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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

August 11, 2004

Honorable Jeffrey A. Beard, Ph.D., Secretary
Department of Corrections
2520 Lisburn Road
P. O. Box 598
Camp Hill, PA 17001

Re: Regulation #19-6 (IRRC #2403)
Department of Corrections
Administration, State Correctional Institutions and Facilities and Release
and Prerelease Programs

Dear Secretary Beard:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact my office at 783-5417.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director
wbg
Enclosure

cc: Honorable Stewart J. Greenleaf, Chairman, Senate Judiciary Committee
Honorable Jay Costa, Jr., Minority Chairman, Senate Judiciary Committee
Honorable Dennis M. O'Brien, Majority Chairman, House Judiciary Committee
Honorable Kevin Blaum, Democratic Chairman, House Judiciary Committee

Comments of the Independent Regulatory Review Commission

on

Department of Corrections Regulation #19-6 (IRRC #2403)

Administration, State Correctional Institutions and Facilities and Release and Prerelease Programs

August 11, 2004

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Department of Corrections (Department) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on July 12, 2004. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

Chapter 91. Administration.

1. Section 91.6. Use of force and restraints. – Reasonableness; Clarity.

Subsection (a)

Subsection (a)(2)(i) allows for the use of deadly force if an inmate attempts to “escape from a correctional facility or while in immediate pursuit of an inmate escaping from a correctional facility.” The term “correctional facility” is not defined. The term “facility” is defined under Section 91.6, relating to definitions, as “An institution, motivational boot camp or community corrections center operated or contracted by the Department.” The Department has indicated that this provision does not apply to an escape from a community corrections center. For clarity, the final-form regulation should define the term “correctional facility” and it should not include the term community corrections center. Alternatively, the defined term “facility” should be substituted for “correctional facility” and Subsection (a)(2)(i) should be amended to specifically exempt community corrections centers.

Subsection (a)(2)(ii) allows the use of deadly force if an inmate who has been convicted of a forcible felony attempts to “escape from a work detail, transport or other approved temporary absence when deadly force is necessary to prevent the escape. . . .” The term “forcible felony” is not defined in regulation or statute. However, it is defined in Department Policy Statement No. DC ADM-201 – *Use of Force*, as “an offense involving the threat of physical force or violence against any individual.” The Department should include this definition in the final-form regulation.

Subsection (c)

This subsection establishes the procedures for the use of chemical munitions. It requires staff to follow procedures in Administrative Directives. The Department should include the name and form number of the applicable documents in the final-form regulation.

Chapter 93. State Correctional Institutions and Facilities.

2. Section 93.2. Inmate correspondence. – Clarity.

Subsection (f) relates to the rejection of correspondence. It states, in part, the following: “The letter may be held for at least 7 business days after mailing of the notification to permit reasonable opportunity to protest the decision.” The word “may” suggests that this provision is optional. The Department has indicated that they routinely hold letters for seven business days. The final-form regulation should make this provision a requirement by changing the word “may” to “will.”

3. Section 93.3. Inmate visiting privileges. – Reasonableness; Clarity.

Subsection (a)

This subsection relates to the approved list of visitors. We have three areas of concern.

First, the opening sentence is being amended to state the following: “A list of approved visitors may contain at least 20 names or more if permitted by the Department.” This change seems to require an inmate to have at least 20 visitors on the list. To avoid this confusion, the Department should retain the existing language that stated, in part, “A list of approved visitors may contain up to 20 names”

Second, under the existing regulation, a child under the age of 12 may visit an inmate when accompanied by an adult. The proposed amendment to this provision would require a child under the age of 18 to be accompanied by a parent, legal guardian or county children/youth services agency staff. The Department’s current policy statement and handbook are inconsistent with this provision in the proposed regulation.

Section (VI)(A)(2)(f) of Department Policy Statement No. DC ADM-812 – *Inmate Visiting Privileges* provides that an immediate family member approved by the parent or legal guardian may accompany a minor when visiting an inmate. In addition, Section (VI)(C)(2) allows a minor to visit only when accompanied by a parent/legal guardian, county children/youth services agency staff, or an adult approved by the parent/legal guardian.

The *Handbook for the Families and Friends of Pennsylvania Department of Corrections Prison Inmates* permits an adult on an inmate’s approved visiting list to accompany a child visiting an inmate. The Department should explain the inconsistencies between the proposed regulation and the documents noted above.

Third, the provision relating to the removal of visitors from an approved list is being amended by deleting the phrase “for good cause.” The Department should retain this phrase, or explain the basis on which the facility manager will remove the name of a visitor.

Subsections (b), (c) and (j)

These subsections relate to visitations by religious advisers, attorneys and media representatives. They all contain the phrase “. . . the total designated by the Department.” The Department has indicated that they do not “designate” lists of visitors. Instead, they approve lists of visitors. These subsections should be amended to read “. . . the total approved by the Department.”

Subsection (h)

Subsections (h)(1) and (h)(2) provide that visiting days and hours will be “at the discretion of the facility manager.” Representative Kathy Manderino, a member of the House Judiciary Committee, is concerned that this new language would make it more difficult for family members to visit inmates who are confined to facilities far from their homes. She suggests the Department establish minimum standards for all facilities that would allow reasonable access for family visits. We agree that visiting days and hours should reasonably accommodate family members.

