

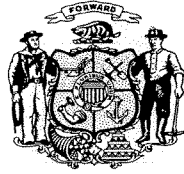
Emergency Rule DOC 309

Relating to resources for inmates. Extension of the effective period of this emergency rule for 60 days at the request of the Department of Corrections. First consideration

permanent rule will be published 9/1/01

Scott McCallum
Governor

Jon E. Litscher
Secretary



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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.

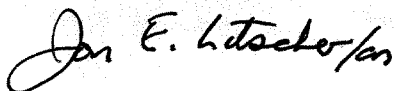
The enclosed proposed permanent rule was submitted to the Administrative Rules Clearinghouse and the Revisor of Statutes on February 23, 2001, notably the same date as the Emergency Rule became effective. The enclosed Administrative Rules Clearinghouse report was sent to DOC on March 19, 2001. On May 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

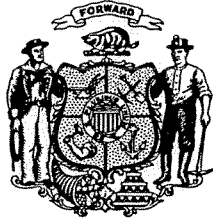
WISCONSIN LEGISLATIVE COUNCIL STAFF

LCRC
FORM 2

RULES CLEARINGHOUSE

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(608) 266-1304

One E. Main St., Ste. 401
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Madison, WI 53701-2536
FAX: (608) 266-3830

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

WISCONSIN LEGISLATIVE COUNCIL STAFF

RULES CLEARINGHOUSE

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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.
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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

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.

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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.)