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(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ... PUBLIC HEARING - COMMITTEE RECORDS

2001-02

(session year)

Assembly

(Assembly, Senate or Joint)

Committee on ... Corrections and Courts (AC-CC)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
 - (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
 - (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (May/2012)

Assembly

Record of Committee Proceedings

Committee on Corrections and the Courts

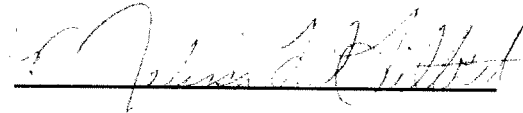
Clearinghouse Rule 01-022

Relating to resources for inmates.

Submitted by the Department of Corrections.

May 31, 2001 Referred to Committee on Corrections and the Courts.

July 2, 2001 **NO ACTION TAKEN**



Committee Clerk



Scott McCallum
Governor

Jon E. Litscher
Secretary



OFFICE OF LEGAL COUNSEL
149 East Wilson Street
Post Office Box 7925
Madison, Wisconsin 53707-7925

Writer's Direct Line: (608) 267-9839
Fax: (608) 267-3661

State of Wisconsin Department of Corrections

May 24, 2001

Scott Jensen, Speaker
Wisconsin State Assembly
211 West, State Capitol
Madison, Wisconsin 53702

Fred Risser, President
Wisconsin State Senate
Room 102,
119 Martin Luther King Blvd.
Madison, Wisconsin 53702

Re: Clearinghouse Rule 01-022
A proposed order amending DOC 309 and creating rules relating to resources for inmates.

Gentlemen:

As provided in s. 227.19 (2), Stats., notice is given that the above-mentioned rule is in final draft form. This notice and the report required under s. 227.19 (2) and (3), Stats., are submitted in triplicate.

The rule was submitted to the Legislative Council for review under s. 227.15, Stats.. A copy of the Council's report is also enclosed.

If you have any questions regarding the rule, please contact Julie Kane at (608) 240-5015.

Sincerely,

A handwritten signature in cursive script that reads "Jon E. Litscher".

Jon E. Litscher
Secretary

Enclosures

Cc: Gary Poulson, Deputy Revisor of Statutes
Senator Judith Robson, JCRAR
Representative Glenn Grothman, JCRAR

**PROPOSED ADMINISTRATIVE RULES – DOC 309,
RELATING TO RESOURCES FOR INMATES
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3) STATS.**

Need for Rule

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

Responses to Clearinghouse Recommendations

This rule was submitted to Legislative Council on February 23, 2001. All but the following recommendations were accepted:

In s. DOC 309.02 (14), in the first sentence, the first instance of "fully" should be replaced with "full" to be consistent with the current rule's text. The drafter may wish to make the same change in the second sentence because it appears that the intent is to require a full covering as opposed to a fully opaque covering.

ANSWER: The current rule does not use consistent language. This proposed rule is intended to clarify the department's intent. The intent of the proposed rule is to require a fully opaque covering as opposed to a full covering. The proposed language accurately reflects the department's intent.

Public Hearings

This rule received three public hearings.

Date & Time

Location

May 3, 2001
Thursday
10:00 A.M.

Room 120
State Office Building
141 N.W. Barstow Street
Waukesha, Wisconsin

May 4, 2001
Friday
11:00 A.M.

Room 136
State Office Building
1681 2nd Avenue South
Wisconsin Rapids, Wisconsin

May 9, 2001
Wednesday
11:00 A.M.

Room 041
State Office Building, GEF III
125 S. Webster
Madison, Wisconsin

There were no appearances or registrations at any of the public hearings.

Written comments

The time for public comment through written comments was held open until May 18, 2001. The following written comment was received:

1. Fernando Escobar
Black River Correctional Institution
Opposing the rule.

Mr. Escobar writes that the rule should be denied because prison officials do not support the settlement agreement in this case, and because the rule does not clearly define what "community" standards are. Mr. Escobar states that we should differentiate between the white community and Hispanic or black communities.

