

## Chapter HSS 311

## OBSERVATION STATUS IN ADULT CORRECTIONAL INSTITUTIONS

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**HSS 311.01 Purpose.** The purpose of this chapter is to provide for an involuntary or voluntary nonpunitive status used for the temporary confinement of an inmate to ensure his or her safety and the safety of others if the inmate is mentally ill and dangerous or has a medical problem that requires separation from the population for treatment. This is consistent with the division's goal of ensuring personal safety and security within an institution.

**History:** Cr. Register, July, 1981, No. 307, eff. 8-1-81.

**HSS 311.02 Applicability.** Pursuant to authority vested in the department of health and social services under s. 227.014 (2), Stats., the department adopts this chapter which applies to the department, the division of corrections, and all adult inmates in its legal custody. It interprets ss. 53.07, 53.08, and 53.36, Stats.

**History:** Cr. Register, July, 1981, No. 307, eff. 8-1-81.

**HSS 311.03 Definitions.** In this chapter:

(1) "Adjustment committee" or "committee" means the adjustment committee authorized under the departmental disciplinary rules ch. HSS 303 to impose disciplinary measures for inmate misconduct.

(2) "Department" means the department of health and social services.

(3) "Division" means the department of health and social services, division of corrections.

(4) "Misconduct" means behavior in violation of state or federal statutes or the rules of the department.

(5) "PRC" or "program review committee" means the program review committee created under ch. HSS 302.

(6) "Security director" means the security director of an institution, or designee.

(7) "Shift captain" means the shift captain of an institution, or designee.

(8) "Superintendent" means the superintendent of an institution, or designee.

(9) "TLU" or "temporary lockup" is described under the departmental disciplinary rules, ch. HSS 303.

**History:** Cr. Register, July, 1981, No. 307, eff. 8-1-81.

Register, July, 1981, No. 307

**HSS 311.04 Observation.** (1) Observation is an involuntary or voluntary nonpunitive status used for the temporary confinement of an inmate to ensure his or her safety and the safety of others if:

(a) The inmate is mentally ill and dangerous to self or others; or

(b) The inmate has, or is suspected of having, a medical problem such as tuberculosis, alcoholism, drug dependence, or a communicable disease or infection that requires separation from the population for treatment by a physician.

(2) An inmate is mentally ill if there is substantial evidence that he or she has a substantial disorder of thought, mood, perception, orientation, or memory which grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life in an institution, but does *not* include alcoholism.

(3) An inmate is dangerous if he or she evidences a substantial probability of physical harm to self or to other persons as manifested by:

(a) Recent homicidal or other violent behavior; or

(b) The reasonable fear of others of violent behavior and serious physical harm because of a recent overt act, attempt or threat to do such physical harm.

(c) Serious self-destructive behavior or such a threat; or

(d) The inability to cope with life in the institution to the degree that self or others are thereby endangered.

(4) An inmate may be placed in observation by:

(a) A clinical psychologist, clinical social worker, or physician;

(b) The adjustment committee;

(c) The superintendent;

(d) A clinical or medical services staff member if a clinical psychologist, clinical social worker, or physician is not available for consultation either directly or by telephone; or

(e) The security director or shift captain if a clinical psychologist, clinical social worker, or physician is not available for consultation either directly or by telephone.

(5) (a) If an inmate is placed in observation by the adjustment committee, superintendent, staff member, shift captain, or security director, the inmate shall be informed orally of the reasons for the placement. A clinical psychologist, clinical social worker, or physician shall be notified immediately of the placement and should examine the inmate within 24 hours, but in no case later than 5 days after placement. Within 24 hours or as soon as feasible after the examination, the inmate shall receive written notification of the reasons for the placement.

(b) If the inmate is placed in observation under sub. (1) (a), the examination may result in the inmate's continued confinement in observation for a period of 10 working days from the date of examination or immediate release from observation.

(c) If the inmate is placed in observation under sub. (1) (b) the inmate shall receive periodic reviews of this status by a physician as needed and may appeal under sub. (20) (a) at any time following decision to continue the status.

(d) The appropriate privileges and properties to be allowed the inmate in observation shall be determined after a consultation with the supervisor of the unit (see sub. (15)).

