

Notice of Proposed Rule

DEPARTMENT OF CORRECTIONS

RULE NOS.: RULE TITLES:

33-103.002 Inmate Grievances – Terminology and Definitions
33-103.005 Informal Grievance
33-103.006 Formal Grievance – Institution or Facility Level
33-103.007 Appeals and Direct Grievances to the Office of the Secretary
33-103.011 Time Frames for Inmate Grievances
33-103.014 Reasons for Return of Grievance or Appeal Without Processing
33-103.015 Inmate Grievances – Miscellaneous Provisions

PURPOSE AND EFFECT: The purpose and effect of the proposed rule is to comply with the Prison Rape Eliminate Act (PREA), to explain who can file grievances related to sexual abuse and the procedural requirements to file such grievances, to clarify transportation of the grievance lock box, to clarify the processing of grievances, to clarify how a grievance may be withdrawn, and to expand on the reasons for a grievance being returned without processing.

SUMMARY: The revisions define sexual abuse, allow third parties to file grievances related to sexual abuse, changes timeframes related to filing grievances related to sexual abuse, revise Form DC1-303, clarify the transportation of the grievance lock box, clarify the processing of grievances, clarify how a grievance may be withdrawn, and expand on the reasons for a grievance being returned without processing.

SUMMARY OF STATEMENT OF ESTIMATED REGULATORY COSTS AND LEGISLATIVE RATIFICATION:

The Agency has determined that this will not have an adverse impact on small business or likely increase directly or indirectly regulatory costs in excess of \$200,000 in the aggregate within one year after the implementation of the rule. A SERC has not been prepared by the agency.

The Agency has determined that the proposed rule is not expected to require legislative ratification based on the statement of estimated regulatory costs or if no SERC is required, the information expressly relied upon and described herein: Upon review of the proposed changes to these rules and incorporated forms, the department has determined that the amendments will not exceed any one of the economic analysis criteria in a SERC as set forth in Section 120.541(2)(a), F.S.

Any person who wishes to provide information regarding a statement of estimated regulatory costs, or provide a proposal for a lower cost regulatory alternative must do so in writing within 21 days of this notice.

RULEMAKING AUTHORITY: 944.09 FS.

LAW IMPLEMENTED: 944.09, 944.241 FS.

IF REQUESTED WITHIN 21 DAYS OF THE DATE OF THIS NOTICE, A HEARING WILL BE SCHEDULED AND ANNOUNCED IN THE FAR.

THE PERSON TO BE CONTACTED REGARDING THE PROPOSED RULE IS: LaDawna Fleckenstein, 501 South Calloun Street, Tallahassee, Florida 32399-2500

THE FULL TEXT OF THE PROPOSED RULE IS:

33-103.002 Inmate Grievances – Terminology and Definitions.

The following terms, as defined, shall be standard usage throughout the department:

(1) through (16) No change.

(17) Sexual Abuse

(a) Any unwanted or coerced act by an inmate against another inmate, without the inmate's consent, including any of the following:

1. Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

2. Contact between the mouth and the penis, vulva, or anus;

3. Penetration of the anal or genital opening of another person, however slight, by a hand, finger, object or other instrument; and

4. Any other intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast,

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inner thigh, or buttocks of another person, excluding contact incidental to a physical altercation;

(b) Any of the following acts perpetrated by a staff member, contractor, or volunteer against an inmate, with or without consent of the inmate:

1. Contact between the penis and the vulva or the penis and the anus, including penetration, however slight;

2. Contact between the mouth and the penis, vulva, or anus;

3. Contact between the mouth and any body part where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

4. Penetration of the anal or genital opening, however slight, by a hand, finger, object, or other instrument, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

5. Any other intentional contact, either directly or through the clothing, of or with the genitalia, anus, groin, breast, inner thigh or buttocks, that is unrelated to official duties or where the staff member, contractor, or volunteer has the intent to abuse, arouse, or gratify sexual desire;

6. Any attempt, threat, or request by a staff member, contractor, or volunteer to engage in the activities described in the above paragraphs 1 – 5 of this subsection;

7. Any display by a staff member, contractor, or volunteer of his or her uncovered genitalia, buttocks, or breast in the presence of an inmate, and

8. Voyeurism by a staff member, contractor, or volunteer.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS., 28 CFR Part 115. History—New 10-12-89, Amended 1-15-92, 12-22-92, 4-10-95, 12-7-97, Formerly 33-29.002, Amended 10-11-00, 1-2-03, 9-16-03, 2-9-05, 3-25-08, 5-27-12, 11-7-12,_____.