ANSWER: "Community standards" is used in this rule as it is used in section 944.21 of the Wisconsin Statutes regarding obscene material. This rule reflects current statutory language that states "community" means "this state." The law forbids discrimination on the basis of race. To apply this rule by differentiating on the basis of racial "communities" would be to discriminate in one way or another. In addition, this rule is being amended in response to a lawsuit brought by prisoners. The department is a party to the lawsuit and must, therefore, approve any settlement

Final Regulatory Flexibility Analysis

This proposed rule is not expected to impact on small businesses as defined in s. 227.114 (1.)

PROPOSED ORDER OF THE
DEPARTMENT OF CORRECTIONS
AMENDING AND CREATING RULES

The Wisconsin department of corrections proposes an order to amend ss. DOC 309.02 (14) and 309.02 (16), and create ss. DOC 309.02 (7m) and 309.02 (16)(b) and (c), relating to resources for inmates.

Statutory authority: ss. 301.02, 301.03 (1) and (2), and 227.11 (2), Stats.
Statutes interpreted: ss. 46.07, and 302.32 (1), Stats.

Analysis prepared by the Department of Corrections

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

This order:

- Revises the present rules restricting inmates' access to sexually explicit material by prohibiting access to published material that depicts nudity on a routine or regular basis or promotes itself based on nudity in the case of individual one-time issues.
- Revises the present rules by prohibiting access to written material when it meets the legal definition of obscenity.

SECTION 1. DOC 309.02 (7m) is created to read:

DOC 309.02 (7m) "Features" means the publication contains depictions of nudity on a routine or regular basis or promotes itself based upon depictions of nudity in the case of individual one-time issues. The department will not prohibit a publication solely because it contains nudity that has a medical, educational or anthropological purpose.

SECTION 2. DOC 309.02(14) is amended to read:

DOC 309.02 (14) "Nudity" for commercially published material means the showing of the human male or female genitals, or pubic area or buttocks with less than a full fully opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion below the top of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state. "Nudity" for purposes of a personal photograph means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

SECTION 3. DOC 309.02(16) is amended to read:

DOC 309.02 (16) "Pornography " means any of the following:

any (a) Any material, whether written, visual, video, or audio representation or reproduction, other than written material, that depicts any of the following:

- (a) 1. Human sexual behavior.
- (b) 2. Sadomasochistic abuse, including but not limited to flagellation, bondage, brutality to or mutilation or physical torture of a human being.
- (c) 3. Unnatural preoccupation with human excretion.
- (d) Nudity which appeals to the prurient interest in sex.
- (e) 4. Nudity which is not part of any published photograph or printed material, such as a personal nude photograph.
- (f) 5. Nudity of any person who has not attained the age of 18.

SECTION 4. DOC 309.02(16) (b) and (c) are created to read:

DOC 309.02(16) (b) A publication that features nudity.

(c) Written material which the average person, applying state contemporary community standards, would find, when taken as a whole does all of the following:

1. Appeals to the prurient interest.
2. Describes human sexual behavior in a patently offensive way.
3. Lacks serious literary, artistic, political, educational, or scientific value.

SECTION 5. DOC 309.04(4)(c)8.a. is amended to read:

- a. Is in whole or in part, pornography.

The rules contained in this order 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

Date: _____

By _____
Jon E. Litscher
Secretary

Seal:

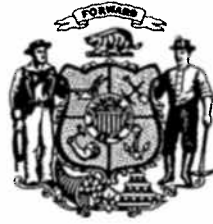
WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-022

AN ORDER to amend DOC 309.02 (14) and (16); and to create DOC 309.02 (7m) and (16) (b) and (c), relating to resources for inmates.

Submitted by **DEPARTMENT OF CORRECTIONS**

02-26-01 RECEIVED BY LEGISLATIVE COUNCIL.

03-19-01 REPORT SENT TO AGENCY.

