



---

---

## WISCONSIN LEGISLATIVE COUNCIL RULES CLEARINGHOUSE

---

---

**Ronald Sklansky**  
*Clearinghouse Director*

**Richard Sweet**  
*Clearinghouse Assistant Director*

**Terry C. Anderson**  
*Legislative Council Director*

**Laura D. Rose**  
*Legislative Council Deputy Director*

### 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 01-045

AN ORDER to create chapter HFS 95, relating to the use of force to prevent escapes, pursue and capture escaped persons detained or committed under chapter 980, stats., and to provide security at facilities housing such persons.

Submitted by **DEPARTMENT OF HEALTH AND FAMILY SERVICES**

04-24-01 RECEIVED BY LEGISLATIVE COUNCIL.

05-16-01 REPORT SENT TO AGENCY.

RS:PS;jal;tlu

**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 RULES CLEARINGHOUSE

---

---

Ronald Sklansky  
*Clearinghouse Director*

Richard Sweet  
*Clearinghouse Assistant Director*

Terry C. Anderson  
*Legislative Council Director*

Laura D. Rose  
*Legislative Council Deputy Director*

### CLEARINGHOUSE RULE 01-045

#### 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.]**

#### 1. Statutory Authority

a. In the various locations at which s. 46.058, Stats., is cited as authority for the rule, the more specific citation s. 46.058 (2m), Stats., should be provided. That provision provides authority for the department to define by rule “necessary and appropriate force” to prevent escapes of sexually violent persons and to capture escaped sexually violent persons. The rule also pertains to providing security at facilities housing such persons. These facilities include the secure mental health facility under s. 46.055, Stats., the Wisconsin Resource Center under s. 46.056, Stats., and a secure mental health unit or facility provided by the Department of Corrections under s. 980.065 (2), Stats. Section 980.065 (2), Stats., directs the department to promulgate rules governing the custody and discipline of persons placed by the department in the secure mental health unit or facility provided by the Department of Corrections. Therefore, that statute should also be cited as authority for this rule. Any specific statutes authorizing the department to promulgate rules relating to providing security at the other two facilities should also be cited. Finally, the lists of statutes providing authority for this rule in the transmittal page, the analysis and s. HFS 95.01 should be consistent.

b. The rule is replete with requirements that the director of an institution adopt written policies and procedures to govern specified institution activities. To the extent that these anticipated policies and procedures are substantive and capable of uniform expression, rather than merely internal management matters for each institution, they should be promulgated fully in ch. HFS 95, in accordance with the statutory directive that the department promulgate rules.

**2. Form, Style and Placement in Administrative Code**

- a. In s. HFS 95.01, the statutory cross-references should be cited in ascending order.
- b. In s. HFS 95.03, the definition of "disturbance" in sub. (4) is out of alphabetical order and should be switched with the definition of "director," currently in sub. (5).
- c. In s. HFS 95.03 (10), the first comma should be replaced by the word "or."
- d. In s. HFS 95.08 (1), the notation "s." should be inserted before the first cross-reference. In sub. (2) (intro.), the phrase "all of" should precede the phrase "the following." These comments also apply to sub. (3) (intro.).