(6) Any staff member or inmate may recommend to any person noted under sub. (4) that an inmate be placed in observation. The staff member or inmate shall state the reasons for the recommendation and describe the inmate's conduct that underlies the recommendation.

(7) No inmate may remain in observation for longer than 10 consecutive working days from the examination under sub. (5) if admitted under sub. (1) (a) unless notice of review of the inmate's status in accordance with sub. (9) has been served and mandatory commitment proceedings have been initiated pursuant to sub. (8). An inmate admitted under sub. (1) (b) may remain in observation for a reasonable period of time for diagnosis and, if necessary, treatment until the disease is in remission or the inmate has passed the communicable stage of the disease or infection.

(8) If, in the opinion of the attending clinical psychologist, clinical social worker, or physician, an inmate in observation under sub. (1) (a) is in need of additional treatment at a mental health or medical facility, such recommendation shall be made to the superintendent for approval and the inmate may be transferred pursuant to s. 51.37 (5) or 51.20, Stats.

(9) If there is substantial evidence that an inmate is mentally ill and dangerous and requires continued confinement in observation under sub. (1) (a) in excess of the 10 working day period noted under sub. (7) and commitment proceedings have been initiated, a clinical psychologist, physician, or clinical social worker may make a decision for continued confinement of the inmate following notice under sub. (10). An inmate may then be continued in observation after a review in accordance with this section.

(10) An inmate placed in observation under sub. (1) (a) shall be given written notice within 10 working days of examination under sub. (5) of the review under sub. (9). Notice shall include:

- (a) The allegation of the inmate's mental illness and dangerousness;
- (b) The standards used to determine mental illness and dangerousness;
- (c) The evidence to be considered at the review;
- (d) The sources of information relied upon unless such disclosure would threaten personal safety or institution security;
- (e) An explanation of the possible consequences of any decision;
- (f) An explanation of the inmate's rights at the review which are:
  1. The right to be present at the review;
  2. The right to deny the allegation;

3. The right to an advocate in accordance with HSS 303.79 and the right to present or have the advocate present information obtained from witnesses;

4. The right to present documentary evidence;

5. The right to question witnesses in accordance with sub. (12);

6. The right to receive a written decision, stating the reasons for it based upon the evidence; and

7. The right to appeal the finding in accordance with sub. (20); and

(g) The date, time, and place of the review and an order that the inmate appear at the review.

(11) The review under sub. (9) shall take place not sooner than 2 working days and not later than 5 working days after service of notice to the inmate. The inmate may waive this review or the time limits under this sub.. The waiver shall be in writing.

(12) At the review under sub. (9), the allegations of the inmate's dangerousness and mental illness shall be read aloud and all witnesses present including the inmate and the staff member who recommended the placement into observation, shall have a chance to speak. The clinical psychologist, physician, or clinical social worker may require medical evidence to be offered. Direct questions may be permitted or the inmate may be required to submit questions to be asked of the witnesses. Repetitive, disrespectful, or irrelevant questions may be forbidden. Whenever the clinical psychologist, physician, or clinical social worker determines that a witness shall not be called, or that the identities of sources of information relied upon or any statements or evidence should not be included in a written record because personal safety or institution security is implicated, the fact of the omission in the record shall be recorded.

(13) After the review, the clinical psychologist, physician, or clinical social worker shall deliberate in private concerning only the evidence presented, the inmate's records, and the standard for dangerousness as defined under sub. (3) and mental illness as defined under sub. (2). The clinical psychologist, physician, or clinical social worker shall decide whether an inmate is mentally ill and dangerous and, if so, the inmate shall be continued in observation under sub. (1) (a). The reasons for the decision shall be given to the inmate in writing.

(14) There shall be a review of a inmate in observation under sub. (1) (a) at least once every 15 working days and the procedures for review under this section shall be followed.

(15) An inmate in observation shall be confined alone in a comfortably warm, well-ventilated, sanitary, secure cell equipped with an observation port and shall be entitled to the same privileges and properties as an inmate in the general population *unless*:

(a) The staff member under sub. (4) who places the inmate in observation reasonably believes that these privileges or properties may be used by the inmate, or another inmate also in observation, for self harm or to harm others; or

(b) The properties cannot be moved conveniently to the observation cell; or

(c) The privileges cannot be offered due to the secured nature of the observation unit.