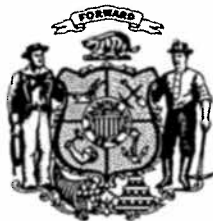
RNS:AS:jal;ksm

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CLEARINGHOUSE RULE 01-022

Comments


[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

- a. In s. DOC 309.02 (16) (intro.), "any" should not be underscored. The subsequent stricken "any" should be deleted.
- b. In s. DOC 309.04 (4) (c) 8. a., "7" should be inserted following "Is".

5. Clarity, Grammar, Punctuation and Use of Plain Language

In s. DOC 309.02 (14), in the first sentence, the first instance of "fully" should be replaced with "full" to be consistent with the current rule's text. The drafter may wish to make the same change in the second sentence because it appears that the intent is to require a full covering as opposed to a fully opaque covering.

1999 Session		LRB Number
FISCAL ESTIMATE DOA-2048 N(R06/99)		Bill Number
<input checked="" type="checkbox"/> ORIGINAL <input type="checkbox"/> UPDATED <input type="checkbox"/> CORRECTED <input type="checkbox"/> SUPPLEMENTAL		Amendment No. if Applicable
Subject Modifying Department of Corrections (DOC) administrative rule 309 relating to inmates' access to sexually explicit material.		Administrative Rule Number DOC 309
Fiscal Effect		
State: <input checked="" type="checkbox"/> No State Fiscal Effect		
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation.		
<input type="checkbox"/> Increase Existing Appropriation	<input type="checkbox"/> Increase Existing Revenues	<input type="checkbox"/> Increase Costs - May be possible to Absorb Within Agency's Budget <input type="checkbox"/> Yes <input type="checkbox"/> No <input type="checkbox"/> Decrease Costs
<input type="checkbox"/> Decrease Existing Appropriation	<input type="checkbox"/> Decrease Existing Revenues	
<input type="checkbox"/> Create New Appropriation		
Local: <input checked="" type="checkbox"/> No local government costs		
1. <input type="checkbox"/> Increase Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	3. <input type="checkbox"/> Increase Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	5. Types of Local Governmental Units Affected: <input type="checkbox"/> Towns <input type="checkbox"/> Villages <input type="checkbox"/> Cities <input type="checkbox"/> Counties <input type="checkbox"/> Others _____ <input type="checkbox"/> School Districts <input type="checkbox"/> WTCS Districts
2. <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	4. <input type="checkbox"/> Decrease Revenues <input type="checkbox"/> Permissive <input type="checkbox"/> Mandatory	
Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S		Affected Chapter 20 Appropriations
Assumptions Used in Arriving at Fiscal Estimate		
<p>Effective December 1, 1998, the Department of Corrections (DOC) implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (Aiello v. Litscher). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal court decisions that were reported after the rules were implemented.</p> <p>In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest case law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. There is no fiscal impact expected as a result of these changes.</p>		
Long-Range Fiscal Implications None.		
Prepared by: Doug Percy	Telephone No. 266-6658	Agency Corrections
Authorized Signature:  Robert Margolies	Telephone No. 266-2931	Date 12/21/00



DATE: May 31, 2001

TO: Melissa Gilbert

Committee on Corrections and the Courts

FROM: John Scocos, Assembly Chief Clerk

RE: Clearinghouse Rules Referral

The following Clearinghouse Rule has been referred to your committee.

CLEARINGHOUSE RULE 01-022

AN ORDER to amend DOC 309.02 (14) and (16); and to create DOC 309.02 (7m) and (16) (b) and (c), relating to resources for inmates.

