

CR 86-126

CERTIFICATE

STATE OF WISCONSIN )  
 ) SS  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

**RECEIVED**

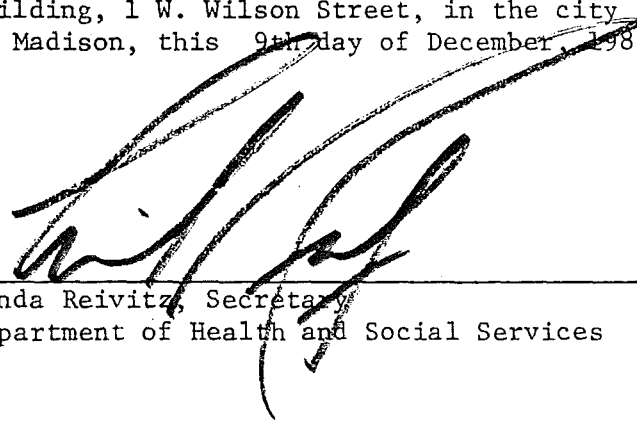
DEC 10 1986

9:55 am  
Revisor of Statutes  
Bureau

I, Linda Reivitz, Secretary of the Department of Health and Social Services and custodian of the official records of the Department, do hereby certify that the annexed rules relating to body content searches to detect the ingestion of intoxicants or the possession of other contraband by inmates of adult correctional institutions were duly approved and adopted by this Department on December 9, 1986.

I further certify that this copy has been compared by me with the original on file in the Department and that this copy is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department at the State Office Building, 1 W. Wilson Street, in the city of Madison, this 9th day of December, 1986.



SEAL:

Linda Reivitz, Secretary  
Department of Health and Social Services

2-1-87

ORDER OF THE  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
RENUMBERING, AMENDING AND CREATING RULES

To renumber HSS 306.16(5) to (8); to amend HSS 303.59 and Note, 306.16(1) and Note (1st to 4th paragraphs) and 306.16(6)(intro.), as renumbered; and to create HSS 306.16(5) and 306.215, relating to body content searches to detect the ingestion of intoxicants or the possession of other contraband by inmates of adult correctional institutions.

Analysis by the Department of Health and Social Services

The level of drug use, including alcohol use, in American prisons is thought to be high and to seriously threaten safety and security at the institutions. In Wisconsin, the Division of Corrections recently carried out a study which disclosed a high incidence of marijuana use in its inmate population. Drug and alcohol use within institutions leads to the entry, movement and selling of contraband and provides financial incentives that can corrupt staff as well as inmates.

To discourage drug and alcohol use in its institutions, the Division of Corrections from time to time conducts random testing of the body contents of inmates to detect the presence of intoxicating substances and other contraband. Test results may lead to disciplinary actions aimed at deterring inmates from using the intoxicants and from bringing them into the institutions.

Body contents searches and the subsequent testing of specimens are effective means to detect illicit use of drugs and alcohol. Requiring inmates to cooperate in the testing programs which have this purpose and disciplining them for refusal are necessary to meet the objectives of testing and to maintain order in the institutions.

The proposed revisions in chs. HSS 303 and 306, Wis. Adm. Code, make clear that the Department may order inmates to submit to urinalysis, blood tests, breathalyzer tests, and physical examinations which have as their purpose the detection of the presence of intoxicating substances and other contraband. These body content searches are unrelated to physical examinations and medical tests ordered by medical staff for medical purposes.

The proposed rules state who has the authority to approve body contents searches, who may conduct them, under what circumstances, and that refusal to provide a specimen or submit to a test or physical examination for this purpose constitutes a failure to obey an order which is a punishable offense.

The Department's authority to renumber, amend and create these rules is found in ss. 46.03(6)(b), 53.07 and 227.11(2)(a), Stats. The rules interpret ss. 53.04, 53.07 and 53.08, Stats.

Pursuant to authority vested in the Department of Health and Social Services by ss. 46.03(6)(b), 53.07 and 227.11(2)(a), Stats., the Department hereby renumbers, amends, and creates rules interpreting ss. 53.04, 53.07 and 53.08, Stats., as follows:

SECTION 1. HSS 303.59 and Note are amended to read:

HSS 303.59 USE OF INTOXICANTS. (1) Any inmate who intentionally takes into his or her body any intoxicating substance, except prescription medication in accordance with the prescription, is guilty of an offense.

(2) When a test on a specimen of an inmate's breath, blood or stool or a test on a specimen of an inmate's urine, which has been confirmed in accordance with division procedures by a separate test approved by the state laboratory of hygiene using a chemical method different from the first test, or a physical examination of an inmate indicates use of an intoxicating substance, and the test or examination was requested in accordance with s. HSS 306.16, the inmate is guilty of an offense, unless the use of the intoxicating substance was not intentional or was the result of legitimate use of prescription medication.

(3) The refusal of an inmate to either provide a body fluids specimen or to submit to a physical examination or a breathalyzer test requested in accordance with s. HSS 306.16 is an offense.

