

firearms ought not be carried by staff who have contact with inmates. In view of the danger created by firearms and their minimal benefit, only the superintendent is permitted to authorize the issuance of firearms. Typically, the person who is in charge of the institution when the superintendent is not there will also have this authority. This subsection follows the recommendations of ABA at 555.

Sub. (4) indicates the nature of the weapons training and qualification program staff must complete to be certified to be issued weapons. It is important the staff who have weapons know how to use them. This greatly increases the chances that they will be used responsibly and diminishes the chances for accidents or negligent handling of them. Moreover, there is a great need for training in human relations and alternatives to force. This training should be part of weapons training.

To insure that weapons are handled responsibly, sub. (5) indicates the procedure to be followed before discharging a weapon. It will not always be possible, given the nature of the situations in which firearms are used, to follow this procedure. However, it is required that it be followed unless it is not feasible to do so. For example, if it becomes necessary to shoot at a person holding a hostage, the procedure might not be followed.

The procedure is designed to verbally inform the inmate that a staff member possesses a weapon and that the inmate should stop the activity. An adequate verbal warning to a person attempting to escape would be to say, "Halt, don't move! I have a weapon." If the verbal warning is disregarded and the inmate does not halt, a warning shot should be fired. If this is disregarded, it might be necessary to fire shots at the inmate. Such shots should be fired to stop the activity and, if possible, not to kill or cause great bodily harm. There may be situations in which it is necessary to shoot to kill. This is provided for in sub. (6) by the phrase "if the inmates activity poses an immediate threat of death or great bodily harm to another." In such case, shooting with the intention of causing death or great bodily harm would be justified and is authorized by the rule.

Sub. (7) requires the investigation of incidents in which a weapon is discharged. This investigation is for the purpose of administrative review and is not intended to take the place of an investigation conducted by another government agency.

Subsections (7) (a)-(c) provide for investigation and reporting through the normal chain of command. Sub. (7) (d) and (e) provide for investigation and reporting by a special panel when anyone is killed or wounded by a firearm discharge. Because of the seriousness of such an event, it is desirable to include on the panel people from outside the division of corrections to insure that the investigation is conducted with the necessary objectivity.

No attempt is made in the rule to identify those sanctions that may or shall be applied to staff members who violate the rules. Clearly, the civil and criminal law of the state applies. A current issue in administrative law is whether the violation of a rule is the basis for a cause of action in tort or under 42 U.S.C. s. 1983. These are matters for the legislature and the Congress. What administrative sanction may be applied is addressed elsewhere in these rules.

**Note:** HSS 306.08. HSS 306.08 authorizes and regulates the use of chemical agents in adult correctional institutions.

The division's policy is to allow use of chemical agents in emergencies, and to ensure that in nonemergency situations chemical agents are used only as a last resort and not as alternatives to communication with an inmate or to other types of non-deadly force. The rule also makes clear that chemical agents may not be used to punish an inmate but only to control him or her when necessary.

As stated in sub. (2), the use of chemical agents is regulated by this section. Because chemical agents pose a risk of injury to others, they may only be used in limited situations.

Subsection (3) identifies emergency situations in which chemical agents may be used without going through the steps identified in sub. (4). Under this subsection, chemical agents may be used to regain control of an institution or part of an institution over which physical control has been lost during an emergency, HSS 306.23 (1), or disturbance, HSS 306.22 (1). "Part of an institution" may be a building or a small area like a room. Whether a chemical agent should be used in such a situation depends upon whether using the chemical agent is less hazardous for both the person seeking to use the chemical agent and the inmate than using other reasonable means to accomplish the purpose. As explained in HSS 306.06 (5) (b), an inmate's simple refusal to follow an order does not constitute loss of control of all or part of an institution.

