witnesses, you have a right to be helped by a "hearing facilitator" (not a lawyer). In hearings other than disciplinary infraction hearings, the Department may in its discretion allow you to have a lawyer present who is willing to represent you.

(2) If you do not understand English an interpreter will be provided.

(3) The proceedings of the hearing are recorded.]