Note: HSS 303.59. The reasons for the policy of not allowing inmates to use any kind of intoxicating drugs, including alcohol, are explained given in the note to HSS 303.43.

Misuse of prescription medications is not covered by this section because it is already an offense covered by HSS 303.57. For the purpose of deciding which of the 2 sections applies, "prescription medication" means only drugs obtained properly or improperly, directly or indirectly, from pharmacy supplies at the institution. The fact that a particular drug is sometimes prescribed by some doctor somewhere does not make it a "prescription medication" for purposes of this section.

In sub. (2) use of intoxicating substances is proven by a positive test result performed on body contents specimens or breath or through physical examinations, requested in accordance with HSS 306.16. The division uses reliable tests accepted by the scientific community and follows the standards suggested by the test authors or manufacturers. Refusal to provide breath or body fluid specimens or to submit to a physical examination is a separate offense since the inmate is refusing to obey a direct order. With respect to urinalysis, an inmate is considered to have refused to submit to a body fluids search if he or she does not provide a urine specimen within a reasonable time after the request.

SECTION 2. HSS 306.16(1) and Note (1st to 4th paragraphs) are amended to read:

HSS 306.16 SEARCH OF INMATES. (1) There are ~~3~~4 types of searches of inmates, as follows:

(a) A "personal search" is a search of an inmate's person, including, but not limited to, the inmate's pockets, frisking his or her body, an examination of the inmate's shoes and hat, and an inspection of the inmate's mouth.

(b) A "strip search" is a search in which the inmate is required to remove all of his or her clothes. Permissible inspection includes examination of the inmate's clothing and body and visual inspection of his or her body cavities. A strip search may only be conducted in a clean and private place. Visual inspection of body cavities may be by any staff. Except in emergencies, a strip search must shall be conducted by a person of the same sex as the inmate being searched.

(c) A "body cavity search" is a strip search in which body cavities are inspected by the entry of an object or fingers into body cavities. Such These inspections shall be by medical staff.

(d) A "body contents search" is a search in which the inmate is required to provide a sample of urine, breath, blood, or stool for testing for the presence of intoxicating substances, as defined in s. HSS 303.02(10), in accordance with division procedures and with methods approved by the state laboratory of hygiene, or to submit to a nonsurgical physical examination by medical staff which may include but is not limited to x-rays for detecting the use of intoxicating substances or the possession of other contraband. Body contents searches do not include examinations and tests requested by medical staff for medical reasons. Appropriately licensed or certified medical staff shall take blood samples and x-rays and shall perform all other procedures requiring medical expertise. A staff member of the same sex as the inmate being searched shall collect urine specimens. Any trained staff member may conduct breathalyzer tests.

Note: HSS 306.16. HSS 306.16 regulates "personal", "strip", "body cavity", and "body contents" searches of inmates. In the note to HSS 306.15, there is a discussion of the purposes and importance of searches of living quarters. ~~While that commentary is applicable here, there are also other matters of concern.~~

HSS 306.16 is primarily directed to controlling the entry of contraband, including intoxicating substances, into correctional institutions and its movement within institutions. Contraband is usually carried into institutions either by visitors or inmates who go outside. It is transported by inmates within institutions and is frequently moved to avoid detection. Contraband, including money illegally obtained, is also removed from institutions. Much of this contraband poses a threat to inmates, to correctional treatment, to staff, and to the very institution itself. See the note to HSS 306.15. The fifth circuit court of appeals has written, with reference to strip searches, "They not only help stem the flow of contraband into, within, and out of prisons, but they also have a beneficial deterrent effect." United States v. Lilly, 576 F. 2nd 1240, 1246 (5th Cir. 1978).

Body contents searches and urinalysis in particular are directed at controlling inmate use of intoxicants. The level of drug use in American prisons is thought to be high and to present a serious threat to the safety and security of correctional institutions. Drug and alcohol use promotes the illegal entry, movement and selling of contraband within institutions and provides financial incentives which may corrupt other inmates and staff. Body contents searches and subsequent testing of those specimens are effective means to detect illicit use of drugs and alcohol. Test results may form the basis for disciplinary action, the prospect of which should deter inmates from using intoxicants or bringing them into the institutions.

Such searches may not be conducted without controls. Subsection (1) defines the-3 4 types of searches of the person of an inmate. The less intrusive and more common search is a personal search. Strip searches are conducted infrequently. Body cavity searches, as defined in this section, are rare. Correctional officials could recall only one during ~~the past 5 years~~ a recent 5-year period. Body contents searches are performed more frequently. In response to a recent study which showed high levels of drug use in Wisconsin correctional institutions, the division established a random urine testing program.

SECTION 3. HSS 306.16(5) to (8) are renumbered HSS 306.16(6) to (9).

