

Furthermore, it must be immediately necessary to realize the objectives stated in sub. (3) (a)-(f). If means other than force can be used before there is an immediate need for force, those means should be used.

S. 939.48, Stats., permits the use of force in the free world to prevent "an unlawful interference" with oneself or another. This is traditionally called "self-defense" and "defense of another."

This section does not require that the user of force reasonably believe that in so doing he or she is preventing an unlawful interference with another. A typical situation in which a correctional staff member would be authorized to use force in defense of another is if there were a fight between or among inmates. The correctional staff member must be authorized to use force to stop the fight. In so doing, it might be necessary to use force against someone who is not unlawfully interfering with another but who is lawfully defending himself or herself. This is so because, in a prison setting, correctional staff must have the authority to prevent disturbances without worrying about who is wrongfully fighting and who is simply defending himself or herself. After the disturbance is ended, investigation should reveal who started the fight. Such situations are so volatile that it is thought better to rely on the rule that excessive force may not be used as a limiting factor.

Sub. (3) (b) authorizes the use of force to prevent damage to property if it might reasonably lead to injury of another. An objective standard is again relied on. A typical situation where force would be necessary, and has in the past been used, is when an inmate begins to set a fire in a cell hall. This creates a serious risk of harm to other inmates and staff and force may be necessary to prevent such harm. While the authority granted in this subsection may sometimes overlap with that granted in sub. (3) (a), it is better to be clear that authority extends to situations in which the danger to oneself or others is less immediate but not so remote that force can safely be dispensed with. It should also be pointed out that some of the disturbances which have occurred in Wisconsin correctional institutions in recent years began with the random destruction of property. These incidents then escalated to the point where people were injured and lives could have been lost. It may be necessary, as it was in those situations, to take immediate action to prevent the escalation and spread of such disturbances so that life is not threatened.

Sub. (3) (c) authorizes the use of force to regain control of a correctional institution or part of an institution after a takeover by inmates. In recent years, prisons across the United States have been the scene of serious disturbances in which lives have been lost. Fortunately, there has been no loss of life in disturbances in Wisconsin. The use of force is sometimes necessary to regain control of institutions. The requirement that there be a detailed plan for each institution in the event of a disturbance is in HSS 306.22.

This subsection substantially conforms to ABA, standard 6.11 and 15, *Cal. Adm. Code* 3279.

Sub. (3) (d) and (e) authorize the use of force to prevent escape and to apprehend an escapee. It is the responsibility of correctional staff to prevent escapes from correctional facilities, and the use of force is sometimes necessary to fulfill this responsibility. ABA, standard 6.11; American Corr. Institute, Model Penal Code s. 3.07 (Proposed Official Draft 1962); 15 *Cal. Adm. Code* 3279.

Sub. (3) (f) authorizes the use of force to change the location of an inmate. Occasionally, an inmate is ordered to be placed in a segregation unit and refuses to go. To maintain the orderly operation of the institution, the inmate may have to be physically moved from one place to another. Of course, in most situations, it is better to try to persuade the person to move before relying on force. This practice should be followed where appropriate. This rule is a more restrictive one than that suggested by the ABA, standard 6.11, where the maintenance of prison discipline permits the use of force. Rather than rely on force to enforce rules, it is more desirable to rely on the disciplinary process. (See ch. HSS 303.) This usually makes force unnecessary. The few instances when it does not are ones in which the inmate simply refuses to move from a cell or place to the hearing or segregation and force may then be used.

More difficult questions than whether force may be used in a particular situation are how much force can be used and whether deadly force can be used. These questions are addressed in subs. (1), (4), and (5). These subsections should be read together for a full understanding of the amount of force which may be used in a particular situation.

As a general rule, only as much force as is reasonably necessary to achieve the objective is authorized and the use of excessive force is forbidden. Thus, if an escape can be prevented or a fight stopped simply by correctional staff wrestling an individual to the ground and holding him or her, that is the amount of force authorized. Of course, how much force is necessary requires the exercise of judgment in accordance with standard of reasonableness. Sub. (1).

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Deadly force, as defined in sub. (1), may be used in limited situations. Its use is limited first by its definition, e.g., it must be reasonably necessary to achieve the objective. If there are other ways to achieve the objective than through the use of deadly force, its use would not be reasonably necessary to achieve the objective. These same limitations apply to the use of deadly force to achieve the objectives identified in sub. (3) (a)-(c), though its use in such situations may be necessary and is authorized.

Deadly force may be used, subject to the limitations under sub. (4), to prevent the escape and apprehend some escapees. Whether deadly force can be used for such purposes poses a difficult problem and a review of the development of what little law exists is helpful in understanding the issues. The *ABA Standards* state that whether deadly force should be authorized to prevent escape is a "subject of dispute."

What little law exists relating to the force used to prevent escape developed not from prison settings, but escapes from police after apprehension. The use of force in such situations was typically limited by the seriousness of the offense for which the individual was apprehended. This precluded the use of deadly force to prevent the escape of people apprehended for misdemeanors, but authorized its use against those accused of felonies. For a helpful discussion of the development of the law, see American Law Institute's Model Penal Code Tent. Draft #8 (hereinafter "*ALI*") at 52 (May 9, 1958). In some cases, deadly force was authorized to prevent the escape of misdemeanants because state law made escape from custody a felony and the force was authorized on the theory that it was to prevent the commission of a felony.

The Model Penal Code draws a distinction between escape from arrest and escape from custody and authorizes the use of deadly force to prevent escape from custody, whether the person was convicted of a felony or misdemeanor or is merely charged and awaiting trial. The comment states, "Persons in institutions are in a meaningful sense in the custody of the law and not of individuals; the social and psychological significance of an escape is very different in degree from flight from arrest." *ALI*, at 64 (May 9, 1958).

Inmates in Wisconsin correctional institutions pose varying degrees of danger to others. It is difficult to articulate workable criteria for distinguishing the dangerous from the non-dangerous. Because people in maximum and medium security institutions may generally be classified as more dangerous, the authority is provided to use deadly force to apprehend escapees and prevent escapes from these institutions. People in minimum security institutions are there because they are thought to be less dangerous than other inmates. This section requires a reasonable belief that a person in such an institution poses a substantial risk to others before deadly force may be used to prevent escape or apprehend an escapee.

This section also restricts the use of deadly force if it creates a danger to innocent third parties. For example, the use of firearms may pose such a risk. The public ought not be exposed to some risks posed by the use of force. The use of force in such a situation is forbidden unless not using such force creates an even greater danger to innocent third parties.

Other measures, though less certain of preventing an escape, may be more desirable in such a situation. Sometimes, however, it may be necessary to expose the public to such risks because the risks are less serious than those created by not using deadly force. This section does not address the situation in which a hostage is taken.

This section does not permit the use of deadly force to change the location of an inmate or to prevent damage to property. It does not seem desirable, for example, to permit deadly force to be used if an inmate takes a can of paint and starts to spill it on the floor. The use of force to stop this is permitted, however, by sub. (3) (g). For example, if an inmate were throwing pool balls through windows, non-deadly force could properly be used to stop this activity.

HSS 306.07. HSS 307.07 governs the use of firearms by correctional staff.

The use of firearms is, of course, subject to the limitations on the use of force in HSS 306.06. This section reflects present policy of the division of corrections. Correctional staff in daily contact with inmates are not armed. Rather, officers who are posted in towers and in central centers are the only staff who are issued firearms, unless there is an emergency. Sub. (2). When firearms may otherwise be required, only the superintendent may authorize the issuance of firearms. Sub. (1). Their issuance is only permitted to those who have successfully completed the training program referred to in subs. (3) and (4). To remain qualified, a staff member must requalify each year. Only issued firearms may be used: HSS 306.06 (1). These rules fulfill the requirements of *ACA*, standards 4154 and 4155. See 15 *Cal. Adm. Code* 3276.

The reasons that firearms are not typically carried by correctional staff is that they do not assist staff in fulfilling their responsibilities and because the presence of firearms in institutions creates an unnecessary risk to the security of the institution. Firearms are not necessary to the appropriate functioning of institutions. They create unnecessary tension. Were a firearm to get into the possession of an inmate or be misused by a staff member, a great danger to other inmates and staff would thereby be created. On balance, modern correctional thinking is that

firearms ought not be carried by staff who have contact with inmates. In view of the danger created by firearms and their minimal benefit, only the superintendent is permitted to authorize the issuance of firearms. Typically, the person who is in charge of the institution when the superintendent is not there will also have this authority. This subsection follows the recommendations of ABA at 555.

Sub. (4) indicates the nature of the weapons training and qualification program staff must complete to be certified to be issued weapons. It is important the staff who have weapons know how to use them. This greatly increases the chances that they will be used responsibly and diminishes the chances for accidents or negligent handling of them. Moreover, there is a great need for training in human relations and alternatives to force. This training should be part of weapons training.

To insure that weapons are handled responsibly, sub. (5) indicates the procedure to be followed before discharging a weapon. It will not always be possible, given the nature of the situations in which firearms are used, to follow this procedure. However, it is required that it be followed unless it is not feasible to do so. For example, if it becomes necessary to shoot at a person holding a hostage, the procedure might not be followed.

The procedure is designed to verbally inform the inmate that a staff member possesses a weapon and that the inmate should stop the activity. An adequate verbal warning to a person attempting to escape would be to say, "Halt, don't move! I have a weapon." If the verbal warning is disregarded and the inmate does not halt, a warning shot should be fired. If this is disregarded, it might be necessary to fire shots at the inmate. Such shots should be fired to stop the activity and, if possible, not to kill or cause great bodily harm. There may be situations in which it is necessary to shoot to kill. This is provided for in sub. (6) by the phrase "if the inmates activity poses an immediate threat of death or great bodily harm to another." In such case, shooting with the intention of causing death or great bodily harm would be justified and is authorized by the rule.

Sub. (7) requires the investigation of incidents in which a weapon is discharged. This investigation is for the purpose of administrative review and is not intended to take the place of an investigation conducted by another government agency.

Subsections (7) (a)-(c) provide for investigation and reporting through the normal chain of command. Sub. (7) (d) and (e) provide for investigation and reporting by a special panel when anyone is killed or wounded by a firearm discharge. Because of the seriousness of such an event, it is desirable to include on the panel people from outside the division of corrections to insure that the investigation is conducted with the necessary objectivity.

No attempt is made in the rule to identify those sanctions that may or shall be applied to staff members who violate the rules. Clearly, the civil and criminal law of the state applies. A current issue in administrative law is whether the violation of a rule is the basis for a cause of action in tort or under 42 U.S.C. s. 1983. These are matters for the legislature and the Congress. What administrative sanction may be applied is addressed elsewhere in these rules.

Note: HSS 306.08. HSS 306.08 authorizes and regulates the use of chemical agents in adult correctional institutions.

The division's policy is to allow use of chemical agents in emergencies, and to ensure that in nonemergency situations chemical agents are used only as a last resort and not as alternatives to communication with an inmate or to other types of non-deadly force. The rule also makes clear that chemical agents may not be used to punish an inmate but only to control him or her when necessary.

As stated in sub. (2), the use of chemical agents is regulated by this section. Because chemical agents pose a risk of injury to others, they may only be used in limited situations.

Subsection (3) identifies emergency situations in which chemical agents may be used without going through the steps identified in sub. (4). Under this subsection, chemical agents may be used to regain control of an institution or part of an institution over which physical control has been lost during an emergency, HSS 306.23 (1), or disturbance, HSS 306.22 (1). "Part of an institution" may be a building or a small area like a room. Whether a chemical agent should be used in such a situation depends upon whether using the chemical agent is less hazardous for both the person seeking to use the chemical agent and the inmate than using other reasonable means to accomplish the purpose. As explained in HSS 306.06 (5) (b), an inmate's simple refusal to follow an order does not constitute loss of control of all or part of an institution.

Subsection (4) covers use of chemical agents in nonemergency situations, including situations in which an inmate refuses to follow an ordinary order. These situations include, for example, an inmate's refusal to take nonemergency medication or submit to nonemergency medical treatment; refusal to return a meal tray or tray inserts, unless the tray or insert is presently being used as a weapon; an inmate's throwing objects or liquids from the cell, unless

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such activity constitutes an immediate threat of bodily injury or death to him or herself or another; refusal to be strip searched; refusal to come to bars of a cell to be handcuffed for any nonemergency reason; and yelling or shouting.

Subsections (4) (b) 1 to 6 outline a series of steps to be taken before using the chemical agents in nonemergency situations, when it is feasible to take those steps. This procedure is designed to ensure that chemical agents are used only as needed in particular situations. The person seeking to use the chemical agent should communicate with the inmate and should ask other available personnel to communicate with the inmate to persuade the inmate to take the desired action or comply with an order. When communicating with an inmate, staff members should take into consideration an inmate's special needs, including, but not limited to, an inmate's inability to understand English. Waiting or reconsidering the propriety of an order may be possible in some cases. Other solutions may be appropriate in other situations.

Except in situations in which the staff member seeking to use chemical agents knows that the inmate has a history of violent behavior and reasonably believes that the inmate will become violent in the present situation, chemical agents may only be used after an inmate physically threatens to use immediate physical force. Physical force includes possession of a weapon, such as a knife. Verbal threats do not constitute a sufficient threat. When the staff member knows that the inmate has a history of violent behavior and reasonably believes that the inmate will become violent in the present situation, the staff member must follow all steps in the procedure in sub. (4) (b) 1 and 4 but may use chemical agents before using actual physical power and strength.

Subsection (5) (a) states that chemical agents may not be used when they clearly would have no effect. Situations include instances when the inmate has thrown a blanket over his or her head, when the chemical agent cannot effectively be used according to the manufacturer's instructions to produce the desired result, or when a particular inmate is known not to react to the chemical agent.

Subsection (5) (b) clarifies the division's policy that an inmate's simple refusal to follow an order does not justify using chemical agents unless the inmate physically threatens to use immediate physical force.

Subsections (7) and (8) regulate the use of particular chemical agents. CN and CS agents are the only agents to be used in enclosed areas, because enclosed areas require the use of agents which can be released in small amounts and can be carefully controlled. This method of use further avoids unnecessary risks of injury. The manufacturer's safety instructions include guidance as to the distance from which the agent should be delivered as well as the date after which the agent must be replaced.

The use of agents identified in sub. (8) is confined to areas where the risk to life by a reduction in the oxygen available is minimal, for example, in open areas and in rooms such as the dining halls at most institutions.

Because use of chemical agents creates risks, sub. (9) imposes severe limitations on who may authorize their use. In emergency situations described in sub. (3) (b) and (c), the superintendent or designee may authorize the use of chemical agents although, to prevent an imminent escape, described in (9) (b), it may be necessary for the senior staff member present to authorize use of a chemical agent. In non-emergency situations, only the person actually in charge of the institution at the given time—who may be the superintendent or deputy superintendent, the security director, or an assistant superintendent—may authorize the use of chemical agents.

As provided in sub. (10), when chemical agents are used, only trained supervisory personnel may use them, except that a trained staff member may use them under immediate supervision. These requirements and the training requirements are to ensure that chemical agents are used only when necessary and in a way that minimizes the risk to staff and inmates.

Subsection (11) requires a medical examination and change of clothes and bedding and cleaning for exposed inmates and areas. Inmates exposed to CS must be given a chance to shower. "Exposed inmates" are not just those against whom the agent is used but those exposed to it because they are nearby. Medical examinations and cleaning minimize the risk of permanent injury, and a change of clothes and bedding minimizes risks to the health of inmates from the residue of chemical agents as well as the discomfort they may cause.

The reporting requirement in sub. (12) ensures adequate administrative notification and review of the use of chemical agents.