

because of their misconduct and as an incentive to all inmates to behave appropriately. While it is true that not all inmates are responsible for the misconduct, it is thought desirable to pay no one except those inmates allowed to work to perform the necessary housekeeping chores, to encourage appropriate behavior so lockdowns can be ended quickly.

HSS 306.15. The search of the living quarters of an inmate is a sensitive issue, and one of great importance to correctional officials and inmates. The experience in corrections in Wisconsin is that it is important that random searches of living quarters be conducted. Experience teaches that such searches are necessary because contraband, including drugs and objects fashioned into dangerous weapons, are frequently discovered during such searches. And, such searches are thought to deter the possession of contraband.

The importance of keeping contraband such as drugs and weapons outside a correctional institution deserves comment. Of primary importance in all correctional institutions is the protection of inmates from each other. Contraband such as drugs can be used as payment to induce an inmate to attack another, or otherwise violate prison rules. If an inmate discovers that another possesses contraband, this information may be used to blackmail the possessor.

Weapons, of course, pose a direct threat to inmates. They may be used to threaten, injure, or kill another. That weapons be kept out of institutions is critical for the safety of inmates.

Contraband must also be kept out of institutions so that inmates can participate in programs, jobs, and other treatment free of the fear that inevitably follows contraband into an institution. It is impossible to motivate inmates to be involved in constructive activities if fear predominates in the institution.

Finally, contraband is a direct threat to the safety of staff and the institution as a whole. Weapons can be used against staff as well as inmates. And, they may be an inducement to cause a disturbance which threatens everyone in the institution.

Experience teaches that the concerns expressed here are not groundless. For example, in early 1979, there were 2 serious incidents in which inmates stabbed other inmates and staff. At present, monthly reports of the contraband seized are submitted to the director of the bureau of institutions. These reports indicate that it is necessary to search the quarters and grounds of institutions randomly to detect contraband and deter people from bringing it into institutions.

While the discovery of contraband is important, this is not to say that the authority to search should be without control. A search of living quarters is an intrusion into the life of an inmate and may not be conducted to harass. Adequate control is established under HSS 306.15 by requiring the approval of the supervisor of the living unit before a search may be conducted, and by requiring a report of each search to be made. Typically, this is filed with the security director. This insures that supervisory people approve the search. It permits the security director to monitor all searches of living units. This should prevent unnecessary searches and insure that enough searches are conducted to control contraband.

It would be inconsistent with the purposes of searches to notify the inmate before such a search is conducted. This would permit the inmate to remove contraband from the living unit.

The manner in which searches are conducted is also important. Sub. (4) requires that searches be conducted so as to disturb the effects of the inmate as little as possible. Of course, a thorough search requires moving objects around. But, the disturbance of living quarters is not the object of the searches.

Consistent with the recognition of the inmate's interest in his or her property, inmates are to be reimbursed for any damage done during a search. Occasionally, some damage is inevitable, given the nature of personal property. It is, of course, to be avoided as much as possible.

The inmate should also be notified of objects seized. This sometimes takes the form of a conduct report, though not always. A report gives the inmate the opportunity to dispute whether the object seized is indeed contraband.

Inmates are not notified if searches take place. This is because searches of geographically close areas are done within a close time period. To notify inmates of searches might be a signal when searches of other areas are to occur. This would permit the movement of contraband into places recently searched and make detection difficult.

This section attempts to give due regard to inmate concerns about their privacy. Courts and commentators have taken varied positions on the applicability of the fourth amendment to the search of inmate living quarters. For example, one court said:

Certainly in a federal prison the authorities must be able to search the prisoners' cells without a warrant, without notice and at any time, for concealed weapons and contraband of the type which threatens the security or legitimate purposes of the institution.

Appendix

United States v. Ready, 574 F. 2nd 1009, 1014, (10th Cir. 1978).

In concluding that a prisoner's objection to a search of his cells without a warrant was without merit, the ninth circuit court of appeals said "We do not feel that it is reasonable for a prisoner to consider his cell private. Therefore, the search did not violate the limitations of the Fourth Amendment." *United States v. Hitchcock*, 467 F. 2nd 1107, 1108 (9th Cir. 1972), cert. denied 410 U.S. 916 (1973).

Recently, the U.S. Supreme Court upheld a prison practice of random searching of the cells of pretrial detainees outside the presence of the detainees. *Bell v. Wolfish*, 441 U.S. 520 (1979). In so doing, the Court suggested that any expectation of privacy of an inmate was very limited, if it existed at all. The Court said:

It may be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person . . . Assuming, *arguendo*, that a pretrial detainee retains such a diminished expectation of privacy after commitment to a custodial facility, we nonetheless find that the room search rule does not violate the Fourth Amendment.

Id. at 556-57.

