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CERTIFICATE

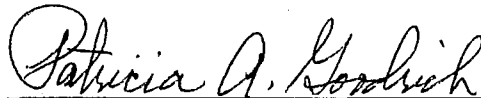
STATE OF WISCONSIN )  
 ) SS  
DEPARTMENT OF HEALTH AND SOCIAL SERVICES)

I, Patricia A. Goodrich, 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 the use of chemical agents on inmates of adult correctional institutions to enforce orders were duly approved and adopted by this Department on November 17, 1989.

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 17th day of November, 1989.

SEAL:



Patricia A. Goodrich, Secretary  
Department of Health and Social Services

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

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To repeal HSS 306.08(5); to renumber HSS 306.06(6) to (12); to amend HSS 306.06(3)(f) and (g) and 306.08(4)(a); to repeal and recreate HSS 306.06 Note (6th and 13th paragraphs), 306.08 Note (4th, 8th and 9th paragraphs) and 306.16(3) and Note; and to create HSS 306.06(3)(h) and Note and 306.08(4)(d), relating to the use of chemical agents on inmates of adult correctional institutions to enforce orders and to strip searches of inmates to detect the presence of contraband.

These rule changes make clear that chemical agents may be used in an adult correctional institution to compel compliance of an inmate with a regulation or lawful order if the inmate physically threatens to use immediate physical force or has a history of violent behavior and staff reasonably believe that the inmate will become violent in the present situation. A typical situation in which a superintendent may authorize the use of chemical agents under these rules is when an inmate refuses to be strip searched prior to entering the segregation unit and at some time in the past has physically attacked an officer when the officer attempted to conduct a strip search. Without the strip search, the inmate could be hiding a weapon that might be used to kill or severely injure himself or herself or someone else. If the inmate cannot be persuaded to obey the order, force must be used to compel compliance. An inmate's refusal to obey an order may affect the security and order of the institution. Without the ability to use chemical agents to enforce regulations and orders, correctional officers would have to intervene physically. This is likely to cause injury to staff and inmates. There have been instances of serious staff injuries incurred while physically intervening to subdue an inmate.

In a recent federal district court case, Colon v Schneider, No. 88-C-564-S (W.D. Wis. March 21, 1989), the court interpreted the Department's rules that were in effect prior to May 12, 1989, to prohibit the use of chemical agents when an inmate refuses to follow an order and the situation is not an emergency under s. HSS 306.08(3). Specifically, the court said that chemical agents may not be used on an inmate who refuses to be strip searched upon changing statuses such as from program segregation to adjustment segregation within a segregation unit even when the inmate has a history of violent behavior which leads staff reasonably to believe that the inmate will become violent in the present situation. The Department did not intend in its rules to prohibit the use of chemical agents in this situation.

The ability to use chemical agents to enforce a lawful order when an inmate physically threatens another or has a history of violence in similar situations is necessary for the security of the institution and the safety of staff and inmates. The court in Soto v Dickey, 744 F.2d 1260 (7th Cir. 1984), stated forcefully that the use of chemical agents when an inmate fails to obey a direct order may be a reasonable response to the institution's legitimate security concerns: "When an order is given to an inmate there are only so many choices available to the correctional officer. If it is an order that requires

action by the institution and the inmate cannot be persuaded to obey the order, some means must be used to compel compliance, such as a chemical agent or physical force....Discipline in a maximum security correctional institution no doubt is difficult, but it is essential if the prison is to function and provide for the care, safety and security of the staff and inmates....Orders given must be obeyed. Inmates cannot be permitted to decide which orders they will obey, and when they will obey them. Someone must exercise authority and control....When an inmate refuse[s] to obey a proper order, he is attempting to assert his authority over a portion of the institution and its officials. Such refusal and denial of authority places the staff and other inmates in danger." Id. at 1267.

This rulemaking order also amends the Department's rules on strip searches of inmates to (1) clarify that not only may an inmate be strip searched on entering or leaving the segregation unit of the institution but also when changing statuses within that unit, for instance, from program to adjustment segregation, and (2) permit the strip searching of an inmate whenever there is a lockdown of the institution, for otherwise contraband may be hidden on an inmate's person which would frustrate the purpose of the lockdown.

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

SECTION 1. HSS 306.06(3)(f) and (g) are amended to read:

HSS 306.06(3)(f) To change the location of an inmate; ~~or~~

(g) To prevent unlawful damage to property; ~~or~~

SECTION 2. HSS 306.06(3)(h) and Note are created to read:

HSS 306.06(3)(h) To enforce a departmental rule, a posted policy or procedure or an order of a staff member.

Note: HSS 306.06(3)(h). Sub.(3)(h) authorizes the use of force to enforce department rules, posted policies and procedures and staff member orders. A typical situation in which a correctional officer would be authorized to use force under this paragraph is if an inmate refuses to be strip searched prior to entering the segregation unit. Without the strip search the inmate could be hiding a weapon that could be used by a self-destructive inmate to kill or severely injure himself or herself or someone else. If the inmate cannot be persuaded to obey the order, some force must be used to compel compliance. However, in general, it is better to use persuasion and the disciplinary process to enforce regulations. (See ch. HSS 303). In any case, force should not be used to punish an inmate for refusing to obey an order.

SECTION 3. HSS 306.06 Note (6th and 13th paragraphs) are repealed and recreated to read:

Note: HSS 306.06(6th paragraph). Furthermore, it must be immediately necessary to realize the objectives stated in sub.(3)(a) to (h). If means other than force can be used before there is an immediate need for force, those means should be used.

(13th paragraph). 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.

SECTION 4. HSS 306.06(3m) is created to read:

HSS 306.06(3m) The use of a chemical agent is a form of non-deadly force but it is regulated by HSS 306.08.

SECTION 5. HSS 306.08(4)(a) and (c) are amended to read:

HSS 306.08(4) NONEMERGENCY SITUATIONS. (a) To deal with situations other than those described in sub.(3), chemical agents may only be used where s. HSS 306.06(3) permits the use of force and, unless par.(c) applies, the inmate physically threatens to use immediate physical force, which may involve a threat to use a weapon, against the staff member. Unless par.(c) applies, ~~An~~ an inmate's verbal threats do not justify using chemical agents.

(c) When s. HSS 306.06(3) permits the use of force and a staff member knows of an inmate's history of violent behavior in similar situations while in custody and reasonably believes that the inmate will become violent in this situation, a chemical agent may be used after the procedures in par. (b) 1 to 4 have been followed but before the inmate physically threatens to use actual physical force.

SECTION 6. HSS 306.08(4)(d) is created to read:

HSS 306.08(4)(d) Chemical agents may not be used in nonemergency situations if:

1. It is clear that the chemical agents would have no physical effect on the inmate; or
2. An inmate refuses to follow an order and the use of chemical agents is not otherwise justified under par. (a) or (c).

SECTION 7. HSS 306.08(5) is repealed.

SECTION 8. HSS 306.08 Note (4th, 8th and 9th paragraphs) are repealed and recreated to read:

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.

Paragraph (4)(d) 1 states that chemical agents may not be used in a nonemergency situation 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.

Paragraph (4)(d) 2 clarifies the division's policy that an inmate's simple refusal to follow an order does not justify using chemical agents in a nonemergency situation unless the inmate physically threatens to use immediate physical force or the inmate has a history of violent behavior and staff reasonably believe that the inmate will become violent in the present situation.

SECTION 9. HSS 306.08(6) to (12) are renumbered HSS 306.08(5) to (11).

SECTION 10. HSS 306.16(3) and Note are repealed and recreated to read:

HSS 306.16(3) A strip search may be conducted:

(a) Before an inmate leaves or enters the security enclosure of a maximum or medium security institution or the grounds of a minimum security institution;

(b) Before an inmate leaves or enters the segregation unit or changes statuses within the segregation unit of a correctional institution;

(c) Before and after a visit to an inmate;

(d) As part of a periodic search and lockdown of an institution under s. HSS 306.14;

(e) At the direction of the shift supervisor who is satisfied that there are reasonable grounds to believe the inmate possesses contraband; and

(f) In the absence of the shift supervisor, if a staff member is satisfied that there are reasonable grounds to believe the inmate possesses contraband.

Note: HSS 306.16(3). Strip searches, by their nature, are unpleasant and degrading to both staff and inmates. All wish that such searches were unnecessary. As has already been stated, they do detect contraband and deter people from bringing it into institutions. *United States v. Lilly*, 576 F.2d 1240 (5th Cir. 1978).