Subsection (4) covers use of chemical agents in nonemergency situations, including situations in which an inmate refuses to follow an ordinary order. These situations include, for example, an inmate's refusal to take nonemergency medication or submit to nonemergency medical treatment; refusal to return a meal tray or tray inserts, unless the tray or insert is presently being used as a weapon; an inmate's throwing objects or liquids from the cell, unless

## Appendix

such activity constitutes an immediate threat of bodily injury or death to him or herself or another; refusal to be strip searched; refusal to come to bars of a cell to be handcuffed for any nonemergency reason; and yelling or shouting.

Subsections (4) (b) 1 to 6 outline a series of steps to be taken before using the chemical agents in nonemergency situations, when it is feasible to take those steps. This procedure is designed to ensure that chemical agents are used only as needed in particular situations. The person seeking to use the chemical agent should communicate with the inmate and should ask other available personnel to communicate with the inmate to persuade the inmate to take the desired action or comply with an order. When communicating with an inmate, staff members should take into consideration an inmate's special needs, including, but not limited to, an inmate's inability to understand English. Waiting or reconsidering the propriety of an order may be possible in some cases. Other solutions may be appropriate in other situations.

Except in situations in which the staff member seeking to use chemical agents knows that the inmate has a history of violent behavior and reasonably believes that the inmate will become violent in the present situation, chemical agents may only be used after an inmate physically threatens to use immediate physical force. Physical force includes possession of a weapon, such as a knife. Verbal threats do not constitute a sufficient threat. When the staff member knows that the inmate has a history of violent behavior and reasonably believes that the inmate will become violent in the present situation, the staff member must follow all steps in the procedure in sub. (4) (b) 1 and 4 but may use chemical agents before using actual physical power and strength.

Subsection (5) (a) states that chemical agents may not be used when they clearly would have no effect. Situations include instances when the inmate has thrown a blanket over his or her head, when the chemical agent cannot effectively be used according to the manufacturer's instructions to produce the desired result, or when a particular inmate is known not to react to the chemical agent.

Subsection (5) (b) clarifies the division's policy that an inmate's simple refusal to follow an order does not justify using chemical agents unless the inmate physically threatens to use immediate physical force.

Subsections (7) and (8) regulate the use of particular chemical agents. CN and CS agents are the only agents to be used in enclosed areas, because enclosed areas require the use of agents which can be released in small amounts and can be carefully controlled. This method of use further avoids unnecessary risks of injury. The manufacturer's safety instructions include guidance as to the distance from which the agent should be delivered as well as the date after which the agent must be replaced.

The use of agents identified in sub. (8) is confined to areas where the risk to life by a reduction in the oxygen available is minimal, for example, in open areas and in rooms such as the dining halls at most institutions.

Because use of chemical agents creates risks, sub. (9) imposes severe limitations on who may authorize their use. In emergency situations described in sub. (3) (b) and (c), the superintendent or designee may authorize the use of chemical agents although, to prevent an imminent escape, described in (9) (b), it may be necessary for the senior staff member present to authorize use of a chemical agent. In non-emergency situations, only the person actually in charge of the institution at the given time—who may be the superintendent or deputy superintendent, the security director, or an assistant superintendent—may authorize the use of chemical agents.

As provided in sub. (10), when chemical agents are used, only trained supervisory personnel may use them, except that a trained staff member may use them under immediate supervision. These requirements and the training requirements are to ensure that chemical agents are used only when necessary and in a way that minimizes the risk to staff and inmates.

Subsection (11) requires a medical examination and change of clothes and bedding and cleaning for exposed inmates and areas. Inmates exposed to CS must be given a chance to shower. "Exposed inmates" are not just those against whom the agent is used but those exposed to it because they are nearby. Medical examinations and cleaning minimize the risk of permanent injury, and a change of clothes and bedding minimizes risks to the health of inmates from the residue of chemical agents as well as the discomfort they may cause.

The reporting requirement in sub. (12) ensures adequate administrative notification and review of the use of chemical agents.

HSS 306.09. HSS 306.09 authorizes particular restraining devices to be used in transporting an inmate. The use of such devices is addressed in HSS 302.12.