

KATHLEEN RICHARD PARALEGAL SPECIALIST
DEPARTMENT OF CORRECTION
LEGAL DIVISION
70 FRANKLIN STREET SUITE 600
BOSTON MA 02110-1327

RE: Written Comments

Dear Kathleen Richard, Paralegal

Thank you for October 1, 2015 letter about Public Listening Sessions-Response Request. I enclose a copy of my 07/06/2015 Petition to Amend Regulations for reconsideration, as comments.

Please note that the 103 CMR is a Human Services number left over when DOC was under Human Services. It should be changed to 520 CMR under Public Safety .

Please maintain my name on your mailing lists for notices about regulations. I like being informed and given chance to comment.

As another matter, as I write, please know that I have free access to two of my books at www.PrisonsFoundation.org.

Under Art Books is Drawing Flower art.

Under Novel Books is UFO: Rodents in Trouble.

Your thoughts would be appreciated and for you to tell others.

DATE 10/07/2015

pc HB
Governor

Enclosures

SINCERELY

Howard B Brown

HOWARD B BROWN

7888

SHR... ..

CAROL HIGGINS O'BRIEN COMMISSIONER
DEPARTMENT OF CORRECTION
50 MAPLE STREET SUITE 3
MILFORD MA 01757

RE: PETITION TO AMEND REGULATIONS

Dear Carol Higgins O'Brien, Commissioner:

Pursuant to M.G.L. c. 30A §4 "Any interested person may petition any agency requesting the adoption, amendment or repeal of any regulation, and may accompany his petition with such data, views and arguments as he thinks pertinent. Each agency shall prescribe by regulation the procedure for the submission, consideration and disposition of such petitions."

I hereby petition to amend regulations.

1) Amend "Restitution, including, if applicable, any medical treatment assessment under M.G.L.c. 124 §1(s);" at 103 CMR §(1)(e), 103 CMR 430.25(2)(e), 103 CMR 430.25(3)(d), 103 CMR 430.25(4)(b), by inserting "in an amount not exceeding \$100.00" after "Restitution,". The proposed amendment would read "Restitution, in an amount not exceeding \$100.00, including, if applicable, any medical treatment assessment under M.G.L.c. 124, §1(s);".

It has been held that prisoners have the right to know the scope of punishment possible for infractions. "To satisfy the minimum standards of due process, Yellowstone County must draft rules which more specifically define prohibited conduct and establish maximum punishments for violations of individual rules..." Noren v Straw, 578 F. Supp. 1, 5 & 6 (D. Mont. 1982). "...The underlying basis for this portion of plaintiff's claim is the lack of written guidelines in the punishment and sentencing area. Although sentencing has traditionally been an area given much discretion, even judges are limited by statutory standards. Prisoners have a right to know the scope of punishment possible for infractions. Moreover, written guidelines may well serve to eliminate the equal protection problems inherent in a standardless sentencing procedure..." Collins v Vitek, 375 F. Supp. 856, 862 (D.N.H. 1974). The current wording lacks a maximum punishment in violation of Due Process of Law and possible violation of equal protection of laws. It is void for vagueness.

We can be guided by the Uniform Law Commr's Model Sentencing and Corrections Act (July 2001) §4-502 Punishment for Disciplinary Infractions (a) Punishments that may be imposed for a disciplinary infraction are:... (6) restitution to

the department or to an injured person in an amount not exceeding \$100 for personal injury or property damage or loss caused by the infraction..."

Wherefore, the proposed amendment should be adopted.

2) Adopt "(g) conduct a hearing in accordance to M.G. L. c. 30A." at 103 CMR 491.10(1).

Our Legislature by M.G.L. c. 127 §§38E-38H mandated that the Commissioner promulgate regulations for inmate grievances. 103 CMR 491.00 Inmate Grievances became law 1/5/01. At M.G.L. c. 127 §38H "A final decision with respect to a grievance shall be subject to judicial review in accordance with section 14 of chapter 30A, in the superior court for the county in which the inmate is incarcerated or otherwise being held, or in Suffolk county..." It is well established that for the court to review under c 30A §14 there must be a hearing. "...There can be no review under c. 30A-§14, unless there was an adjudicatory proceeding..." Westland Housing Corp. v Commissioner of Insurance, 346 Mass 556, 557 (1963) (omitting case cited. It is clear that the Legislature intended that the Commissioner promulgate a regulation that has a hearing for inmate grievances. The current regulation 103 CMR 491.00 Inmate Grievances does NOT have a hearing so does NOT meet the mandates of the Legislature denying inmate of due process of law.

Wherefore, the proposed wording should be adopted so that there is a hearing.

3) Amend 103 CMR491.08(1) the third sentence to read "Additionally, medical or clinical decisions related to an inmate's physical or mental condition shall be grievable under 103 CMR 491.00 and matters concerning access to medical or mental health care are grievable."

