

CR 94-135

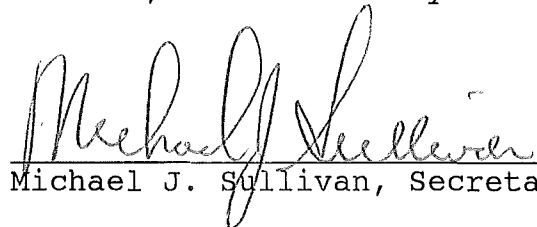
STATE OF WISCONSIN)
) SS
DEPARTMENT OF CORRECTIONS)

I, Michael J. Sullivan Secretary of the Department of Corrections and custodian of the official records, certify that the annexed rules, relating to detection of use of an intoxicating substance through body contents searches or possession of an intoxicating substance by a person on probation or parole supervision, were duly approved and adopted by this Department on March 14, 1995.

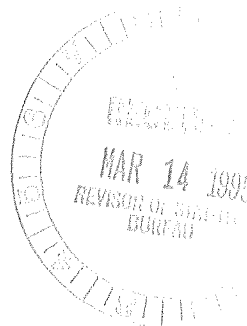
I further certify that this copy has been compared by me with the original on file in this Department and that it is a true copy of the original, and of the whole of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of the Department of Corrections 149 E. Wilson Street in the city of Madison, this 14th day of March, 1995.

SEAL

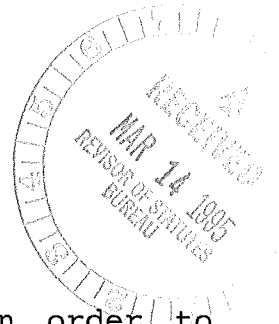


Michael J. Sullivan, Secretary



6-1-95

ORDER OF THE
DEPARTMENT OF CORRECTION
ADOPTING RULES



The Wisconsin department of corrections proposes an order to renumber DOC 328.21 (4) and Note; to renumber and amend DOC 328.21 (5) to (6); to amend DOC 328.04 (3) (k), DOC 328.21 (1) and Note, 1st paragraph, to create DOC 328.04 (3) (m), DOC 328.165, DOC 328.21 (4) and Note, relating to body contents searches, use of a non-prescribed controlled substance, use of alcohol, confirmatory test, confirmatory test fee, and indigency determination for a person on probation or parole supervision.

Statutory authority: s. 301.03 (3), Stats. and s. 227.11 (2) (a), Stats.

Statutes interpreted: s. 301.03 (3), Stats., s. 304.06 (3), s. 973.10, Stats.

Analysis Prepared by Department of Corrections

By using the term body contents search and defining it, the rules require the client to make himself or herself available for a broader range of searches. The rules state the circumstances under which a body contents search may be conducted. The rules make it a violation of supervision for a client to refuse to provide a specimen for testing.

The rules require a client to refrain from the abuse of alcohol and the possession or use of any non-prescribed controlled substance. The rules make it a violation of supervision for a client to intentionally take into the client's body any non-prescribed controlled substance. A client who takes prescribed medication and who takes the prescribed medication according to directions is not guilty of a violation of supervision. The rules prohibit a client who is affected by a specific rule issued by an agent to use alcohol.

The rules require a urine specimen be confirmed within 30 days of the first test when all of the following conditions are met: (1) the test is the sole evidence of use of intoxicants, (2) revocation of probation or parole will be recommended by the agent as a result of the test, (3) the client does not admit to the use of an intoxicating substance, and (4) the client requests a confirmatory test prior to the preliminary hearing, if held, or prior to the final revocation hearing if no preliminary hearing is held.

The rules require that the same sex staff member observe and collect the urine specimen when the agent requires the collection

to be observed. The rules permit trained staff to conduct a breathalyzer test or collect a hair sample. The rules require licensed or certified medical staff to take a blood or stool sample.

The rules require the agent to make a determination of indigency or partial indigency if the client requests financial assistance to pay the fee for the confirmatory test. The rules require the division to pay for the cost of a confirmatory test if the client is indigent. The rules require the client to pay a fee under a fee schedule for the confirmatory test if the client is partially indigent.

SECTION 1. DOC 328.04 (3) (k) is amended to read:

DOC 328.04 (3) (k) Make himself or herself available for searches ~~or tests~~ ordered by the agent, including but not limited to ~~urinalysis, breathalyzer, and blood samples~~ body contents searches as defined in s. DOC 328.21 (4) (a), or search of the client's residence or any property under ~~his or her~~ the client's control;

SECTION 2. DOC 328.04 (3) (m) is created to read:

DOC 328.04 (3) (m) Refrain from the abuse of alcohol and the possession or use of any non-prescribed controlled substance.

SECTION 3. DOC 328.165 is created to read:

DOC 328.165 USE OF A NON-PRESCRIBED CONTROLLED SUBSTANCE. (1) USE OF MEDICATION. A client who intentionally takes into the body any non-prescribed controlled substance is guilty of a violation of supervision. A client who takes into the body medication prescribed for the client and who takes the prescribed medication according to directions is not guilty of a violation of supervision.

(2) USE OF ALCOHOL. A client who is affected by a specific rule issued by an agent under s. DOC 328.04 (3) (1) prohibiting the use of alcohol and who intentionally takes alcohol into the body is guilty of a violation of supervision.

(3) TEST REPORT, EXPERT WITNESS, AND REFUSAL TO PROVIDE SPECIMEN. A report of a test on a specimen of a client's urine, breath, saliva, blood, hair or stool conducted in accordance with s. DOC 328.21 shall be presented as evidence in a revocation hearing. The expert who made the findings need not be called as a witness in a hearing or proceeding under this chapter or chs. DOC 331 or HA 2. A client who refuses to provide a specimen of urine, breath, saliva, blood, hair or stool as requested in accordance with s. DOC 328.21 is guilty of a violation of supervision.

(4) CONFIRMATORY TESTS. (a) The results of a test conducted on a urine specimen shall be verified by a confirmatory test if all of the following conditions are met:

1. The urine test is the sole evidence of use of an intoxicating substance.

2. The agent will recommend revocation of probation or parole as a result of the urine test report.

3. The client does not admit the use of an intoxicating substance.

4. The client requests a confirmatory test before the preliminary hearing or, if no preliminary hearing is held, before the final revocation hearing.

(b) An agent shall ensure the confirmatory test is performed no later than 30 days from the first test.

(c) An agent may request a confirmatory test with supervisory approval.

(d) A client may request a confirmatory test under subd. (a) 4.

(e) In this subsection, a confirmatory test means a second test of a different kind which is used to verify the first test.

(5) CONFIRMATORY TEST FEE. A client shall be responsible for paying a fee for a confirmatory test, except in the following situations:

(a) If an agent requests a confirmatory test, the division shall pay for the confirmatory test.

(b) If the client is indigent, the division shall pay for the confirmatory test.

(c) If the client is partially indigent, the client shall pay a partial fee under the fee schedule developed by the department and the division will pay for the balance of the confirmatory test.

(d) The agent shall provide the client with a copy of the fee schedule.

(6) INDIGENCY DETERMINATION. A client may request an indigency determination if the client is unable to pay for the confirmatory test fee. When a client requests financial assistance to pay for a confirmatory test, the agent shall make an indigency determination. In making an indigency determination, the agent shall do all of the following:

1. Consider the client's financial resources as given in s. DOC 328.05 (2). The agent may require the client to provide financial information as given in s. DOC 328.05 (3).

2. Consider the client's financial need, including reasonable and necessary expenses in support of the client and the client's immediate family.

3. Consider the client's financial obligation, including payment of restitution, fines, court costs, surcharges, and attorney fees.

4. Consider the cost of the test.

5. Determine the client to be indigent if the client's financial need, financial obligation, and cost of the test are greater than the client's income, liquid assets, and assets capable of being converted to cash for payment of the confirmatory test.

6. Determine the client to be partially indigent if the client's income, liquid assets, and assets capable of being converted to cash is greater than the client's financial need, financial obligation but less than the amount needed to pay for the confirmatory test.

Note DOC 328.165. Like non-supervised individuals, there are times a client may need to use prescribed controlled medications. Subsection (1) makes it a violation of supervision for a client to intentionally use non-prescribed controlled substances or to use prescribed medication in a manner other than prescribed.

Subsection (2) prohibits the use of alcohol by a client who has a specific rule prohibiting such use. Some clients have a history of alcohol abuse while others do not have a history of alcohol abuse. To prohibit the use of alcohol for all clients when there is no apparent reason to do so, affects a client's attitude about the corrective process and interferes with the rehabilitative process.

Subsection (3) requires a report of a test of a client's urine, breath, saliva, blood, hair, or stool to be received as evidence in a revocation hearing or proceeding. The expert performing the test is not required to testify at the revocation hearing or proceeding. A client who refuses to provide a specimen for a test is guilty of a violation of supervision.

Currently, the Emit test is used to screen a client's urine. If a client's urine test is positive with the Emit test, the test report should be confirmed before using it in a revocation hearing or proceeding. Subsection (4) requires the urine test to be verified under the specified conditions.

Except for certain situations, a client is required to pay for a confirmatory test. Subsection (5) list the exceptions when the client is not required to pay for a confirmatory test. Subsection (6) requires an agent to make an indigency determination when a client requests financial assistance to pay for the confirmation test. Subsection (6) states how the indigency determination is to be made.

SECTION 4. DOC 328.21 (1) and Note: DOC 328.21, 1st paragraph, are amended to read:

DOC 328.21 (1) GENERAL POLICY. A search of a client, the client's body contents or the client's living quarters or property may be made at any time, but only in accordance with this section.