On the other hand, the ABA would not permit the random search of living quarters. ABA, standard 6.6 (d). Krantz, et al., would permit random "routine room inspections" but not routine room searches. Still another commentator would *require* random, unannounced searches of cells for accreditation. ACA standard 4163.

Judge (now Justice) John Paul Stevens, for the seventh circuit court of appeals, wrote:

Respect for the dignity of the individual compels a comparable conclusion with respect to his interest in privacy. Unquestionably, entry into a controlled environment entails a dramatic loss of privacy. Moreover, the justifiable reasons for invading an inmate's privacy are both obvious and easily established. We are persuaded, however, that the surrender of the Fourth Amendment survives the transfer into custody.

Bonner v. Coughlin, 517 F. 2nd. 1311, 1316 (7th Cir. 1975).

In the *Bonner* case, the Court did not decide what measures a prison must take to protect an inmate's fourth amendment right. HSS 306.15 and this note reflect the view that, in a prison context, the procedures hereby provided are a workable method for controlling contraband and thereby furthering important correctional objectives. This is in the interests of inmates. This section also seeks to protect any fourth amendment interest inmates may have.

HSS 306.16. HSS 306.16 regulates "personal", "strip", and "body cavity" 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 directed to controlling the entry of contraband 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 contaband 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).

The experience of the division of corrections is that personal, strip, and body cavity searches of inmates are necessary to detect contraband and to deter people from bringing it into an institution.

Such searches may not be conducted without controls. Sub. (1) defines the 3 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.

Sub. (2) states the circumstances in which a personal search may be conducted. If a staff member has reasonable grounds to believe an inmate possesses contraband, an immediate search is permissible and is usually necessary to prevent disposal of the contraband. It is also desirable to permit random personal searches. This is permitted by Sub. (2) (b), but requires the approval of the shift supervisor. This is to insure that such searches are not conducted to harass inmates, but are approved after reflection by a supervisory staff member.

Such random searches are not conducted frequently, but are thought to be of substantial deterrent value.

Sub. (2) (c) permits personal searches in lieu of strip searches, where strip searches are permitted.

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. 2nd 1240 (5th Cir. 1978).

It would be unreasonable, however, to permit random strip searches. Cf. *Wolfish v. Levi*, 573 F. 2nd 118 (2nd Cir. 1978). *United States ex. rel. Guy v. McCauley*, 385 F. Supp. 193 (D. Wis. 1974).

Sub. (3) identifies the circumstances in which strip searches are permitted. The rule is written to limit the use of strip searches in 2 principal ways. First, in pars. (a) to (c) the rule identifies the 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 the authority to exist for strip searches. The other limitation, in pars. (d) and (e), is to permit such searches only if grounds exist for the search 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, 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) (c) authorizes strip searches prior to and after a visit. Visitors 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) and (e) 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. (7) 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 were permissible anytime a pretrial detainee had contact with a member of the public. This principle is applied in this rule, as well as in other 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.

HSS 306.17. HSS 306.17 regulates the search of visitors. Other rules relating to visits are found under ch. HSS 309.

It is the firm policy of the division of corrections to encourage visits to inmates. Visits are important to the morale of inmates. Contacts with family members, friends, and other members of the community can be very helpful in motivating inmates and in assisting their reasimilation into the community. Family ties, which are greatly strengthened by personal contact, are essential to successful reintegration.

Unfortunately, some visitors knowingly carry contraband into correctional institutions. More frequently, visitors unwittingly bring objects which are harmless if used as intended, but which can be fashioned into deadly weapons in institutions.

Appendix

There have been cases in the past in which visitors have been told that their loved ones will be harmed by inmates unless they bring contraband into an institution. It is important to the safety of the visitor, the staff, and inmates that contraband or unauthorized objects not be brought into institutions. It is essential that this be done in a way that does not discourage visits or communicate to visitors that they are unwelcome. The dilemma is in treating visitors in a way that makes them feel welcome while insuring that contraband is not being brought into the institution. HSS 306.17 in conjunction with the other rules regarding visiting, is intended to achieve these goals. Krantz, one of the few commentators who has addressed the issue, recommends that visitors be searched. *Krantz, et al*, at 57. A "visitor" is anyone not employed by the division of corrections.

Sub. (1) states the principle that correctional staff must be satisfied that visitors are not carrying unauthorized objects into the institution. Because such objects may be things which people normally carry with them and which visitors might assume are authorized, it is important to inform visitors of what they may or may not carry. Visitors are provided with a place to store their belongings during the visit. Sub. (2).

If a visitor does not wish to submit to an inspection or search, the visitor need not do so. This will result in the visitor not being permitted to enter the institution on this occasion. No authority exists independently to require visitors to submit to inspections or searches. However, the responsibility for the safety of the institution does permit visitors to be excluded if they refuse to submit to inspections and, in the rare cases when they are conducted, personal searches. Sub. (5).

The large majority of visitors are asked to empty pockets, permit the inspection of containers and submit to a metal detector screening similar to those used in airports. Sub. (3). This typically satisfies staff that contraband is not concealed. Occasionally, correctional staff have received information that a visitor is carrying contraband and that the inspection called for in sub. (3) will not detect it. If there are reasonable grounds to believe a visitor is carrying contraband, the superintendent, the security director, or the highest ranking member of the security staff and the bureau director may require the visitor to submit to a personal search or strip search as defined in HSS 306.16 (1) (a) and (b) or be excluded from the institution. This authority is given only to high level supervisory people to insure that it is not abused.

Sub. (6) states the rule that visitors shall be excluded from the institution if they attempt to bring contraband into the institution. The visiting privilege itself may be suspended, as provided in ch. HSS 309. It is not the intention of the rule to exclude people who unwittingly carry unauthorized objects. It is essential that the notice of what is unauthorized be adequate. Sub. (2).

Sub. (7) requires a written report if a visitor is excluded or if a search is even conducted. This is to insure that adequate records are kept that permit review of the decisions. This is a protection for the visitor and the correctional staff.

A dilemma is created when unauthorized objects are found. Sub. (8) resolves it by requiring correctional staff to turn over objects which it is illegal to possess or conceal to the sheriff. It would be neither wise nor safe, for example, to give a pistol to a visitor in the waiting room of an institution. On the other hand, it would not be proper to confiscate personal objects which visitors are not permitted to bring into institutions.

Sub. (9) states the principle alluded to above that staff should try to make visitors feel welcome, and conduct searches and inspections in a way that preserves the dignity of the individual.

HSS 306.18. Searches of staff members are sometimes necessary. This is so for three reasons.

First, staff members may inadvertently bring unauthorized objects into institutions. For example, an employe taking medication may bring in more than he or she needs for an 8-hour period. Second, inmates may threaten staff or their families and thereby attempt to force the staff member to bring contraband into an institution. Third, a staff member may deliberately bring an unauthorized object into an institution.

For these reasons, and because of the danger created thereby, the authority must exist to search staff. Subs. (2) and (3) are substantially the same as the relevant sections found in the section on search of visitors. See the notes to HSS 306.13-306.17.

It is, of course, important to inform staff of the objects they are not permitted to carry into the institution. Sub. (4) provides that they be informed in writing.

HSS 306.19. This section is intended to guide staff who must decide whether there is sufficient reliable information to justify searching another staff member, an inmate, or a visitor.

Errors and abuse of search authority may be due to inadvertence and poor judgment. This section seeks to avoid abuses and errors.

Often, very general information is not reliable because its lack of detail suggests it is hypothetical or incomplete. Specificity on the other hand, usually suggests a more reliable grasp of the relevant facts. Consistency of information is also important. If a report is internally inconsistent, this makes it less reliable. Sub. (1) requires attention to the specificity and consistency of information. Of course, specificity or the lack of it is helpful in evaluating information.

Sub. (2) requires attention to the reliability of the informant, if one exists. Has the person supplied accurate information in the past? Does he or she have a reason to mislead? These are helpful questions to ask in evaluating an informant's reliability.

Sub. (3) suggests that attention must be paid to the activity of any inmate who may be involved with the subject of the search. If the inmate acts in a way that is consistent with the bringing of contraband by another into the institution, this bears on the decision whether to search the person suspected of doing so.

Sub. (4) indicates that before the search, the subject should be talked with. Sometimes, this will elicit information helpful in determining whether a search should be made.

HSS 306.20. HSS 306.20 provides for a report to the director of the bureau of institutions, of all contraband seized. This conforms to the present practice of the division of corrections. Such information is useful because it reveals patterns of time and place as they relate to the discovery of contraband. This is helpful in guiding staff in searching for it. The identity of people who possess or conceal it is also useful in monitoring correctional institutions.

HSS 306.21. HSS 306.21 provides that contraband seized pursuant to a search which violates these rules may be used as evidence in a disciplinary proceeding. There are several reasons for this.

First, the rule encourages the making of adequate administrative rules. If such evidence could not be used, it is likely that there would be a change in the substance of the rules. This is so because the rules relating to searches are more strict than the requirements of the Constitution.

Second, the rule reflects the view that an exclusionary rule is not an effective way of encouraging compliance with the rules. Rather, enforcing the rules should be left to the administrative agency. This is a more desirable and effective way of enforcing compliance.

Third, to exclude the evidence is to misplace emphasis. The only justification for excluding it is to exact compliance. How the evidence was found does not bear on the issue of the guilt or innocence of the possessor of it. In a prison setting, it would be anomalous to not use evidence in a disciplinary hearing that is relevant, to enforce compliance with the rules.

If the issue of admissibility were permitted to be litigated, it would likely delay administrative action against the staff member who violated the rule. This is the experience in the police field, where recommendations similar to the ones in these rules were made. American Bar Association Project on Standards For Criminal Justice, *Standards Relating to the Urban Police Function*, (1973) s. 4.4. There is great value in proceeding promptly against such staff members. This is the most effective deterrent to violation of the rules.

For recommendations to exclude evidence from disciplinary hearings because it was obtained in violation of these rules, see *Krantz, et al.*, at 67; *ABA*, standard 6.6 (g).

HSS 306.22. HSS 306.22 defines a disturbance, requires that each institution have a plan in the event of a disturbance, identifies the elements of the plan and its purposes, provides for the suspension of these rules, explains the effect on an individual's authority if the person is taken hostage, and provides for the investigation of the incident.

Disturbances threaten every inmate and staff member in a correctional institution and the general public. Some prison disturbances have had tragic consequences. See *The Official Report of the New York State Special Commission on Attica* (1972); R. Oswald, *Attica—My Story* (1973); T. Wicker, *A Time to Die* (1973).

Ideally, prison disturbances will be prevented by firm, fair, sensitive correctional administration and the availability of adequate resources to permit inmates to be involved in purposeful, constructive programs. These qualities and the willingness to listen and respond positively to legitimate grievances will do much to prevent disturbances.

Of course, disturbances may occur in the best of institutions:

It is recognized that the nature of incarceration itself and the conditions under which prison sentences are served offer potential for disorder and are particularly conducive to the occasional eruption of incidents of extraordinary violence.

Correctional authorities should address themselves to a systematic review of institutional conditions and factors conducive to unrest and disorder, with a view to producing viable, concrete solutions for preventing and controlling these problems.

National Advisory Committee and Criminal Justice Standards and Goals, *Report of the Task Force on Disorders and Terrorism*, (1976) Goal 8.1.

Prevention, then, is the best way to deal with possible prison disturbances.

If disturbances do occur, staff must be prepared to deal with them in a way that insures, insofar as possible, the safety of people, the protection of property, the restoration and maintenance of order and disciplinary action against those responsible for the disturbance. While these are all important values, the protection of people is foremost. Sub. (2).

Sub. (1) defines a disturbance. The definition is deliberately broad because of the importance of identifying possibly volatile situations and taking decisive action to control them. The definition is modeled after that used in American Correctional Association, *Riots and Disturbances in Correctional Institutions* (1973). Small incidents can turn into serious disturbances and the definition reflects the view that even slight incidents should be regarded with concern. These rules may not be suspended for any disturbance, but only for ones that seriously disrupt institutional routine.

Sub. (3) identifies the elements of the required plan. Given the differences among institutions and the need to limit access to disturbance plans, the subsection simply identifies the elements of the plan. These elements were identified based on prior experience with disturbances in Wisconsin, the study of the growing literature on prison disturbances, and in consultation with the division of emergency government. Much of this literature is the result of the tragedy of Attica in 1971. See, e.g. *Oswald, supra; Wicker, supra; Official Report, supra; ACA, supra; Task Force Report, supra;* and N.Y. Department of Law, *Final Report of the Special Attica Investigation* (1975).

Sub. (4) addresses the situation in which a person in authority is taken hostage. It provides for the temporary suspension of that person's authority, because it is not proper to follow orders given by a person under duress. The subsection also forbids correctional staff from permitting an inmate to escape from an institution through threats to a hostage.

Sub. (5) permits the suspension of the rules of the division. It is not intended that this rule be relied on frequently, but only in situations where the usual functioning of the institution becomes impossible. For example, programs and visits are impossible if a portion of an institution is taken over by inmates. Some rules, like those relating to the use of force, may never be suspended. This is provided for in the rule.

One lesson of the Attica disturbance is that there must be a careful investigation after a disturbance. The disturbance plan must provide for such an internal investigation. Sub. (3) (i). It is also important that people from outside the division be involved in an investigation and that it be adequately staffed. This is provided for in sub. (6). See N.Y. Dept. of Law, *Final Report of the Special Attica Investigation*, (1975) Findings 3 and 4.

HSS 306.23. Emergencies of the kind defined in sub. (1) present a serious threat to the welfare of the public, inmates, and staff. It is essential that there be adequate planning in the event of such emergencies and prevention to avoid them altogether.

Like disturbances, prevention is the best way to deal with emergencies. Sub. (3) (j) requires yearly review of possible hazardous situations and sub. (3) generally addresses the issue by requiring plans in the event of emergencies. The requirements of the plan were developed in consultation with the division of emergency government. As in disturbance plans, there is a need to individualize plans according to the particular characteristics of institutions and to limit access to the information.

The purposes of the plan are stated in sub. (2). See the note to HSS 306.22 (2). Subs. (4) and (5) are identical to HSS 306.22 (5) and (6). See the relevant notes.