Our Legislature by M.G.L. c. 127 §§38E-38H mandated that the Commissioner promulgate regulations. A regulation is promulgated under M.G.L. c 30A §§2 or 3 and MUST be published in the Massachusetts Register. Therefore there MUST be a regulation for MEDICAL INMATE GRIEVANCES. However, the current wording at 103 CMR 491.08(1) excludes medical or clinical decisions because "...the medical contractor is required to maintain its own grievance procedure..." That medical Contractor policy is NOT a regulation in violation of the Legislative mandates and denies inmates due process of law. "...Grievances that maybe brought by inmates subject to the provisions of subsections (a) and (b) shall include all grievances arising out of or resulting from a condition of or occurrence during confinement..." M.G.L. c. 127 §38E(c).

Wherefore, the proposed amendment should be adopted so that there is a regulation for Medical Inmate Grievances as mandated by the Legislature.

RESPECTFULLY SUBMITTED



HOWARD B BROWN

07/06/2015

copy file
Attorney

HIS EXCELLENCY THE GOVERNOR
CHARLES D BAKER
STATE HOUSE ROOM 360
BOSTON MA 02133

RE: Listening Sessions

Dear His Excellency the Governor
Charles D Baker

I enclose a copy of my Listening Sessions comments to the Department of Correction. Your promotion of Listening Sessions is possitive step.

Here is an issue that you might wish to look into. Pursuant to MGL C 30A §4 any interested person may petition any agency requesting changes in regulations. The agency is suppose to have a regulation for such petitions. To the best of my knowledge the Department of Correction does NOT have such a regulation.

Years ago the Department of Correction was under the Human Services. Human Services had "Jointly Adopted Regulations" to meet the MGL c 30A §4 mandate. When DOC went to Public Safety it no longer fell under that regulation.

Pursuant to MGL c 30A §4 I had tried to petition to get a regulation, in the past. I even drafted one based on the "Jointly Adopted Regulation" and other information. To date DOC has not adopted the regulation.

The DOC has a policy, 103 DOC-104 Internal Regulations is directions on when each CMR has annual review, who does it and how to handle comments. However, it is only a policy. MGL c 30A defines what is a regulation. It needs to be published in Massachusetts Register.

Our Legislature mandates a regulation. Petitioners are not given clear means of rights in processing the petition without a regulation. Please correct that.

The 103 CMR number is Human Services and should be in 103 CMR 520 Public Safety area.

Thanks.

SINCERELY

Howard B Brown

HOWARD B BROWN

DATE 10/07/2015

pc HB

Kathleen Richard

Enclosures

Grievance Directions

- The Inmate Medical and Mental Health Grievance and Appeal Form must be used. All grievances must be legible and filled out in its entirety.
- A formal grievance must be filled out within 10 working days of the incident or situation, within 10 working days of the inmate becoming aware of the incident or situation, or within 10 working days of the date on which the inmate receives a response to an informal grievance.
- Whenever a grievance is returned to an inmate for improper format, the inmate shall have an additional three working days from the date of receipt to file a grievance in proper format.
- The time period referred for filing a grievance or the response to the inmate grievance may be extended in some cases. This may occur if the HSA determines that the initial period is insufficient to make an appropriate decision or if the inmate presents a legitimate reason for requesting an extension.
- The HSA or a designee will review and respond in writing to all formal grievances within 10 working days of receiving the grievance.

Appeal Directions

- An inmate may choose to file a formal appeal about medical or mental health related concerns only after dissatisfaction with a response to a formal grievance.
- An appeal must be filled out within 10 working days from receipt of the decision by the HSA. Whenever an appeal is returned to an inmate for improper format, the inmate shall have an additional three working days from the date of receipt to file an appeal in proper format.
- The inmate may file an appeal directly with the MPCH Grievance and Appeal Coordinator. The original grievance form and response must accompany all appeal forms.
- When an appeal is received, the MPCH Grievance and Appeal Coordinator will verify it has gone through the appropriate process. If the appeal has not gone through the appropriate process, the inmate will be informed by letter and given the opportunity to file appropriately.
- The MPCH Grievance and Appeal Coordinator will generate a response to the appeal within 30 working days.
- The decision of the MPCH Grievance and Appeal Coordinator is final.

Abuse of Grievance and Appeals Process

- Punishment or disciplinary actions shall not result from the inmate's filing of a grievance unless the inmate demonstrates a pattern of abuse by filing clearly frivolous, repetitious, or knowingly false documents or by intentionally disregarding the proper grievance and appeal procedure. Abuse of the grievance process shall be determined by the MPCH Grievance and Appeal Coordinator. Upon determination of abuse, limitations on the inmate's ability to file grievances may be imposed.