Note: DOC 328.21. This section provides for searches of clients, clients living quarters and property, and client's body contents by field staff. Although it is preferable to have searches and seizure conducted by law enforcement authorities, that may not always be ~~feasible~~ possible or advisable. It is therefore deemed important to give field staff the authority to conduct reasonable searches at reasonable times. Experience teaches that these searches may be necessary because contraband, including drugs and weapons, may be discovered during the searches. The searches are thought to deter the possession and use of contraband.

SECTION 5. DOC 328.21 (4) is renumbered 328.21 (5):

SECTION 6. DOC 328.21 (4) and Note: DOC 328.21 (4) are created to read:

DOC 328.21 (4) BODY CONTENTS SEARCH. (a) In this subsection, "body contents search" means a search in which the client is required to provide a sample of urine, breath, saliva, blood, hair or stool for testing for the presence of an intoxicating substance. Only licensed or certified medical staff shall take a blood or stool sample. When the agent or supervisor requires the collection of a urine specimen to be observed, a field staff member of the same sex as the client shall observe and collect the urine specimen. Any trained field staff member may conduct breathalyzer tests or collect hair samples.

(b) Any field staff member may order a body contents search under any of the following conditions:

1. Upon the client's reception to field supervision.
2. Upon the staff member's reasonable grounds to believe the client has used, is in possession of or is under the influence of an non-prescribed controlled substance.
3. Upon finding an non-prescribed controlled substance in the possession of the client or in an area controlled, occupied or inhabited by the client.
4. Upon the staff member's reasonable grounds to believe the client has violated a rule or condition of his or her supervision.
5. As part of a field staff member's random testing program. The field staff may not select a client for random testing for the purpose of harassing or intimidating the client.
6. When a client is held in a county jail regardless of work release privileges.
7. When a client has a history of alcohol or other drug abuse.

(c) The field staff member who conducted the search shall maintain a report of every body contents search and file a copy of the report in the client's case record.

(d) The client whose body contents are tested under this section shall pay a fee under the fee schedule developed by the department to partially offset the cost of the testing program. The agent shall provide the client with a copy of the fee schedule.

Note: DOC 328.21 (4). Subsections (4) (b) 1 to 7 state the circumstances under which a body contents search may be conducted. A body contents search and testing are effective means to detect illicit use of drugs and abuse of alcohol. A client's abuse of drugs is a major barrier to successful adjustment in the community. A client's abuse of intoxicants may lead to disruption of the home, family and job. In order to support an addiction, a client may engage in further criminal activity. A body contents search allows an agent to monitor a client's use of intoxicants, to prevent abuse and to enforce appropriate sanctions if evidence of abuse is found.

SECTION 7. DOC 328.21 (5) to (6) are renumbered 328.21 (6) to (7) and amended to read:

DOC 328.21 (6) INFORMING THE CLIENT. Whenever ~~feasible possible~~ before a search is conducted ~~under this section, the client shall be informed that~~, the field staff shall inform the client of all of the following:

- (a) A search is about to occur.
- (b) Why ~~and how~~ the search will be conducted ~~and~~.
- (c) How the search will be conducted.
- (d) The place where the search is to occur.
- (e) The consequences of ~~not~~ complying with the search.

(7) CONTRABAND REASONABLE GROUNDS. In deciding whether there are reasonable grounds to believe that a client has used, possesses or is under the influence of an intoxicating substance, that a client possesses contraband or that a client's living quarters or property contain contraband, a staff member shall consider any of the following:

- (a) The observations of a field staff member~~†~~.
- (b) Information provided by an informant~~†~~.
- (c) The reliability of the information provided by an

informant relied on. In evaluating the reliability attention shall be given to whether the information is detailed and consistent and whether it is corroborated; of the information, the field staff shall give attention to the detail, consistency and corroboration of the information provided by the informant.

(d) The reliability of the informant. In evaluating the informant's reliability, attention shall be given to whether the informant has supplied reliable information in the past and whether the informant has reason to supply inaccurate information~~†~~.

(e) The activity of the client that relates to whether the client might possess contraband or might have used or be under the influence of an intoxicating substance~~†~~.

(f) Information provided by the client that is relevant to whether the client has used, possesses or is under the influence of an intoxicating substance or possesses any other contraband~~†~~.

(g) The experience of a staff member with that client or in similar circumstances~~†~~.

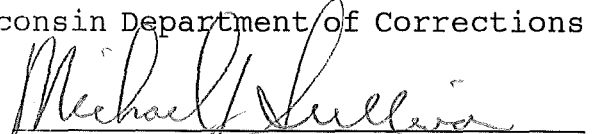
(h) Prior seizures of contraband from the client~~†~~. and

(i) The need to verify compliance with rules of supervision and state and federal law.

This rule shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22 (2) (intro.), Stats.

Wisconsin Department of Corrections

by:


Michael J. Sullivan
Secretary

Date: March 14, 1995

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