4. Section 93.6. Religious activities. – Reasonableness; Clarity.

Subsection (a)

This subsection is being revised to delete language which permits inmates to “possess approved religious items” and be granted “reasonable accommodation for dietary restrictions.” The Department should explain the reason for deleting this language.

Subsection (b)

This subsection relates to religious advisers. The rulemaking is deleting a provision that allows qualified representatives of a faith from the outside community to hold regular services in the correctional facility if the facility contains a sufficient number of inmates of the same faith. This provision is being replaced with the following sentence: “Staff or volunteers will be permitted to hold services that are consistent with the security needs and orderly administration of the facility.” The Department has indicated that qualified representatives who have received endorsement from their faith group will still be allowed to hold services. The final-form regulation should be amended to reflect this fact.

Subsection (c)

This subsection in the existing regulation specifies how requests for accommodations of faith will be handled. Why is this subsection being deleted?

5. Section 93.7. Telephone calls. – Clarity.

Subsection (a) references 18 Pa. C.S. Chapter 57 (relating to wiretapping and electronic surveillance). The Department has indicated that the applicable provision in Chapter 57 is Section 5704. The final-form regulation should be amended to include a reference to 18 Pa. C.S.A. § 5704.

6. Section 93.9. Inmate complaints. – Reasonableness; Clarity.

This section has been amended to add that an inmate who submits a “frivolous” grievance may be subject to appropriate disciplinary procedures. The definition of “frivolous grievance” is contained in DC-ADM 804 – *Inmate Grievance System*. The final-form regulation should

include this definition. Also, the Department should reference DC-ADM 804, which explains who determines if a grievance is frivolous and when that determination is made.

7. Section 93.10. Inmate discipline. – Reasonableness; Clarity.

Subsection (a)

This subsection states, in part, that “Rules which define expectations and prohibitions for inmate behavior will be established by the Department and **made available** to the inmate population.” (Emphasis added.) This sentence implies that rules will be established sometime in the future. However, the Department indicated that rules have been established and are contained in the *Department of Corrections Inmate Handbook (Handbook)*. The final-form regulation should include a reference to that document.

Representative Manderino has expressed concern over the insertion of the phrase “made available” which replaces the existing term “distributed.” The concern is that since inmates will be held responsible for complying with the rules and may be disciplined for infractions, they should receive a complete copy of the rules. We agree.

Additionally, we note that the phrase “made available” or “available” appears in Subsection (b)(2), as well as the following sections of the proposed regulation: the definition of “contraband” in Section 91.1; Section 93.2(e)(1); Section 93.3(h)(6); and Section 94.3(a)(1) and (6). The same concern applies to these sections. The final-form regulation should specify when the complete *Handbook* will be provided to inmates and how inmates will be informed of updates to the *Handbook* and other Department policy statements.

Subsection (b)

Subsection (b)(2) adds language pertaining to an “informal resolution process” for inmate misconduct charges. The Department should explain how this process will be implemented.

Under existing Subsection (b)(5), written statements of a decision and the reasoning of the hearing body must be based on the “preponderance of the evidence.” The Department is proposing to replace “preponderance of the evidence” with “some evidence.” However, “some evidence” is not a legal standard for basing a finding of guilt. The Department should explain why it is not substituting another legal standard, such as “substantial evidence,” on which a finding of guilt will be based.

8. Section 93.12. Prison Medical Services Program. – Need; Reasonableness; Clarity.

Subsection (d)

This subsection lists medical services that will be provided to an inmate without charge. Subsection (d)(8) states the following: “Infirmity care in a Department facility excluding organ transplantation.” Based on discussion with Department staff, we understand that this provision was intended to address organ donation by an inmate. However, this procedure would not take place in a Department facility. Therefore, the exclusion listed in this subsection is unnecessary and should be deleted.

Subsection (e)

Under this subsection, the fee for medical services is being increased from \$2 to \$3 with subsequent increases of an additional dollar on July 1, 2005, and July 1, 2007. The Department should explain the basis for the fee increases.

Chapter 94. Release and Prerelease Programs.

9. Section 94.3. Procedures for participating in prerelease programs. – Clarity

Subsection (a) establishes the criteria for eligibility for prerelease programs. Subsection (a)(1) is being amended to add that inmates sentenced to “other offenses as specified in State or Federal statutes or specified by the Department in the Commonwealth of Pennsylvania *Department of Corrections Inmate Handbook*” are not eligible. The final-form regulation should include references to the applicable State and Federal statutes.

10. Section 94.5. Notification process. – Clarity.

Subsection (b) establishes the procedures to be followed if a judge or court objects to the prerelease of an inmate. If the Department and the judge or court cannot reach an agreement, the Department will refer the matter to the Board for “a hearing.” The existing regulation uses the word “arbitration.” Why has “arbitration” been replaced with “a hearing”? Also, what does the arbitration process entail?

Facsimile Cover Sheet

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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

To: Traci Williams
Agency: Department of Corrections
Phone:
Fax: (717) 731-0497
Date: August 11, 2004
Pages: 7

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Correction's regulation #19-6 (IRRC #2403). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: *Traci Williams* Date: *8/11/04*