Historical and Statutory Notes

1992 Legislation

St.1992, c. 823, approved Jan. 5, 1993, in the first sentence, substituted "ten years" for "five years".

Notes of Decisions

Correctional Institution §

sexually dangerous persons was subject to enhanced penalty statute; treatment center was "correctional institution" and defendant was "prisoner" within meaning of statute. Com. v. Geary (1991) 579 N.E.2d 173, 81 Mass.App.Ct. 930.

8. Correctional Institution
Assault and battery on guard by convicted criminal defendant committed to treatment center for

§ 38D. Notice of transfer of prisoner convicted of offense against officer, guard or correctional institution employee

At the request of any correction officer, guard or other employee of any jail, house of correction or correctional institution, the commissioner, sheriffs or their designees shall provide notice to such officer, guard or employee of any transfer between such facilities or similar facilities utilized by the commonwealth or any political subdivision within or without the commonwealth of a prisoner convicted of an offense against such officer, guard or employee.

Added by St.1986, c. 77.

Historical and Statutory Notes

1996 Legislation

St.1996, c. 77, was approved May 6, 1996.

§ 38E. Inmate complaints; grievance system; grievance resolution

(a) The commissioner shall promulgate regulations to establish a fair, impartial, speedy and effective system for the resolution of grievances filed against the department, its officers or employees, by inmates who are committed to, held by or in the custody of the department in a state, county, or federal correctional facility, or the Massachusetts treatment center. The commissioner, in consultation with the county sheriffs, shall also promulgate regulations for the resolution of grievances filed against a county of the commonwealth, its officials or employees, by inmates who are committed to, held by, or in the custody of a county sheriff.

(b) A grievance system shall provide but not be limited to:

- (1) specific maximum time limits for written replies to grievances with reasons for such replies at each decision level within the system;
- (2) priority processing of grievances that are of an emergency nature, including matters in which delay would subject the petitioner to substantial risk of personal injury or other damages;
- (3) safeguards to avoid reprisals against any petitioner or participant in the resolution of a grievance.

(c) Grievances that may be brought by inmates subject to the provisions of subsections (a) and (b) shall include all grievances arising out of or resulting from a condition of or occurrence during confinement, whether or not said grievance is presented in the form of petition for a writ of habeas corpus. A petition for a writ of habeas corpus seeking only release from unlawful imprisonment or restraint and no other relief shall not be subject to the provisions of this section. All applicable statute of limitations and presentation periods shall be tolled from the date of the filing of a grievance pursuant to this section until the final administrative resolution of the grievance.

Added by St.1999, c. 127, § 133.

Historical and Statutory Notes

1999 Legislation

The Governor's disapproval of St.1999, c. 127, approved Nov. 16, 1999, and by § 390 made effective as of July 1, 1999.

§ 38F. Exhaustion of administrative remedies under section 38E; court consideration of inmate claims; exceptions

An inmate shall not file any claim that may be the subject of a grievance under section 38E unless the inmate has exhausted the administrative remedy established pursuant to said section 38E; but the court may consider such claim if a final administrative resolution of a grievance filed pursuant to said section 38E has not been decided within 180 days from the date of filing such a grievance, or if the inmate can demonstrate to the court that exigent circumstances exist which, if delayed pursuant to the requirements of this section, would jeopardize the life or seriously impair the health of the inmate, or, for actions seeking equitable relief.

Added by St.1999, c. 127, § 133.

Historical and Statutory Notes

1999 Legislation

The Governor's disapproval of St.1999, c.127, approved Nov. 16, 1999, and by § 390 made effective as of July 1, 1999.

§ 38G. Disposition of court actions pending upon effectiveness of regulations promulgated under section 38E

Any claim that may be the subject of a grievance under the provisions of section 38E which is pending in any court, when the regulations promulgated pursuant to section 38E take effect, may be dismissed without prejudice or may be continued by the court for up to 90 days, upon a finding that a continuance or dismissal would be appropriate and in the interests of justice to permit resolution of the claim under the terms specified by the grievance procedure established in section 38E.

Added by St.1999, c. 127, § 133.

Historical and Statutory Notes

1999 Legislation

The Governor's disapproval of St.1999, c. 127, approved Nov. 16, 1999, and by § 390 made effective as of July 1, 1999.

§ 38H. Judicial review of final decision on grievance

A final decision with respect to a grievance shall be subject to judicial review in accordance with section 14 of chapter 30A, in the superior court for the county in which the inmate is incarcerated or otherwise being held, or in Suffolk county. A complaint filed with the court by an inmate in accordance with this section shall be accompanied by a copy of the final decision for which review is sought, if any, and a complaint not so accompanied subject to the excision in section 38F shall not be accepted for filing. The availability of review under this section shall not be construed to limit any judicial remedies otherwise available.

Added by St.1999, c. 127, § 133.