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

- a. In the analysis, it would be helpful to list the various types of facilities to which the rule applies.
- b. In s. HFS 95.03 (2), "illness" is included in the definition of "bodily injury." However, it is not included in the definition of "great bodily injury" in sub. (10)." Is there a reason why it is included in one and not the other?
- c. In s. HFS 95.03 (5) and (17), it is suggested that the phrase "that person's" be inserted before the word "designee." [See, also, s. HFS 95.06 (2) (a) 1.] Also, in sub. (5), should the term "superintendent" be used to denote the head of a facility, rather than "director," in order to avoid confusion with the term "security director" under sub. (17) and to be consistent with the use of the word "superintendent" in s. 46.058 (2m), Stats.?
- d. In s. HFS 95.03 (7) (d), it is suggested that the word "Any" be replaced by the word "A."
- e. In s. HFS 95.03 (10), why is the phrase "serious bodily injury" used? The rule defines the term "bodily injury" and "great bodily injury" and does not appear to use the phrase "serious bodily injury" anywhere else. The use of the latter term could cause confusion.
- f. In s. HFS 95.03 (11), where are the incapacitating devices "approved" by the department? In rules? If no, should they be?
- g. In ss. HFS 95.05 and 95.08, why are the policies not *written*, as is in ss. HFS 95.04, 95.06 and 95.07? Also, in s. HFS 95.05, the word "into" should be inserted after the word "enter" on line 3.
- h. In s. HFS 95.06 (1) (a), the word "progression" should be inserted after the word "This" on line 4.
- i. In s. HFS 95.06 (1) (b) (intro.), the phrase "the use of" should be inserted after the word "that" on line 2.

j. In s. HFS 95.06 (1) (c) 1. (intro.), the word "such" should be inserted after the first "of" on line 2.

k. The following comments pertain to s. HFS 95.06 (2) (b):

(1) In subd. 2., if the intent of the provision is to have *each* staff person present during the firearm discharge incident write a separate written report, that should be clarified by changing the word "all" to "each staff member." Also, to whom is the written report submitted? Does each staff person submit a report to his or her supervisor? Do all reports go to the director?

(2) In subd. 3., the supervisor is required to investigate the incident and submit a report to the director. Is the supervisor required to forward the reports submitted by "all staff present" to the director? If not, how will the director "send to the administrator the *reports* required by this paragraph"?

l. In s. HFS 95.06 (3) (a), is the word "division" correct or should it be either "director" or "administrator"?

m. In s. HFS 95.06 (3) (d), the comma after the word "used" on line 3 should be changed to the word "and." Also, might there be circumstances in which medical staff should be consulted *prior to* cleaning off an incapacitating chemical agent, to ensure that it is removed properly and safely?

n. Section HFS 95.06 (4) provides that a staff member taken hostage "has no authority to order use of force . . . ." In accordance with s. 1.01 (2), Manual, this prohibition should instead be expressed as "No staff member taken hostage may order the use of force . . . ."

o. In s. HFS 95.08 (2) (intro.), the comma following the rule citation on line 1 should be deleted.

p. In s. HFS 95.08 (3) (intro.), should the training in the use of incapacitating devices be "a department-approved training and qualification program," as is the program for staff authorized to use firearms under s. HFS 95.08 (2) (intro.)? Also, for consistency with the wording in sub. (2) (intro.), the phrase "that shall include instruction on the following" in sub. (3) (intro.) could be rewritten "that includes instruction on all of the following."

PROPOSED ORDER OF THE  
DEPARTMENT OF HEALTH AND FAMILY SERVICES  
CREATING RULES

To create HFS 95, relating to the use of force to prevent escapes, pursue and capture escaped persons detained or committed under Ch. 980, Stats., and to provide security at facilities housing such persons.

Analysis Prepared by the Department of Health and Family Services

This order creates rules to guide the use of force to prevent escapes and recapture escaped persons under Ch. 980, Stats., and to provide security at facilities housing such persons. #1

1999 Wisconsin Act 9 created s. 46.058, Stats. <sup>(7m)</sup> That law requires the department to establish rules to define the use of "necessary and appropriate force" in relation to preventing escapes and in pursuing and capturing persons detained <sup>(a)</sup> or committed under ch. 980, Stats., who have escaped. This order complies with that statutory requirement.

*Plus*  
In addition to defining the use of force in such circumstances, this order sets forth standards for the appropriate use of force in order to provide security at facilities housing such persons. Use of force is sometimes required in situations to prevent injuries, regain control of parts of a facility, control disruptive persons, or prevent property damage. This order requires the adoption of policies and procedures to ensure that only so much force is used as is necessary under the circumstances.

This order also sets forth criteria for use of firearms and incapacitating devices. Proper and ongoing training is required.