33-103.005 Informal Grievance.

(1) Inmates shall utilize the informal grievance process prior to initiating a formal grievance. Inmates may skip this step and initiate the process at the formal institutional level for issues pertaining to the following: grievance of an emergency nature, grievance of reprisal, grievance alleging violations of the Americans with Disabilities Act, medical grievance, grievance involving gain time governed by Rule 33-601.101 F.A.C. Incentive Gain Time, grievance challenging placement in close management or subsequent reviews, grievances regarding the return of incoming mail governed by subsection 33-210.101(14), F.A.C., grievances regarding disciplinary action (does not include corrective consultations) governed by Rules 33-601.301-.314, F.A.C., and grievances regarding allegations of sexual abuse as defined in subsection 33-103.002(17), F.A.C. Inmates may proceed directly to the Office of the Secretary on the following issues as governed by subsection 33-103.007(6), F.A.C.: ~~grievance alleging a violation of the Health Insurance Portability and Accountability Act (HIPAA)~~, grievance of emergency nature, grievance of reprisal, protective management, admissible reading material, sentence structure issues (release date calculations), and inmate banking issues. Grievances alleging a violation of the Health Insurance Portability and Accountability Act (HIPAA) must be filed directly with the Office of the Secretary using the Request for Administrative Appeal, Form DC1-303, Request for Administrative Remedy or Appeal. Form DC1-303 is incorporated by reference in Rule 33-103.006, F.A.C.

(a) An informal grievance shall be submitted to the designated staff by ~~personally~~ placing the informal grievance in a locked grievance box. Locked boxes shall be available to inmates in open population and special housing units. A staff person from classification, the grievance coordinator's office, or the assistant warden's office shall be responsible for the key. If the staff member collecting the grievances is from classification or the assistant warden's office, he or she shall retrieve the grievances and appeals and deliver them to the institutional grievance coordinator in a locked container. The warden shall designate one (1) staff member who shall log all informal grievances and distribute to the appropriate department or staff.

(b) After being logged, informal grievances shall be forwarded to the staff member who is responsible in the particular area of the problem, the classification team, the appropriate section head, or other institutional staff. When an informal grievance is received by the reviewing authority as defined in Rule 33-103.002, F.A.C., the reviewing authority shall respond to the grievance; or refer the grievance to a staff member for response, ~~or shall advise the inmate to re-file with a specific staff member.~~

(c) No change.

(2) When submitting an informal grievance, the inmate shall use Form DC6-236, Inmate Request, and shall:

(a) Check the appropriate box indicating to whom he is submitting the informal grievance. If the inmate checks the box designated "other," and elects to name a specific staff member, the final determination of the appropriate person to handle the grievance shall ultimately be made by staff. The inmate shall ~~he or she shall print the name or title of the person the form is going to in the space underneath the box,~~ and complete the other sections of the heading;

(b) No change.

(3) No change.

(4) The informal grievance shall be responded to within 10 days of the initial receipt date as noted on the informal grievance log.

(a) through (c) No change.