(16) A staff member shall have immediate access to an inmate admitted under sub. (1) (a), shall observe the inmate at least once every 15 minutes, and shall accompany the inmate at all times while out of the cell.

(17) If any of the privileges or properties noted under sub. (15) is used by the inmate or another inmate also in observation for self harm or harm to others, it shall be withdrawn immediately by the staff member noting the problem; and the security director shall reevaluate and either approve the withdrawal or reinstate the privilege or property as soon as possible.

(18) Unless there is a continuation under sub. (9), or a transfer or commitment under sub. (8), the inmate shall be returned to previous status and assignment if possible and advisable or shall be reassigned by the PRC after expiration of the initial 10 working day period under sub. (7). An inmate may be returned at any earlier time upon the written recommendation of the attending clinical psychologist, clinical social worker, or physician. Similarly, after any termination of a continuation or after return transfer from a mental health or medical facility, the inmate shall resume his or her assignment or be reassigned.

(19) All placements into, releases from, and transfers from observation as well as any suicide attempts prior to or during placement in observation shall be reported to the security office. The attending physician, clinical psychologist, or clinical social worker shall be informed by the security director of any suicide attempts made prior to placement in observation.

(20) (a) An inmate placed in observation under sub. (1) (a) who does not receive timely reviews in accordance with this section or who has had a decision under sub. (13), as well as any inmate placed in observation under sub. (1) (b) for more than 5 days who wishes to challenge his or her placement, shall have the immediate right to appeal such placement to the directors of the bureau of adult institutions and program resources. The directors of the bureaus of adult institutions and program resources may request an additional clinical or medical assessment of the inmate's condition prior to the directors' written decision which shall be issued to the inmate and appropriate staff within 5 working days of receipt of the appeal.

(b) An inmate may appeal a decision under sub. (5) (a) to the administrator who shall issue a written decision within 5 working days.

(21) A daily entry shall be made in the inmate's record describing progress with treatment. Specific descriptions of incidents that may reveal the inmate's mental illness and dangerousness, or lack of these, or other medical condition shall be recorded.

**History:** Cr. Register, July, 1981, No. 307, eff. 8-1-81.

**Note:** HSS 311.04 provides for the temporary confinement of an inmate who is mentally ill and dangerous or who has, or is suspected of having, a disease or condition requiring treatment and isolation from the population.

## APPENDIX

Observation is a nonpunitive measure taken to ensure the safety of the inmate or others during the crisis period. Hopefully, by confining the inmate under observation for a short time, the personal crisis will subside without any harm being done to the inmate or to others. Examples of personal crisis are situations in which an inmate receives discouraging or disheartening news from his or her family and evidences a mental health problem and dangerousness and temporarily needs emotional support and observation because of the possibility of attempted self harm or harm to others; or when an inmate is in an emotional depression and needs to be carefully watched because of the possibility of attempted self harm or harm to others; or when an inmate has attempted to commit suicide and shows signs of another attempt. Sometimes an inmate requires isolation because his or her mental condition has deteriorated to the point that the inmate may be victimized by others or the inmate presents a danger to others.

Alcoholic and drug dependent inmates shall be placed in observation only if treatment is necessary and cannot be provided while the inmate is in the general population.

An inmate who violates a disciplinary rule and satisfies the criteria under sub. (1), may be placed in observation under this section prior to or after disciplinary action. This sometimes occurs because the individual's mental illness becomes apparent during the disciplinary process. Typically, such a mentally ill person is not disciplined, but is placed in observation status. Confinement in observation is *not* a penalty for rule infractions, however. Thus observation is distinguished from the punitive segregated statuses such as temporary lockup (TLU), control, program, or adjustment segregation. Administrative confinement is reserved for an inmate who is found dangerous but not mentally ill. An inmate who is mentally ill and dangerous may be transferred to a medical or mental health facility under s. 51.37 (6) or 51.20, Stats., for treatment if release into the previous status is deemed unwise after the stay in observation. The division must initiate such proceedings within 16 working days of the inmate's placement in observation.

Inmate misconduct is handled through the disciplinary process. Placement in observation is *not* a penalty for misconduct, but may result after a finding of mental illness and dangerousness either prior to or subsequent to a disciplinary proceeding or independent of any such proceeding.

