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Berks County Prison

1287 County Welfare Road, Leesport, PA 19533
(610) 208-4800 Fax: 376-0956

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INDEPENDENT REGULATORY REVIEW COMMISSION

David B Farney, Assistant Counsel
Department of Corrections
Office of Chief Counsel
55 Utley Drive
Camp Hill, PA 17011

July 13, 2006

Dear Mr. Farney:

I would like to offer my comments on the proposed changes to sections of Title 37, Chapter 95. Although I embrace the need for local jails to meet professional standards, and by implication the necessity for an inspection process to insure that this takes place, I do have some concerns with the changes to Title 37, as proposed. Many of the concerns/suggestions that I will enumerate were brought to the attention of the Department of Corrections "Review Planning Committee" described in the *Purpose and Background* section of the Proposed Rulemaking.

95.220.b Scope.
Removing the ability to receive a waiver of compliance with the Chapter for jails that achieve ACA accreditation (or NCCHC accreditation) is counterproductive, since both are far more difficult to achieve than are compliance with the standards of this Chapter. The reasoning that removal is based on the need to ensure "periodic" audits or inspections is flawed since to achieve and maintain these accreditations, a jail must be audited/inspected, in depth, and periodically. Ostensibly, and left unspecified is the implication that this is to ensure periodic audits/inspections/reviews by the PA DOC. If this is the concern, accept accreditation, provide a waiver of compliance, and have DOC Inspection staff <u>visit</u> the accredited jail yearly.

Ordering a hearing to declassify a county jail is troublesome for more than one reason.

1- It is not clear to county officials that the state/DOC has the authority to pursue this methodology to enforce jail standards. For instance, Purdons Title 61, establishes local oversight for county jails, and "<u>exclusively</u>" vests the government and management of jails, <u>locally</u>.
2- "Prisoners sentenced to a maximum term of 6 months or more, but less than 5 years" is essentially everyone sentenced to a county jail.
3- This is an un-funded mandate. When directly asked, on several occasions, where these prisoners would be sent, and who would bear the costs, representatives of the DOC had no response. This

issue is not addressed in the Chapter. Undoubtedly, the burden of arrangements, and costs will fall upon the county.

4- In a letter to the County Commissioners Association dated 27 March 2003, the Secretary of Corrections stated that county concerns on this issue were reviewed, and that the de-certification process would be removed form this document.

Fiscal Impact – It is noted in this draft that there will be no negative fiscal impact upon "…political subdivisions…". There will certainly be costs to counties to implement (comply with) these standards. Throughout my comments that follow specific examples will be noted. Generally, however, the costs to comply with the daily, monthly, quarterly, and yearly – assessments, reports, reviews, inspections, document generation, etc. will be significant. The more staff efficient an institution, the more significant the costs, since positions will have to be created to perform the tasks. And this burden will be aggravated even more in smaller jails.

Paperwork Requirements – It is also stated that there is no expectation of a significant effect on the paperwork requirements of "…political subdivisions…". My comments regarding the fiscal impact are mirrored here.

95.220a. Definitions.

Force, use of – This definition omits the use of force option "to gain compliance with a lawful order", a universally recognized concept in the field of corrections.

Force option – Here the definition language implicitly requires that one must use force always "beginning with the least amount of force and progressing through the degrees…". This is often not the case, nor is it the correct way to teach use of force options. Specifically, one uses the least amount of force necessary, but considering all the circumstances, one may have to begin at any point on a force continuum.

Governing county prison authority – The language provided attempts to define the local prison board's role as restricted to only administrative oversight and policy setting responsibility for the jail. In fact, the Prison Board is empowered by law with the "government and management" of the local jail and this responsibility is "exclusively vested" in the board.

Intake interview – The issue is not the definition, rather the individual county's choice to provide treatment services (and which services, if any will be provided), and also the staff time and costs involved in this process.

Major infraction – I take exception with this entire definition. It restricts the options available for progressive jurisdictions when handling inmate misconduct (and shaping inmate behavior) to the mundane methodologies of the past. Specific detail will be provided when this section (inmate discipline) is discussed later in the document.

Minor infraction – see above.

Segregation – Most jurisdictions include disciplinary segregation and security segregation in this definition. They are entirely overlooked.

Training – The literal reading of this definition precludes the use of "on-line/interactive computer training" programs.

Unclothed search – Should read …"An examination of an inmate's ~~unclothed~~ naked body …" since some jurisdictions do non-touching visual searches of inmates after asking them to take off ('unclothe'?) only their outer clothing, i.e. check them in their underwear.