SECTION 4. HSS 306.16(5) and Note are created to read:

HSS 306.16(5) A body contents search may only be conducted under one of the following conditions and only after approval by the superintendent or that person's designee:

(a) If a staff member, from direct observation or reliable sources, has reasonable grounds to believe that the inmate has used, possesses or is under the influence of intoxicating substances, as defined in s. HSS 303.02(10), or other contraband;

(b) Upon intake in the assessment and evaluation process;

(c) After an inmate returns from:

1. A furlough;
2. Work or study release;
3. Temporary release offgrounds;
4. Any outside work detail; or
5. A visit; or

(d) As part of a random testing program conducted on the entire population of the correctional institution. Selection of inmates for random testing may not be made with knowledge of inmate identities.

Note: 306.16(5). Subsection (5) describes the circumstances under which a body contents search may be conducted. Medical staff are in no way restricted from requesting physical examinations and tests for medical reasons. The department's divisions of corrections and health are expected to develop a protocol to define the role of correctional health staff and their obligations under these rules for both body cavity and body contents searches. When possible, less invasive means of screening for contraband will be employed before involving health care staff. Paragraph (a) permits a body contents search if there are grounds to believe the inmate has used, possesses or is under the influence of intoxicants or other contraband. For example, grounds for a body contents search would exist if contraband were found either on the inmate or in an area controlled, occupied or inhabited by the inmate. In addition, if a staff member observes an inmate possessing or using contraband or if a staff member receives information from a reliable source that an inmate is currently under the influence of or has recently used contraband, grounds would exist for a body contents search. Paragraph (c) lists specific situations in which an inmate may be subjected to a body contents search. All those situations are ones in which the inmate has left the institution grounds and it is therefore possible that the inmate has had access to contraband. The superintendent has discretion to authorize body contents searches when inmates return to the institution under the situations listed in par. (c). If an inmate returns late from these offgrounds activities, the superintendent should always authorize a body contents search. Conducting body contents searches on inmates returning from offgrounds activities is intended to reduce the flow of contraband into the institutions. Since the use of intoxicants is often difficult to detect, par. (d) permits the division to establish random testing programs. Random testing of body fluids is not unreasonable as long as inmates are chosen for testing without regard to their identities. Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984).

Each institution is expected to have procedures for selecting inmates on a random basis for body contents searches which minimize the potential for harassing or intimidating inmates. The division is expected to have procedures which ensure that the test results are reliable, the test operators are properly trained, the chain of custody is preserved, and inmates are treated in the least degrading manner possible. These procedures are available on request from the Bureau of Adult Institutions, Division of Corrections, P.O. Box 7925, Madison, WI 53707.

SECTION 5. HSS 306.16(6) (intro.), as renumbered, is amended to read:

HSS 306.16(6) (intro.) A written report or written log entry of all strip searches under sub. (3)(d), of all body cavity searches under sub. (4), of all

body contents searches under sub. (5) and of all searches in which contraband is found shall be filed with the security director. This report shall state:

SECTION 6. HSS 306.215 is created to read:

HSS 306.215 USE OF TEST RESULTS AS EVIDENCE AT DISCIPLINARY HEARINGS.

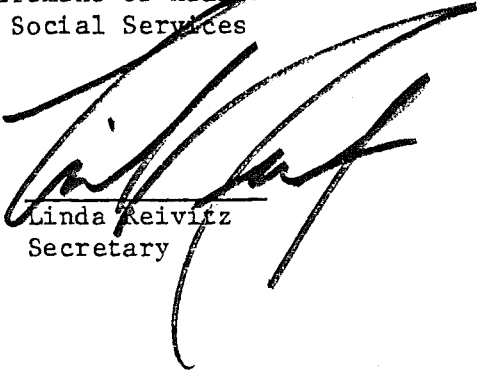
Subject to the confirmation required under s. HSS 303.59(2), results of physical examinations and tests performed on body content specimens for the purpose of detecting intoxicating substances may be used as evidence at a disciplinary hearing conducted pursuant to ch. HSS 303.

The rules contained in this order shall take effect on the first day of the month following their publication in the Wisconsin Administrative Register, as provided in s. 227.22(2), Stats.

Department of Health  
and Social Services

Dated: December 9, 1986

By:

  
Linda Reivitz  
Secretary

Seal:

9-5-12A/462





**State of Wisconsin** \ DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
1 West Wilson Street, Madison, Wisconsin 53702

Anthony S. Earl  
Governor

Linda Reivitz  
Secretary

December 9, 1986

**RECEIVED**

Mailing Address:  
Post Office Box 7850  
Madison, WI 53707

DEC 10 1986

Mr. Orlan Prestegard  
Revisor of Statutes  
9th Floor - 30 on the Square  
Madison, Wisconsin 53702

Revisor of Statutes  
Bureau

Dear Mr. Prestegard:

As provided in s. 227.20, Stats., there is hereby submitted a certified copy of HSS 303.59 and 306.16, administrative rules relating to body content searches to detect the ingestion of intoxicants or the possession of other contraband by inmates of adult correctional institutions.

These rules are also being submitted to the Secretary of State as required by s. 227.20, Stats.

These rule changes do not affect small businesses as defined in s. 227.114(1)(a), Stats., because they apply to adult correctional institutions and to inmates of those institutions.

Sincerely,

Linda Reivitz  
SECRETARY

Enclosure