Subsection (2) and (3) set forth in the standards to be used in determining dangerousness and mental illness. They are similar to the standards used to determine dangerousness and mental illness for involuntary civil commitment under s. 51.20, Stats. The analogy between the standards is apt since both are vehicles for removing dangerous persons from the population in which they live.

Subsection (4) authorizes certain people to place an inmate in observation. Ideally, placement should be made by highly trained personnel, and the clinical psychologist, clinical social worker, physician, or superintendent should authorize all placements. However, experience teaches that this is not always possible. Thus, others are authorized to place inmates in observation, but in such cases the clinical psychologist, clinical social worker, or physician review that placement within 24 hours and decide on the necessity of either the examination, continued confinement with allowed privileges, and properties or the immediate release of the inmate from observation. It is anticipated that, if an inmate is placed in observation by a staff member, the inmate will be in observation only overnight prior to such examination. This procedure is in the inmate's best interest because it ensures the inmate's protection if there is indeed a crisis.

The kinds of property and privileges allowed in observation may differ substantially, and great care should be exercised in determining which properties and privileges should be allowed an inmate.

If the time limits in sub. (7) for observation under sub. (1) (a) are not sufficient to properly handle the crisis, the institution must initiate civil commitment procedures under s. 51.20, Stats., or transfer procedures under s. 51.37 (6), Stats. However, experience teaches that mental health institutions are reluctant to accept transfers of inmates for confinement or transfer under ss. 51.20 and 51.37 (6), Stats., and hopefully the provisions under sub. (9) will be adequate to handle an inmate's crisis.

Subsection (9) provides that an inmate may be continued in observation after a special review. This review contains due process protections of the major disciplinary hearing. Due process protections are important and are afforded the few inmates affected by this provision because the seriousness of this confinement parallels civil commitment. At this special review, dangerousness and mental illness shall be the only criteria for placement in this status. Both findings are prerequisites for continuation of confinement in observation.

Subsection (10) provides the inmate with adequate written notice of the review. Subsections (10) (d) and (10) (f) 3 note that safety and security may be breached if certain testimony or evidence is allowed into the open record. In such cases, review shall deal with the omissions as noted under sub. (12). See the major disciplinary procedures.

Subsection (11) provides for the time of the review. The inmate may waive the review as well as the time limits. To ensure that any waiver is a knowing intelligent one, the inmate must be informed of his or her right to a review and what that entails; the inmate must be informed of what the review will be like if he or she waives the time limits; and the waiver must be in writing. The waiver is *not* an admission of dangerousness or mental illness.

Subsection (14) provides for a review of the inmate's status at least once every 15 working days. An earlier review may occur. This time period balances fairness to the inmate with the practicalities of providing for a meaningful review.

Placement of an inmate in observation status is not thought to implicate the interests cited in *Vitek v. Jones* 100 s. ct. 1254 (1980). In *Vitek*, the transfer was to a separate institution which was solely for mentally ill people. A person in observation status in Wisconsin frequently will remain in his or her own cell or room. Sometimes, the person is transferred to a different cell, for their own protection or so that they can be more carefully observed to prevent self-destructive conduct.

More important, if an inmate is in observation status for 15 days, commitment proceedings pursuant to ch. 51, Stats., are commenced. These proceedings do more than *Vitek* requires for the transfer of an inmate to a mental health institution.

A staff member must have direct access to an inmate in the event that a problem develops, and a staff member must observe the inmate often to ensure that the inmate is safe. It is also important that the staff member accompany the inmate, for the inmate's protection, at all times while he or she is out of the cell. Sub. (16).

If observation is not continued under sub. (9) or the inmate is not transferred under s. 51.20 or 51.37 (5), Stats., the inmate is returned to his or her previous status. Since observation is a nonpunitive status, every attempt should be made to have inmates resume previous assignments. If the attending psychologist, clinical social worker, or physician and inmate believe that a return to the assignment would have a harmful effect (e.g., rekindle the emotions that prompted the crisis), the inmate would be recommended for reassignment by the PRC. Sub. (18).

This chapter is in substantial accord with the provisions regarding the special management of inmates in the American Correctional Association's Manual of Standards for Adult Correctional Institutions (1977), standards 4201-4221, 4381, and 4383.