95.220b. Scope

(9)(ii) Contrary to the oft repeated interpretation… "Declassification hearings are only ordered for violations that present a significant threat…". This section obviously allows for a declassification hearing to be ordered as a result of any continued non-compliance that results in "Citation". I can be persuaded, perhaps, that this is not the Secretary's intent, now. But what the future may portend, or the intentions of yet unknown Secretaries of Corrections, is and should be of great concern to counties.

(11)(i) I ask again, where do these inmates go, who pays for their housing (I cannot believe it will be free), and note that this is surely a potential fiscal impact of enormous proportion.

95.222 Admission and release

(1)[(3)](iv) The term "unclothed search" is used and should be better defined as I suggested in the 'definition' section. This refers to a naked or 'strip' search. Call it what it is.

(1)[(3)](iv)(A) It is implied that current charges for drug offenses/being under the influence of drugs, will justify a strip search. In fact recent case law (Way v. County of Ventura, 9th Circuit) indicates the opposite.

95.235. Work programs

(3) This section requires that inmates receive compensation for nearly all work details, only excepting personal housekeeping and housing area cleaning. Whether there should be payment for work details is exclusively a local decision to make.

(5) Providing comparable opportunities for both male and female inmates to "<u>all available</u> work programs" will be nearly impossible, extremely staff intensive, and create additional operational costs. →Form two of every type of work detail, one for each sex? Is there truly an "applicable law" that demands this option, as is implied in this language.

95.240. Inmate disciplinary procedures

(2) Not all jails have only two levels of misconduct. This restricts creative and innovative disciplinary programs. A major infraction (whatever the definition) may not necessarily require a formal misconduct hearing.

(3) Minor discipline may not be imposed without review of an independent person who determines guilt. This is far too restrictive.

(4) Discipline for a major infraction may not be imposed unless there is a formal hearing. This too, is far too "prison" and lacks the innovation of modern jail management.

See the attachment for a detailed program outline that illustrates the concerns noted:

There are three levels of discipline

Line staff can impose very minor sanctions without "review".

Higher infraction levels can be handled without a hearing.

95.241. Security

(2)(i) Use of force is restricted to self-defense, protection of others and property, and prevention of escape. It does not include force used to gain compliance with lawful orders, a common and necessary use of force in the field of corrections.

(2)(ii)(A) Here it is stated that written local policy "must specify authorized purposes allowing for the use of force." That statement is contradictory with the restrictions stated in section (2)(i).

(2)(ii)(D) It should not be required that our local policy specify that one must begin at the least amount of force and progress through the degrees of force, since there are circumstances when one may need to begin with substantial force to achieve the necessary goal. Further, the most recent nationally recognized legal advice on "force continuums" and "ladders of force" advises training in use of force but

the utilization of these concepts as illustrative of how force may be applied. A better statement for this sub-section would be –"Force options, illustrating degrees of force from non-deadly through deadly force."

(f) "Tools /equipment control" – I believe this section is mislabeled and should be "(6)". If that is the case, the balance of section 241 is mislabeled.

(f)(v) This is cumbersome and staff intensive. It will necessitate the hiring of additional staff. An operational alternative is a personal tag system for the check out of tools and equipment.

95.243. Treatment services

(2) Although I firmly believe in, and support the value of, treatment services of all types for inmates, the decision to provide services, and what types will be provided, must be made locally. This section is an infringement upon that local right, and an un-funded mandate.

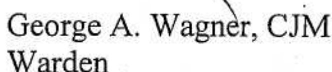
(4) Section six creates similar problems in that it requires a level of screening that is not provided in every jurisdiction. To provide this level of service in jurisdictions that do not currently do so will require additional staff resources, again an un-funded mandate.

95.246. Investigations – deaths and sexual assaults/threats

(1)(i) In reading all of the sections of 246, it is my belief that section (1)(i) was meant to have the two words "or designee" inserted in the first sentence after the third word, and read: "The prison administrator or designee…."

Please consider the comments and suggestions that I have provided. Further, I respectfully request an opportunity to provide testimony before the Independent Regulatory Review Commission should a hearing be scheduled relative to this Proposed Rulemaking.

Sincerely,



George A. Wagner, CJM
Warden

gw

cc: Prison Board
Judge Linda Ludgate
Senator Michael O'Pake
Representative Thomas Caltigarone
Sr. Staff
Chairman Alvin C. Bush
IRRC
14th Floor
333 Market Street
Harrisburg, PA 17101

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