The department's authority to create these rules is found in ss. 46.058(2m) and #1 227.11(2), Stats. The rule interprets ss. 46.055, 51.61, 980.06, and 980.04(1), Stats.

*980.065 (2) provides the authority to prom rules gov. the custody & discipline of psus. placed in a sec. inst. facic or unit prov. by sec who not cited writ*

SECTION 1. Chapter HFS 95 is created to read:

CHAPTER HFS 95  
USE OF FORCE TO PREVENT ESCAPES, TO PURSUE AND CAPTURE  
ESCAPED PERSONS AND TO PROVIDE SECURITY AT  
FACILITIES HOUSING SUCH PERSONS  
COMMITTED OR DETAINED UNDER CH. 980, STATS.

*cd this be  
shaken?  
#12  
USE OF FORCE  
AND PROVISION  
OF SECURITY  
AT FACILITIES  
HOUSING SEC.  
UNREST PERSON*

- HFS 95.01 Authority and purpose
- HFS 95.02 Applicability
- HFS 95.03 Definitions
- HFS 95.04 Preventing escapes
- HFS 95.05 Pursuing capturing escapees
- HFS 95.06 Use of force
- HFS 95.07 Documentation
- HFS 95.08 Training

*and cite same stats as in st. of MHI. authority  
bottom a previous page*

**HFS 95.01 Authority and purpose.** Pursuant to the authority vested in the department by ss. 46.058(2m), 46.055, 980.06, 980.04(1), 51.61(9), and 227.11(2), Stats., the department adopts this chapter to define the use of "necessary and appropriate force" in relation to preventing escapes and pursuing and capturing persons detained at or committed to a facility, center or unit under ch. 980, Stats., who have escaped and to establish security standards at facilities housing such persons. Primary security objectives of the department are to protect the public, staff and patients and to afford patients the opportunity to participate in treatment and activities in a safe setting. Every employee of a facility is responsible for the safe custody of patients.

*order  
X*

**HFS 95.02 Applicability.** This chapter applies to the secure mental health facility established under s. 46.055, Stats., the Wisconsin resource center established under s. 46.056, Stats., and any secure mental health unit or facility provided by the department of corrections under s. 980.065(2), Stats.

**HFS 95.03 Definitions.**

- (1) "Administrator" means the administrator of the division *place and visitation facilities*
- (2) "Bodily injury" means physical injury, illness, or any impairment of physical condition. *not in def of good bod. harm*
- (3) "Department" means the department of health and family services.

*#2  
#5*

— (4) "Disturbance" means a situation caused by a patient that disrupts the normal functioning of the facility, including but not limited to any of the following:

- (a) An assault on any person by 2 or more patients.
- (b) The taking of a hostage by a patient.
- (c) The destruction of state property or the property of another by 2 or more patients.

*#2  
not  
with  
11/15*

(d) The refusal by 2 or more patients, acting in concert, to comply with an order.

(e) Any word or acts by two or more patients which incite or encourage other patients to do any of the above.

(5) "Director" means the superintendent of a facility, or designee.

(6) "Division" means the division of care and treatment facilities in the department.

(7) "Emergency" means an immediate threat to the safety of the public, staff or patients of the facility. An emergency includes, but is not limited to any of the following:

(a) A utility malfunction.

(b) A fire.

(c) A bomb threat or an explosion.

(d) Any natural disaster.

(e) A civil disturbance.

(f) A patient's escape.

(8) "Facility" means the secure mental health facility established under s. 46.055, Stats., the Wisconsin resource center established under s. 46.056, Stats., or any secure mental health unit or facility provided by the department of corrections under s. 980.065(2), Stats.

(9) "Force" means the exercise of strength or power to overcome resistance or to compel another to act or to refrain from acting in a particular way.

(10) "Great bodily injury" means bodily injury which creates a high probability of death, serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.

(11) "Incapacitating device" means any commercially manufactured chemical agent or mechanical device approved by the department for the purpose of incapacitating someone.