Submitted by **Department of Corrections.**

Report received from Agency on **May 24, 2001.**

To committee on **Corrections and the Courts.**

Referred on **Thursday, May 31, 2001.**

Last day for action - **Monday, July 2, 2001.**

Under section 227.19 (4) of the Wisconsin Statutes, your committee has 30 days to take action or get an extension. The day **after** the official referral date is day one of your review period. Therefore, the 30th day should fall four weeks and two days after the referral date. For example, for Clearinghouse Rules referred on a Monday, a Wednesday would be your 30th day. For Clearinghouse Rules referred on a Tuesday, a Thursday would be your 30th day. For Clearinghouse Rules referred on a Wednesday, a Friday would be your 30th day. For Clearinghouse Rules referred on a Thursday or Friday, your 30th day would fall on a weekend. Therefore, your time would expire on the next working day (Monday) as provided for in s. 990.001 of the Wisconsin Statutes. Also, if the 30th day falls on a legal holiday, time would expire on the next working day.

Section 227.19 **requires** you to notify each member of your committee that you have received this Clearinghouse Rule. Although some committee chairs do so, you are not required to send a copy of the text of the rule to each member at this time. Your notice could state that members should contact you if they wish to receive a hard copy of the rule. (Please note that, unlike bills and amendments, the text of Clearinghouse Rules is not currently available online. However, LTSB is currently working on such a project.) Please put a copy of your official notification memo in the rule jacket.

Three copies of the Clearinghouse Rule and its accompanying documents are contained in the jacket. If you wish to have your Legislative Council attorney review the Clearinghouse Rule, send him/her a copy. I only need one copy remaining in the jacket when you report it out of committee at the end of the review period.

The identical process is happening simultaneously in the Senate. Keep track of their action on the rule.

For assistance with the Clearinghouse Rule process, please consult Ken Stigler (6-2406) or your Legislative Council attorney. If you wish to learn more on this subject, read section 227.19 of the Wisconsin Statutes or part 2 of the *Administrative Rules Procedures Manual* written by the Revisor of Statutes Bureau and the Wisconsin Legislative Council staff.





Scott Walker

Wauwatosa's Representative in the Wisconsin State Assembly

TO: Members of the Assembly Committee on Corrections and the Courts

FROM: Rep. Scott Walker, Chair

DATE: June 1, 2001

RE: Clearinghouse Rule 01-022

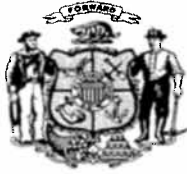
The following clearinghouse rule has been referred to the Assembly Committee on Corrections and the Courts:

CR 01-022 An order to amend DOC 309.02 (14) and (16); and to create DOC 309.02 (7m) and (16) (b) and (c), relating to resources for inmates.

The committee's jurisdiction over CR 01-022 ends on Monday, July 2, 2001. If you wish to receive a copy of this rule or if you wish to submit comments or request a hearing, please contact Missy in my office at 266-9180.

Thank you.





Scott McCallum
Governor

Jon E. Litscher
Secretary

Mailing Address

3099 E. Washington Ave.
Post Office Box 7925
Madison, WI 53707-7925
Telephone (608) 240-5000
Fax (608) 240-3300

State of Wisconsin Department of Corrections

June 22, 2001

Senator Judy Robson, Co-Chair
Joint Committee for Review of Administrative Rules
P.O. Box 7882
Madison, Wisconsin 53707-7882

Representative Glenn S. Grothman, Co-Chair
Joint Committee for Review of Administrative Rules
P.O. Box 8952
Madison, Wisconsin 53708-8952

RE: Clearinghouse Rule 01-022, relating to resources for inmates

Dear Senator Robson and Representative Grothman:

The Department of Corrections (DOC) promulgated an emergency rule concerning the above captioned subject matter on February 23, 2001. The emergency rule will expire on July 23, 2001, before it can be replaced with the proposed permanent rule. Therefore, I am requesting that the Joint Committee for Review of Administrative Rules extend the emergency rule by 60 days pursuant to s. 227.24, (2), Stats.

The emergency rule is required to permit the DOC to continue abiding by the settlement agreement reached in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The parties negotiated a settlement which included an immediate revision of the rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule was, and remains, necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees. Any lapse in the effectiveness of this emergency rule could result in DOC being deemed non-compliant with the settlement agreement and could affect the litigation. For these reasons, DOC requests an extension of the emergency rule to allow time for the permanent rule to become effective.

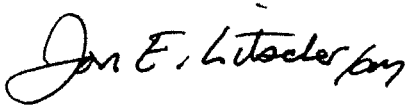
The enclosed proposed permanent rule was submitted to the Administrative Rules Clearinghouse and the Revisor of Statutes on February 23, 2001, notably the same date as the Emergency Rule became effective. The enclosed Administrative Rules Clearinghouse report was sent to DOC on March 19, 2001. On May 3, 4, and 9, public hearings were conducted in Waukesha, Wisconsin

Rapids, and Madison, respectively. No public testimony was offered at hearing. However, one inmate of a correctional institution filed a written comment in opposition to the rule. The permanent rule was submitted to the Legislature on May 24, 2001.

The DOC has expedited this rule to every possible extent, but it is not possible to promulgate the permanent rule prior to expiration of the emergency rule. It is anticipated that legislative jurisdiction will expire at the end of June and allow the DOC to submit the permanent rule to the Revisor in July, for a likely effective date of September 1, 2001.

Copies of the hearing notice, order creating the emergency rule, proposed permanent rule and report to the legislature are also enclosed. Should you have any questions concerning the request to extend the effective period of the emergency rule, please contact Julie Kane of the DOC Office of Legal Counsel at 240-5015.

Sincerely,



Jon E. Litscher
Secretary

Enclosures

Cc: JCRAR members
Senator Fred Risser
Representative Scott Jensen
~~Committee on Corrections and the Courts~~
Committee on Economic Development and the Courts

WISCONSIN LEGISLATIVE COUNCIL STAFF



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Legislative Council Staff
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Richard Sweet
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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE 01-022

AN ORDER to amend DOC 309.02 (14) and (16); and to create DOC 309.02 (7m) and (16) (b) and (c), relating to resources for inmates.

Submitted by **DEPARTMENT OF CORRECTIONS**

02-26-01 RECEIVED BY LEGISLATIVE COUNCIL.

03-19-01 REPORT SENT TO AGENCY.

RNS:AS:jal;ksm

LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

Comment Attached YES NO

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

Comment Attached YES NO

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

Comment Attached YES NO

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS
[s. 227.15 (2) (e)]

Comment Attached YES NO

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

Comment Attached YES NO

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL
REGULATIONS [s. 227.15 (2) (g)]

Comment Attached YES NO

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

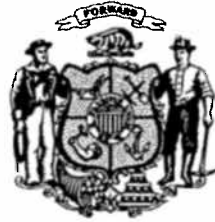
Comment Attached YES NO

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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Director
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Richard Sweet
Assistant Director
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Terry C. Anderson
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Legislative Council Staff
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CLEARINGHOUSE RULE 01-022

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

2. Form, Style and Placement in Administrative Code

- a. In s. DOC 309.02 (16) (intro.), "any" should not be underscored. The subsequent stricken "any" should be deleted.
- b. In s. DOC 309.04 (4) (c) 8. a., "¿" should be inserted following "Is".

5. Clarity, Grammar, Punctuation and Use of Plain Language

In s. DOC 309.02 (14), in the first sentence, the first instance of "fully" should be replaced with "full" to be consistent with the current rule's text. The drafter may wish to make the same change in the second sentence because it appears that the intent is to require a full covering as opposed to a fully opaque covering.

ORDER OF THE
DEPARTMENT OF CORRECTIONS
CREATING RULES

FINDING OF EMERGENCY

The Department of Corrections finds that an emergency exists and that rules included in this order are necessary for preservation of the public welfare. A statement of the facts constituting the emergency is: Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. Adoption of the revised rules no later than February 23, 2001, is necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

This order:

- Revises the present rules restricting inmates' access to sexually explicit material by prohibiting access to published material that depicts nudity on a routine or regular basis or promotes itself based on nudity in the case of individual one-time issues.
- Revises the present rules by prohibiting access to written material when it meets the legal definition of obscenity.

ORDER

Under the authority vested in the Department of Corrections by ss.301.02, 301.03 (1) (2), and 227.11(2), Stats., the Department of Corrections hereby amends and creates rules relating to resources for inmates, interpreting ss. 46.07, 301.32 (1), Stats.

SECTION 1. DOC 309.02 (7m) is created to read:

DOC 309.02 (7m) "Features" means the publication contains depictions of nudity on a routine or regular basis or promotes itself based upon depictions of nudity in the case of individual one-time issues. The department will not prohibit a publication solely because it contains nudity that has a medical, educational or anthropological purpose.

SECTION 2. DOC 309.02(14) is amended to read:

DOC 309.02 (14) "Nudity" for commercially published material means the showing of ~~the human male or female genitals, or pubic area or buttocks~~ with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of ~~any portion below the top of the areola or nipple~~, or the depiction of covered male genitals in a discernibly turgid state. "Nudity" for purposes of a personal photograph means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

SECTION 3. DOC 309.02(16) is amended to read:

DOC 309.02 (16) "Pornography " means any of the following:

~~any~~ (a) Any material, ~~whether written, visual, video, or audio representation or reproduction, other than written material~~, that depicts any of the following:

~~(a)~~ 1. Human sexual behavior.

~~(b)~~ 2. Sadomasochistic abuse, including but not limited to flagellation, bondage, brutality to or mutilation or physical torture of a human being.

~~(c)~~ 3. Unnatural preoccupation with human excretion.

~~(d)~~ Nudity which appeals to the prurient interest in sex.

~~(e)~~ 4. Nudity which is not part of any published photograph or printed material, such as a personal nude photograph.

~~(f)~~ 5. Nudity of any person who has not attained the age of 18.

SECTION 4. DOC 309.02(16) (b) and (c) are created to read:

DOC 309.02(16) (b) A publication that features nudity.

(c) Written material which the average person, applying state contemporary community standards, would find, when taken as a whole does all of the following:

1. Appeals to the prurient interest.

2. Describes human sexual behavior in a patently offensive way.
3. Lacks serious literary, artistic, political, educational, or scientific value.

SECTION 5. DOC 309.04(4)(c)8.a. is amended to read:

- a. Is ~~in whole or in part,~~ pornography.

The rules contained in this order shall take effect as emergency rules upon publication in the official state newspaper, as provided in s. 227.24(1)(c), Stats.

Wisconsin Department of Corrections

Date: _____

By _____

Jon E. Litscher
Secretary

Seal:

PROPOSED ORDER OF THE
DEPARTMENT OF CORRECTIONS
AMENDING AND CREATING RULES

The Wisconsin department of corrections proposes an order to amend ss. DOC 309.02 (14) and 309.02 (16), and create ss. DOC 309.02 (7m) and 309.02 (16)(b) and (c), relating to resources for inmates.

Statutory authority: ss. 301.02, 301.03 (1) and (2), and 227.11 (2), Stats.
Statutes interpreted: ss. 46.07, and 302.32 (1), Stats.

Analysis prepared by the Department of Corrections

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

This order:

- Revises the present rules restricting inmates' access to sexually explicit material by prohibiting access to published material that depicts nudity on a routine or regular basis or promotes itself based on nudity in the case of individual one-time issues.
- Revises the present rules by prohibiting access to written material when it meets the legal definition of obscenity.

SECTION 1. DOC 309.02 (7m) is created to read:

DOC 309.02 (7m) "Features" means the publication contains depictions of nudity on a routine or regular basis or promotes itself based upon depictions of nudity in the case of individual one-time issues. The department will not prohibit a publication solely because it contains nudity that has a medical, educational or anthropological purpose.

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1. Appeals to the prurient interest.
2. Describes human sexual behavior in a patently offensive way.
3. Lacks serious literary, artistic, political, educational, or scientific value.

SECTION 5. DOC 309.04(4)(c)8.a. is amended to read:

- a. Is ~~in whole or in part,~~ pornography.

The rules contained in this order 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

Date: _____

By _____
Jon E. Litscher
Secretary

Seal:

NOTICE OF HEARING

DEPARTMENT OF CORRECTIONS

(Resources for inmates—DOC 309)

NOTICE IS HEREBY GIVEN that pursuant to ss. 227.11 (2) (a), 227.17 and 227.24 (4), 301.02, and 301.03 (1) and (2) Stats., and interpreting ss. 46.07, and 302.32 (1), Stats., the department of corrections will hold public hearings in the following locations to consider the emergency rule published on February 23, 2001 and the proposed permanent rule amending and creating rules relating to resources for inmates.

Hearing Information:

Date & Time

Location

May 3, 2001
Thursday
10:00 A.M.

Room 120
State Office Building
141 N.W. Barstow Street
Waukesha, Wisconsin

May 4, 2001
Friday
11:00 A.M.

Room 136
State Office Building
1681 2nd Avenue South
Wisconsin Rapids, Wisconsin

May 9, 2001
Wednesday
11:00 A.M.

Room 041
State Office Building, GEF III
125 S. Webster
Madison, Wisconsin

The public hearing sites are accessible to people with disabilities.

PROPOSED ORDER OF THE
DEPARTMENT OF CORRECTIONS
AMENDING AND CREATING RULES

The Wisconsin department of corrections proposes an order to amend DOC 309.02 (14) and 309.02 (16), and create DOC 309.02 (7m) and 309.02 (16)(b) and (c), relating to resources for inmates.

Statutory authority: ss. 301.02, 301.03 (1) and (2), and 227.11 (2), Stats.
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Analysis prepared by the Department of Corrections

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

This order:

- Revises the present rules restricting inmates' access to sexually explicit material by prohibiting access to published material that depicts nudity on a routine or regular basis or promotes itself based on nudity in the case of individual one-time issues.
- Revises the present rules by prohibiting access to written material when it meets the legal definition of obscenity.

SECTION 1. DOC 309.02 (7m) is created to read:

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SECTION 2. DOC 309.02(14) is amended to read:

DOC 309.02 (14) "Nudity" for commercially published material means the showing of ~~the human male or female genitals, or pubic area or buttocks~~ with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of ~~any portion below the top of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.~~ "Nudity" for purposes of a personal photograph means the showing of the human male or female genitals, pubic area or buttocks with less than a fully opaque covering, or the showing of the female breast with less than a fully opaque covering of the areola or nipple, or the depiction of covered male genitals in a discernibly turgid state.

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3. Lacks serious literary, artistic, political, educational, or scientific value.

SECTION 5. DOC 309.04(4)(c)8.a. is amended to read:

- a. Is, ~~in whole or in part,~~ pornography.

The rules contained in this order 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

Initial Regulatory Flexibility Analysis:

These rules are not expected to have an effect on small businesses.

Fiscal Estimate:

Effective December 1, 1998, the Department of Corrections (DOC) implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (Aiello v. Litscher). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision off the present rules to conform to the latest case law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. There is no fiscal impact expected as a result of these changes.

Contact Person:

Julie M. Kane (608) 267-9839
Office of Legal Counsel
149 East Wilson Street
P.O. Box 7925
Madison, Wisconsin 53707-7925

If you are hearing or visually impaired, do not speak English, or have circumstances which might make communication at the hearing difficult and if you, therefore, require an interpreter or a non-English, large print or taped version of the hearing document, contact the person at the address or phone number above. A person requesting a non-English or sign language interpreter should make that request at least 10 days before the hearing. With less than 10 days notice, an interpreter may not be available.

Written Comments:

Written comments on the proposed rules received at the above address no later than May 18, 2001 will be given the same consideration as testimony presented at the hearing.

**PROPOSED ADMINISTRATIVE RULES – DOC 309,
RELATING TO RESOURCES FOR INMATES
ANALYSIS FOR LEGISLATIVE STANDING COMMITTEES
PURSUANT TO S. 227.19 (3) STATS.**

Need for Rule

Effective December 1, 1998, the Department implemented rules restricting inmates' access to sexually explicit material. These rules were challenged in federal court in a class action suit brought by several inmates (*Aiello v. Litscher*, Case No. 98-C-791-C, Western District of Wisconsin). The defendants filed a motion for summary judgment, but it was denied by the court in language that suggested the rules were unconstitutional in their present form based on a number of federal appellate court decisions that were reported after the rules were implemented.

In light of these developments, the parties negotiated a settlement which includes an immediate revision of the present rules to conform to the latest decisional law regarding the extent to which inmates' access to sexually explicit material can be restricted for legitimate penological objectives. The emergency rule, adopted February 23, 2001, was necessary to avoid a lapse of the settlement agreement and lengthy trial with the attendant possibility of having to pay a considerable amount in attorneys' fees.

Responses to Clearinghouse Recommendations

This rule was submitted to Legislative Council on February 23, 2001. All but the following recommendations were accepted:

In s. DOC 309.02(14), in the first sentence, the first instance of "fully" should be replaced with "full" to be consistent with the current rule's text. The drafter may wish to make the same change in the second sentence because it appears that the intent is to require a full covering as opposed to a fully opaque covering.

ANSWER: The current rule does not use consistent language. This proposed rule is intended to clarify the department's intent. The intent of the proposed rule is to require a fully opaque covering as opposed to a full covering. The proposed language accurately reflects the department's intent.

Public Hearings

This rule received three public hearings.

Date & Time

Location

May 3, 2001
Thursday
10:00 A.M.

Room 120
State Office Building
141 N.W. Barstow Street
Waukesha, Wisconsin

May 4, 2001
Friday
11:00 A.M.

Room 136
State Office Building
1681 2nd Avenue South
Wisconsin Rapids, Wisconsin

May 9, 2001
Wednesday
11:00 A.M.

Room 041
State Office Building, GEF III
125 S. Webster
Madison, Wisconsin

There were no appearances or registrations at any of the public hearings.

Written comments

The time for public comment through written comments was held open until May 18, 2001. The following written comment was received:

1. Fernando Escobar
Black River Correctional Institution
Opposing the rule.

Mr. Escobar writes that the rule should be denied because prison officials do not support the settlement agreement in this case, and because the rule does not clearly define what "community" standards are. Mr. Escobar states that we should differentiate between the white community and Hispanic or black communities.

ANSWER: "Community standards" is used in this rule as it is used in section 944.21 of the Wisconsin Statutes regarding obscene material. This rule reflects current statutory language that states "community" means "this state." The law forbids discrimination on the basis of race. To apply this rule by differentiating on the basis of racial "communities" would be to discriminate in one way or another. In addition, this rule is being amended in response to a lawsuit brought by prisoners. The department is a party to the lawsuit and must, therefore, approve any settlement

Final Regulatory Flexibility Analysis

This proposed rule is not expected to impact on small businesses as defined in s. 227.114 (1.)





SCOTT R. JENSEN
ASSEMBLY SPEAKER

July 26, 2001

ELECTRONIC DOCUMENT

The Honorable John Scocos
Assembly Chief Clerk
John.Scocos@legis.state.wi.us

CRule
01-022
folder

Dear Chief Clerk,

Per §227.24(2)(c) (Wisc Stats) I am referring the extension of emergency DOC rule 309 to the Committee on Corrections and the Courts. Also, please publish in the journal that this emergency rule has been extended. Please find a letter from the Joint Committee on Administrative Rules referencing their actions on DOC 309 attached.

If you have any questions, please contact Adam Peer in my office.

Sincerely,

Scott R. Jensen
Assembly Speaker

SRJ:asp

Cc: The Honorable Glenn Grothman, Assembly Chair- Joint Committee on Administrative Rules
The Honorable Judith Robson, Senate Chair- Joint Committee on Administrative Rules
The Honorable Scott Walker, Chair- Assembly Committee on Corrections & the Courts