Sub.(3) identifies the circumstances in which strip searches are permitted. The rule is written to limit the use of strip searches by, first, specifying in pars.(a) to (d) specific situations in which inmates may be strip searched. All of those situations are ones in which contraband is moved most frequently or where the danger created by the presence of contraband is so great as to require that authority exist for strip searches. The other limitation, in pars. (e) and (f), is to permit searches at other times only if grounds exist to believe that the inmate possesses contraband.

Because inmates bring contraband in and out of institutions, it is necessary to permit strip searches upon entry and exit. If this were not permitted, it is likely that there would be less movement in and out of institutions. This would defeat program objectives. Sub.(3)(a).

The segregation unit of a correctional institution is usually a tense place. Inmates are there because they have committed a serious violation of prison rules, or because they are dangerous or disturbed. It is essential to the safety of inmates that contraband not be brought into a segregation unit. Inmates cannot be constantly observed while in segregation or when they are temporarily absent. Without the strip search of inmates entering and leaving segregation or changing statuses within the segregation unit, a weapon could be taken in or out and used by a self-destructive inmate to kill or severely injure himself or herself or someone else. Sub.(3)(b).

Sub.(3)(c) authorizes strip searches prior to and after a visit. Visitors may bring contraband to and also carry it from institutions. Frequently, they are not restricted to the visiting area during visits. Either the authority must exist to permit the search of visitors and inmates, or contact with visitors must be limited. On balance, it seems preferable to emphasize searches of inmates. Authority is also given to search visitors, however. See HSS 306.17.

Sub.(3)(d) authorizes strip searches during a search of an entire institution or a part of an institution during a lockdown. Without strip searches during a lockdown, inmates can conceal contraband on their persons and defeat the purpose of the search under s. HSS 306.14.

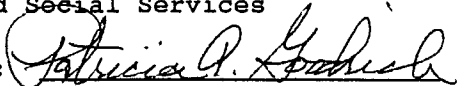
Sub.(3)(e) and (f) do not give staff members unlimited discretion to conduct strip searches. They state that a strip search may be made if there are reasonable grounds to believe the inmate possesses contraband. This is a less than probable cause standard, but more than mere suspicion. It is the same standard as in sub.(2)(a). Sub.(9) indicates what may be considered in determining if there are reasonable grounds. What a staff member observed, information from a reliable source, prior seizures of evidence from the inmate, and the experience of the staff member are all relevant to the determination to strip search. The staff member must believe that it is necessary to strip search an inmate without supervisory approval because a strip search is necessary to preserve evidence or in other cases in which timeliness is very important. Of course, a staff member may also conduct a strip search of an inmate at the direction of the shift supervisor.

In *Bell v. Wolfish, supra*, the U.S. Supreme Court held that strip searches, including visual body cavity inspections, are permissible anytime a pretrial detainee has contact with a member of the public. This principle is applied in this rule to cover situations where the likelihood of contraband being moved or the danger created by the contraband is such that, in the judgment of correctional officials, a search should be permissible.

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.

Dated: November 17, 1989

Wisconsin Department of Health  
and Social Services

By: 

Patricia A. Goodrich  
Secretary

Seal:

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State of Wisconsin \

DEPARTMENT OF HEALTH AND SOCIAL SERVICES  
1 West Wilson Street, Madison, Wisconsin 53702

Tommy G. Thompson  
Governor

Patricia A. Goodrich  
Secretary

November 17, 1989

Mailing Address:  
Post Office Box 7850  
Madison, WI 53707

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NOV 17 1989

Revisor of Statutes  
Bureau

Mr. Orlan Prestegard  
Revisor of Statutes  
7th Floor - 30 on the Square  
Madison, WI 53702

Dear Mr. Prestegard:

As provided in s. 227.20, Stats., there is hereby submitted a certified copy of HSS 306.06, 306.08 and 306.16, administrative rules relating to the use of chemical agents on inmates of adult correctional institutions to enforce orders.

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

These rules apply to the Department and to inmates of adult correctional institutions. The rules do not affect small businesses as defined in s. 227.114(1)(a), Stats.

Sincerely,

Patricia A. Goodrich  
Secretary

Enclosure