(12) "Lethal force" means force which the user reasonably believes will create a substantial risk of causing death or great bodily injury to another.

(13) "Non-lethal force" means force which the user reasonably believes will not create a substantial risk of causing death or great bodily injury to another.

(14) "Patient" means a person detained at or committed to a facility under ch. 980, Stats.

(15) "Reasonably believes" means that the actor believes that a certain fact situation exists and such belief under the circumstances is reasonable.

(16) "Secretary" means the secretary of the department

*Health and family services #2*

*See also sub. (17)*

*that person's #5*

*as she's name referred to as 'super' instead to avoid confusion*

*"Security" etc?*

*See 46.058 (2m)*

*uses "Supers."*

*or (why does "bod. injury" incl. illness but not here? means)*

*Alp #2*



(17) "Security Director" means the security director at a facility, or <sup>that person's</sup> designee. X

(18) "Strength or power" means the use of physical strength alone or with any device or object, including but not limited to an incapacitating device, firearm, or any other mechanical, electronic or physical object.

**HFS 95.04 Preventing escapes.** The director shall adopt written policies and procedures consistent with this chapter to prevent escapes. ?

**HFS 95.05 Pursuing and capturing escapees.** The director shall adopt policies and procedures consistent with this chapter to pursue and capture escapees. <sup>written</sup> The director may enter <sup>?</sup> agreements with local and state law enforcement agencies to pursue and capture escapees. <sup>5</sup> <sub>mtb</sub> .5

**HFS 95.06 Use of force.** (1) FORCE OPTION CONTINUUM. (a) *Policies and procedures.* The director shall adopt written policies and procedures that establish a systematic progression of force based on the perceived level of threat to guide staff in the use of force in a disturbance or emergency, to prevent escapes or to pursue and capture escapees. <sup>?</sup> This <sup>5</sup> progression includes staff presence, dialogue, empty-hand control, incapacitating devices, and lethal force. The policies and procedures shall be designed to help ensure that force is only used when necessary and that only the amount of force that is necessary under the circumstances is used.

(b) *Non-lethal force.* Staff may use non-lethal force against patients only if the user reasonably believes that non-lethal force is immediately necessary to achieve any of the following: <sup>the use of</sup> 5

1. Prevent death or bodily injury to oneself or another.
2. Regain control of a facility or part of a facility.
3. Prevent escape or apprehend an escapee.
4. Change the location of a patient.
5. Control a disruptive patient.
6. Prevent unlawful damage to property.
7. Enforce a departmental rule, a facility policy or procedure or an order from a staff member.

(c) *Lethal force.* 1. Staff may use lethal force only if the user reasonably believes that the use of force is immediately necessary to achieve any of the following: <sup>such</sup> 5

- a. Prevent death or bodily injury to oneself or another.
- b. Prevent unlawful damage to property that may result in death or bodily injury to oneself or another.
- c. Regain control of a facility or part of a facility when less forceful means of regaining control are unsuccessful or not feasible under the circumstances.

d. Prevent escape or apprehend an escapee.

2. Staff may not use lethal force if its use creates a substantial danger of harm to non-involved third parties, unless the danger created by not using such force is greater than the danger created by using it.

(d) *Other uses of force prohibited.* Force may not be used except as provided in this chapter and under policies and procedures adopted in accordance with this chapter, including but not limited to use of force as a means of disciplining patients.

(2) FIREARMS. (a) *Authority to carry firearms.* 1. Only staff designated by the director or designee may authorize use of firearms.

2. Except in disturbances or emergencies only staff assigned to posts requiring the use of firearms may be armed.

3. Staff may only carry or use firearms approved and issued by the department and only after successfully completing the training program under s. HFS 95.08.

4. Only staff authorized by the director may in the course of their duties carry firearms off the grounds of the facility.