~~(d) The response to the informal grievance shall include the following statement, or one similar in content and intent if the grievance is denied: You may obtain further administrative review of your complaint by obtaining form DC1-303, Request for Administrative Remedy or Appeal, completing the form as required by Rule 33-103.006, F.A.C., attaching a copy of your informal grievance and response, and forwarding your complaint to the warden or assistant warden no later than 15 days after the grievance is responded to. If the 15th day falls on a weekend or holiday, the due date shall be the next regular work day. Form DC1-303 is incorporated by reference in Rule 33-103.006, F.A.C.~~

(5) It is the policy of the department that all inmate request forms be answered.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS. History—New 10-12-89, Amended 1-15-92, 12-22-92, 3-30-94, 4-17-94, 4-10-95, 8-10-97, 12-7-97, 2-17-99, Formerly 33-29.005, Amended 8-1-00, 2-9-05, 3-25-08, 1-31-10, 5-27-12, 11-7-12, _____.

33-103.006 Formal Grievance – Institution or Facility Level.

(1) When an inmate decides to file a formal grievance, he or she shall do so by completing Form DC1-303, Request for Administrative Remedy or Appeal, and filing within the time limits set forth in Rule 33-103.011, F.A.C. Form DC1-303 is hereby incorporated by reference. Copies of this form are available from the Forms Control Administrator, 501 South Calhoun Street, Tallahassee, Florida 32399-2500. <http://www.flrules.org/Gateway/reference.asp?No=Ref-01223>. The effective date of the form is _____ 2-05.

(a) through (b) No change.

(2) Procedural Requirements.

(a) through (g) No change.

(h) The inmate shall submit the grievance or appeal to designated staff by placing the grievance or appeal in a locked grievance box. Locked boxes shall be available to inmates in open population and special housing units. A staff person from classification, the grievance coordinator's office, or the assistant warden's office shall be responsible for the key. If the staff member collecting the grievances is from classification or the assistant warden's office, he or she shall retrieve the grievances and appeals and deliver them in a locked container to the institutional grievance coordinator. The institutional grievance coordinator shall log all formal grievances and provide the inmates with receipts. The appeals will be forwarded to the Bureau of Policy Management and Inmate Appeals after being processed for mailing in accordance with paragraphs 33-103.006(8)(b) and (c), F.A.C. The Bureau of Policy Management and Inmate Appeals shall log all appeals and forward receipts to the inmates. Grievances and appeals shall be picked up and forwarded by the institutions daily Monday through Friday.

(i) No change.

(j) If the inmate or third party is filing a grievance involving sexual abuse, it shall be clearly stated in the first line of the grievance that it is a grievance related to sexual abuse. Also on Form DC1-303 the third party filer shall

check the box next to Third Party Grievance Alleging Sexual Abuse.

(3) The following types of grievances may be filed directly with the reviewing authority as defined in subsection 33-103.002(15), F.A.C., by-passing the informal grievance step, and may be sent in a sealed envelope through routine institutional mail channels:

(a) through (i) No change.

(j) Grievances alleging sexual abuse as defined in Rule 33-103.002(17).

1. If an inmate believes he or she is the victim of sexual abuse they should immediately report it. They may also decide to complete form DC1-303, Request for Administrative Remedy or Appeal and file within the requirements and guidelines listed below. This rule is established to meet the requirements of the Prison Rape Elimination Act (PREA) of 2003.

a. The grievance should begin at the formal level at the institution unless filing pursuant to paragraph 33-103.007(6)(a), F.A.C., or subparagraph 3-103.007(6)(b)5., F.A.C. There is no time limit on when an inmate or third party may initiate a grievance regarding allegations of sexual abuse. However, normal time limits as described in Rule 33-103.011, F.A.C., will apply when the inmate receives the response to the formal grievance and elects to proceed to the next level of review. Staff shall comply with response time requirements outlined in Rule 33-103.011, F.A.C.

b. Inmates filing grievances alleging sexual abuse shall not be instructed to file the grievance to the individual(s) who are the subject(s) of the complaint. Additionally grievances of this nature shall not be referred to the subject(s) of the complaint

c. Third parties, including fellow inmates, staff members, family members, attorneys and outside advocates, shall be permitted to assist inmates in filing grievances alleging sexual abuse. Third parties are also permitted to file such grievances on behalf of inmates.

d. Third parties must use the official Form DC1-303 which can be obtained from subsection (1) of this rule. The form may also be requested from the inmate's current location or the Department's Central Office at 501 South Calhoun Street, Tallahassee FL. 32399. On Form DC1-303 the third party filer shall check the box next to Third Party Grievance Alleging Sexual Abuse. Additionally when a third party files a sexual abuse grievance they must complete the information that identifies the inmate on the top of the form and place their signature and the date at the bottom of the form. When completed, a third party filer who is not an inmate, shall mail the form to the attention of the warden at the institution where the inmate is currently housed unless the grievance is filed pursuant to paragraph 33-103.007(6)(a), F.A.C. When the third party filer is an inmate, the grievance shall be submitted pursuant to subsections (8) or (9) of this rule.

e. When third parties initiate a sexual abuse grievance, the inmate will be notified by institutional staff. A staff member shall interview the inmate within 2 business days of receipt of the third party grievance alleging sexual abuse. During this interview the inmate shall elect to allow the grievance to proceed or request that the grievance be stopped by completing the top half of Form DC6-236, Inmate Request, stating whether he elects for the grievance to proceed or be stopped. The institution shall document the inmate's desire to either allow or refuse the grievance to proceed under the response section of Form DC6-236. Form DC6-236 is incorporated by reference in Rule 33-103.005, F.A.C. A copy of the Inmate Request will be placed in the inmate's file. If the inmate refuses to allow the grievance to proceed on their behalf staff will also document the refusal in IGLOGS and designate the grievance as "withdrawn". IGLOGS is the Inspector General Office Log System (Database) that is utilized to store and maintain log numbers, dates, responses, dispositions and other relevant data on all inmate formal grievances and appeals.

f. If the inmate agrees to let the grievance filed by a third party proceed, staff shall log the third party grievance alleging sexual abuse and provide a receipt to the inmate. The response will be provided to the inmate. If the inmate is unsatisfied with the response to the formal grievance they may file an appeal on Form DC1-303. The third party who initiated the formal grievance cannot appeal the decision when it is rendered. Staff shall notify the third party filer of the disposition rendered on the grievance. In accordance with the Health Insurance Portability and Accountability Act, specifics of the case shall not be divulged to the third party.

g. The Department may claim an extension of time to respond, of up to 70 days, if the normal time period for response is insufficient to make an appropriate decision. The inmate shall be notified in writing of the extension and a date by which a decision will be made.

h. An inmate may file an emergency grievance if they believe they are subject to a substantial risk of imminent

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sexual abuse.

i. When receiving an emergency grievance from an inmate expressing belief they are subject to a substantial risk of imminent sexual abuse the institution must take immediate corrective action. Staff handling this grievance shall provide an immediate response within 48 hours and shall issue a final decision within 5 calendar days from the receipt of the grievance. The final decision will document the agency's determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

2. An inmate may be subject to disciplinary action for filing a grievance related to alleged sexual abuse if the Department demonstrates that the inmate filed the grievance in bad faith. Failure of the inmate to substantiate their grievance allegations shall not, by itself, be used as grounds to initiate disciplinary actions. If it is found that an inmate has intentionally falsified information in the grievance, or grievance appeal, disciplinary action may be taken against the inmate in accordance with Rule 33-601.314, F.A.C.

(4) through (10) No change.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS., 28 CFR Part 115. History—New 10-12-89, Amended 1-15-92, 12-22-92, 4-10-95, 8-10-97, 12-7-97, 5-10-98, 2-17-99, Formerly 33-29.006, Amended 8-1-00, 10-11-00, 2-9-05, 10-28-07, 3-25-08, 5-27-12, 11-7-12,_____.

33-103.007 Appeals and Direct Grievances to the Office of the Secretary.

(1) through (2) No change.

(3) The Office of the Secretary has designated the Bureau of Policy Management and Inmate Appeals to receive, review, investigate, evaluate and respond to appeals and direct grievances filed with the Office of the Secretary. Appeals and direct grievances to the Office of the Secretary shall be turned over that same date to the Bureau of Policy Management and Inmate Appeals which shall ensure that the grievance is date-stamped in on the date of receipt. Upon receipt of the appeal or direct grievance by the Bureau of Policy Management and Inmate Appeals, the following shall occur:

The decision of whether or not the grievance has been timely filed by the inmate shall be made based upon the following comparisons:

(a) In the case of an appeal being filed with the central office, by comparing the receipt date on the DC1-303 form to the return response date of the formal grievance (the date the grievance leaves the recipient's office).

(b) No change.

(4) through (5) No change.

(6) Direct Grievances.

(a) Emergency grievances and grievances of reprisals, protective management, admissible reading material, grievances concerning sentence structure (release date calculations), ~~or~~ inmate banking issues or sexual abuse grievances when the abuse is alleged to have been committed by the Warden of the institution where the inmate is currently housed may be filed directly with the Office of the Secretary using the Request for Administrative Remedy or Appeal, Form DC1-303. Grievances alleging a violation of the Health Insurance Portability and Accountability Act (HIPAA) must be filed directly with the Office of the Secretary using the Request for Administrative Remedy or Appeal, Form DC1-303. The following shall apply:

1. The inmate shall state at the beginning of Part A of Form DC1-303 that the grievance concerns either an emergency or is a grievance of a reprisal. When alleging HIPAA violations, the inmate shall state that the grievance concerns HIPAA at the beginning of Part A of Form DC1-303. The inmate or the third party filer of a sexual abuse grievance shall state at the beginning of Part A of Form DC1-303 that the grievance is a sexual abuse related grievance. On Form DC1-303 the third party filer shall check the box next to Third Party Grievance Alleging Sexual Abuse.

2. The inmate must clearly state the reason for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and formal grievance steps of the institution or facility, except in the case of a HIPAA violation grievance which must be filed directly with the Office of the Secretary. In the case of a sexual abuse grievance, the inmate or the third party filer must clearly state that the formal grievance step of the institution or facility was by-passed because the abuse is alleged to have been committed by the Warden of the institution where the inmate is currently housed.

3. The inmate may forward grievances of these ~~four~~ types to the Office of the Secretary in a sealed envelope by following the procedure set out in paragraph 33-103.006(8)(d), F.A.C. When a direct grievance alleging violation of HIPAA is received at the Office of the Secretary, the Bureau of Policy Management and Inmate Appeals shall forward the grievance to the Office of the Assistant Secretary for Health Services for investigation and response. The disclosure of medical information in a grievance authorizes staff to review the information and to use and disclose the medical information necessary to investigate in order to respond. Following preparation of a response and signature of the responding employee, the grievance shall be returned to the Bureau of Policy Management and Inmate Appeals to ensure appropriate filing and routing.

(b) Emergency Grievances. An emergency grievance may be filed directly with the Secretary. Upon receipt, staff of the Bureau of Policy Management and Inmate Appeals shall take the following actions as soon as possible, but no later than two calendar days following receipt:

1. through 3. No change.

4. If an emergency is not found to exist, it will be clearly marked on the grievance ~~will be stamped~~ “not an emergency,” signed and dated by the responding employee, and returned to the inmate within three working days of receipt as his reasons for by-passing the previous level of review will not be valid.

5. An inmate may file an emergency grievance if they believe they are subject to a substantial risk of imminent sexual abuse. When receiving an emergency grievance from an inmate expressing belief they are subject to a substantial risk of imminent sexual abuse the institution must take immediate corrective action. Staff handling this grievance shall provide an immediate response within 48 hours and shall issue a final decision within 5 calendar days from the receipt of the grievance. The final decision will document the agency’s determination whether the inmate is in substantial risk of imminent sexual abuse and the action taken in response to the emergency grievance.

(c) through (d) No change.

(7) through (8) No change.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS and 28 CFR Part 115. History–New 10-12-89, Amended 1-15-92, 12-22-92, 4-10-95, 8-10-97, 12-7-97, 10-7-98, 2-17-99, Formerly 33-29.007, Amended 8-1-00, 6-29-03, 2-9-05, 8-21-06, 3-25-08, 6-13-12, 11-7-12,_____.

33-103.011 Time Frames for Inmate Grievances.

When determining the time frames for grievances in all cases, the specified time frame shall commence on the day following the date of the incident or response to the grievance at the previous level. For example, if an incident occurred on December 1, fifteen days from that date would be December 16.

(1) Filing of Grievances.

(a) No change.

(b) Formal Grievances – Must be received no later than 15 calendar days from:

1. No change.

2. The date on which the incident or action being grieved occurred if an informal grievance was not filed pursuant to the circumstances specified in subsection 33-103.006(3), F.A.C., unless the grievance is an issue related to sexual abuse. Pursuant to sub-subparagraph 33-103.006(3)(j)1.a., F.A.C., sexual abuse grievances filed either by the inmate or a third party may be filed at any time after the incident is alleged to have occurred. After the initial filing, all other applicable timeframes shall apply.

(c) Grievance Appeals to the Office of the Secretary – Must be received within 15 calendar days from the date of the response to the formal grievance is returned to the inmate.

(d) No change.

(2) No change.

(3) Responding to Grievances.

(a) Informal Grievances – ~~Within 10 calendar days~~ Following the initial receipt of an informal grievance by the staff member, a written response shall be completed within 10 calendar days provided to the inmate. See Rule 33-103.005, F.A.C.

(b) through (d) No change.

(4) through (5) No change.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS., 28 CFR Part 115. History–New 10-12-89, Amended 1-15-92,

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12-22-92, 4-10-95, 12-7-97, Formerly 33-29.011, Amended 2-9-05, 3-25-08, 5-27-12, 11-7-12,_____.

33-103.014 Reasons for Return of Grievance or Appeal Without Processing.

(1) The informal grievance, formal grievance, direct grievance, or grievance appeal, hereafter referred to as “grievance,” may be returned to the inmate without further processing if, following a review of the grievance, one or more of the following conditions are found to exist. The reasons listed below are the only reasons for returning a grievance without a response on the merits.

(a) through (w) No change.

(x) The inmate fails to use his committed name pursuant to 33-603.101 and 33-103.006, F.A.C., when completing a grievance.

(2) No change.

Rulemaking Authority 944.09 FS. Law Implemented 944.09 FS. History–New 10-12-89, Amended 1-15-92, 12-22-92, 4-10-95, 12-7-97, 5-10-98, Formerly 33-29.014, Amended 6-29-03, 2-9-05, 6-13-12, 11-7-12,_____.

33-103.015 Inmate Grievances – Miscellaneous Provisions.

(1) through (12) No change.

(13) If an inmate elects to withdraw a grievance they should notify staff using Form DC6-236, Inmate Request. The request should include the date the grievance was filed along with the subject matter of the grievance. Staff should indicate on the grievance log that the grievance was withdrawn at the request of the inmate along with the date of the request to withdraw.

Rulemaking Authority 944.09 FS. Law Implemented 944.09, 944.241 FS. History–New 10-12-89, Amended 1-29-92, 9-3-92, 12-22-92, 7-11-93, 5-3-94, 4-10-95, 9-23-96, 8-10-97, 12-7-97, 5-10-98, 2-17-99, Formerly 33-29.015, Amended 8-1-00, 10-11-00, 2-7-01, 5-27-02, 1-2-03, 2-9-05, 9-4-05, 10-28-07, 5-27-12, 11-7-12,_____.

NAME OF PERSON ORIGINATING PROPOSED RULE: Alan McManus, Chief of the Bureau of Policy Management and Inmate Appeals

NAME OF AGENCY HEAD WHO APPROVED THE PROPOSED RULE: Michael D. Crews, Secretary

DATE PROPOSED RULE APPROVED BY AGENCY HEAD: August 8, 2013

DATE NOTICE OF PROPOSED RULE DEVELOPMENT PUBLISHED IN FAR: June 18, 2013