(b) *Reporting discharged firearm.* If a staff member discharges a firearm, staff shall do all of the following:

1. The staff member who discharged the firearm shall verbally notify the ~~staff member's~~ supervisor as soon as possible. *his or her*

2. As soon as possible after the discharge of the firearm, all staff present during the incident shall write and submit a written report about the incident on a form approved by the director. *to the director? supervision?*

3. A supervisor shall investigate the incident and submit a report to the director. The report shall state all facts relevant to the discharge of the firearm and shall include the supervisor's opinion as to whether the discharge was justified and occurred in accordance with facility policies and procedures and this chapter. The director shall send to the administrator the reports required by this paragraph, along with the director's conclusion regarding whether the discharge was consistent with this chapter. *X S*

(c) *Death or injury caused by firearm.* 1. If a person is injured or killed by the discharge of a firearm, the department shall convene a firearm review panel to investigate the incident. The panel shall consist of 5 persons selected as follows:

a. Two members designated by the secretary, one of whom shall be a member of the public and one of whom shall be a member of the department staff. The department staff member designated by the secretary shall serve as chairperson.

b. Two members designated by the administrator, one of whom shall be a member of central office staff and one of whom shall be a member of the public.

c. One member designated by the director of the facility, center or unit where the incident occurred, who is a member of the institution staff.

2. The panel shall submit a written report to the secretary. The report shall include a description of the incident and the panel's conclusion regarding whether the use of force complied with the policies and procedures adopted under this chapter.

(3) **INCAPACITATING DEVICES.** (a) Staff may only use incapacitating devices approved by the division and only in compliance with this chapter and facility policies and procedures. *Administrative*

(b) The director shall adopt policies and procedures consistent with this chapter for the control and issuance of incapacitating devices, including the chain of command for authorization to issue such devices.

(c) Staff may only use incapacitating devices after successfully completing the training program under s. HFS 95.08.

(d) As soon as possible after an incapacitating device has been used, staff shall provide the exposed person an opportunity to clean off any incapacitating chemical agent that was used, to change clothing and shall consult with medical staff who shall provide appropriate medical care. *200*

(e) As soon as possible following the use of an incapacitating device, all staff present shall write and submit a written report to the director about the incident on a form approved by the director. The report shall include a description of the incident, the name of each person present during the incident, the incapacitating device that was used and any resultant physical health treatment that was required or provided.

(4) **HOSTAGES.** Notwithstanding any other provision of this section, a staff member taken hostage has no authority to order use of force or any other action or inaction by staff. *shall have*

**HFS 95.07 Documentation.** The director shall adopt written policies and procedures to ensure that all uses of force are documented in a manner approved by the department. *where on rule?*

**HFS 95.08 Training.** (1) The director shall adopt policies and procedures to ensure that facility staff who may be called upon to use force under HFS 95.06 are properly trained and regularly updated on the systematic progression of force policies and procedures adopted under s. HFS 95.06(1)(a). *s. written*

(2) Staff authorized to use firearms under s. HFS 95.06(1)(c) and (2) shall attend a department-approved training and qualification program that includes instruction on the following: *all of*

- (a) Safe handling of firearms while on duty.
- (b) Legal use of firearms and the use of lethal force.
- (c) Facility policies and procedures regarding firearms.
- (d) Fundamentals of firearms use, including range firing.

(e) In situations where firearms may be used, the manner in which they must be used, including the use of verbal warnings and warning shots.

(3) Staff authorized to use incapacitating devices under <sup>s.</sup> HFS 95.06(1)(b) and (3), shall successfully complete training that shall include instruction on the following: 5

- (a) Safe handling of incapacitating devices *dept approved? that includes instruction...*
- (b) Legal use of incapacitating devices and the use of non-lethal force.
- (c) Facility policies and procedures regarding incapacitating devices.
- (d) In situations where incapacitating devices may be used, the manner in which they must be used, including the use of verbal warnings.

The rule included 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 Health and Family Services

Dated:

By: \_\_\_\_\_  
Phyllis J. Dubé  
Secretary

SEAL: