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Friday, July 21, 2006

Chairman Alvin C. Bush
Independent Regulatory Commission
333 Market St, 14th Floor
Harrisburg, PA 17101

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

Sirs,

As warden of Franklin County, I am formally requesting to be heard at a hearing on the matter of the proposed rulemaking of Chapter 95, Title 37.

On the attached pages, I have specifically listed the areas of concern I have with the proposed rulemaking, and ask that my comments be seriously considered.

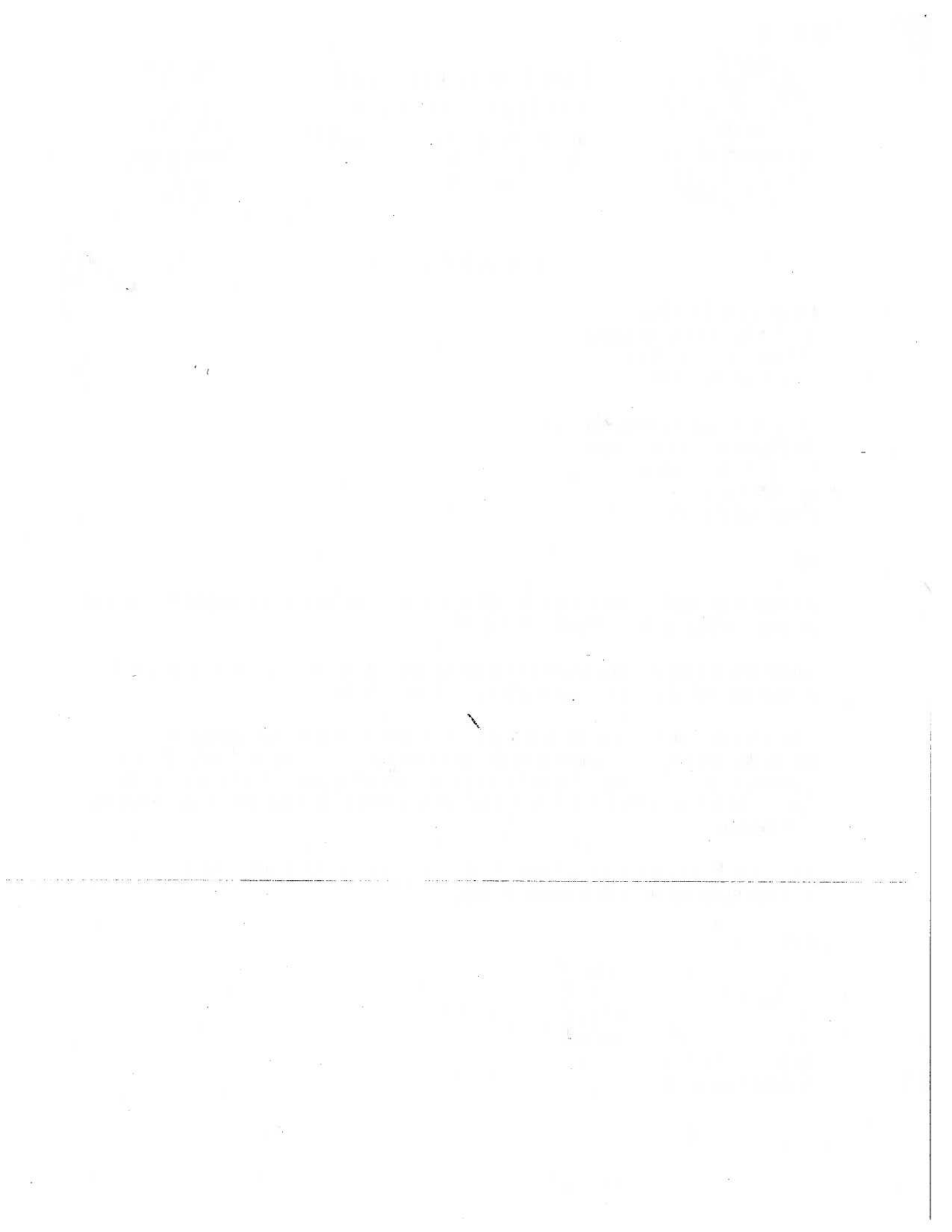
I am concerned that these standards, as written, do not reflect modern local corrections operations, and will force counties to modify their operations for the worse. I would further request that, using the current proposed rulemaking as a starting point, the process begin anew, and the standard are further developed and refined with meaningful input from local corrections professionals.

Again, should there be a hearing, I would request the ability for myself along with select members of my organization to be able to testify.

Thank-you.

John E. Wetzel, Warden
Franklin County Jail

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INDEPENDENT REGULATORY
COMMISSION



Proposed Rulemaking
Department of Corrections
37 PA. Code Ch. 95
County Correctional Institutions

36 Pa.B. 3094
Saturday June 24, 2006

REVIEW PERIOD

There is a 30-day period to review and comment on the proposed modifications to Title 37, Chapter 95.

GENERAL IMPRESSIONS

In general, there are several areas of concern to local jurisdictions in this proposed rulemaking. First, it does not recognize the statutory authority of the local prison board, as well as the funding authority of the county commissioners. Next, it creates a series of unfunded mandates as well as an increase in the amount of paperwork. By not incorporating input from local jail administrators, it lacks an understanding of the operation of local jails, thereby putting jails in a position to either be in non-compliance, or increase staff or funding needlessly.

SUGGESTIONS

This process needs to begin again, with local jail administrators, as well as prison board members and county commissioners given true input to develop standards by taking a team approach. It is poor practice and misguided to develop standards that effect local tax dollars to the level these do, and not give the property owner a voice through their elected and appointed representatives.

Statutory Authority

The Department is acting under the authority of section 506 of The Administrative Code of 1929 (71 P. S. § 186). Under section 506 of the Administrative Code of 1929, the Department is empowered to prescribe rules and regulations for the performance of the Department's business. A portion of the Department's business includes establishing standards for county jails and prisons, including physical facilities and standards for correctional programs of treatment, education and rehabilitation of inmates. See section 3(3) of the act of December 27, 1965 (P. L. 1237, No. 502) (Act 502) (61 P. S. § 460.3(3)). The Department is also empowered by section 3(4) of Act 502 to inspect county jails and to classify them, in accordance with the standards for county jails and prisons

the Department adopted, as eligible to receive prisoners sentenced to maximum terms of 6 months or more but less than 5 years.

There is a question as to the authority of the PA DOC to both promulgate standards and more specifically to classify county jails to be able to receive prisoners. Title 61 clearly gives the authority to operate county prisons (jails) to Prison Boards. In doing so, it calls in to question the DOC's authority to take any action that would impede the Prison Board's management of jails. It should also be noted that all funding for county jails comes from general fund tax dollars appropriated by the County Commissioners, and that the PA DOC does not provide ANY FUNDING for jails.

Purpose and Background

The Department undertook a review of its regulations regarding county correctional institutions. Based on this review, the Department found that many of the regulations are outdated, too technical and do not afford county prison administrators sufficient flexibility to address prison management problems that are strictly local in nature.

During the first phase of this process, the Department amended 12 sections of Chapter 95. This final-form rulemaking was published at 30 Pa.B. 866 (February 19, 2000). This proposed rulemaking amends a total of 22 sections of Chapter 95 and creates 1 new section. This proposed rulemaking completes the revision of outdated regulations and makes the minimum standards consistent with recognized professional standards for adult local detention facilities.

In addition to updating the outdated provisions, this proposed rulemaking enhances the inspection process by rewarding facilities reaching full compliance with the minimum standards and focuses greater attention on facilities with compliance problems. The proposed rulemaking proceduralizes the declassification of county prisons with serious issues of noncompliance with security-related minimum standards. The proposed rulemaking also expands the inspection process by the offering or ordering of a vulnerability assessment of a county prison. The enhancements to the inspection process are designed to assist county prisons in identifying and correcting deficiencies particularly those serious deficiencies that may threaten the security and safety of a county prison and by extension the public safety. Therefore, the

Department proposes amendments to Chapter 95 to read as set forth in Annex A.

In September of 2000, the Department initiated a Review Planning Committee to allow for input from county prison wardens and county commissioners when drafting amendments to the sections of Chapter 95 that were not updated and amended at 30 Pa.B. 866. Following an initial meeting of the Review Planning Committee, regional workshops were held during October 2000 in the Northwest, Northeast, Southwest and Southeast regions of this Commonwealth, as well as in Philadelphia County. The regional workshops were held to solicit input from county prison officials from all areas of this Commonwealth. The Review Planning Committee and regional workshops also involved Department personnel from the Office of Chief Counsel, Bureau of Operations, Bureau of Health Care Services, Office of Grants and Special Projects and the Deputy Secretary for Intergovernmental Relations. The Review Planning Committee periodically met and corresponded about revisions to Chapter 95 through December 2002.

Periodic meetings and ongoing correspondence regarding the draft amendments to Chapter 95 marked the Review Planning Committee activity. Additional regional workshops were conducted in 2003 and 2004 to expand the review and discussion of the proposed amendments to Chapter 95. The Department has also provided presentations on the proposed amendments to the County Commissioners Association of Pennsylvania (CCAP), as well as the Pennsylvania Prison Wardens Association membership.

The following meetings and presentations took place with the intent of involving the regulated parties in the revision process:

September 26, 2000	Review Planning Committee Meeting
October 3, 10, 17, 24 and 31, 2000	Five Regional Workshops--Southwest, Northwest, Northeast, Southeast and Philadelphia
November 14, 2000	Review Planning Committee Meeting
July 25, 2001	Review Planning Committee Meeting
October 30 and 31, 2001	Department Fall Forum for County Wardens and County Commissioners
December 11, 2002	Review Planning Committee Meeting
April 11, 2003	Pennsylvania Prison Wardens Association Spring

Conference

December 14--17, 2003	Four Regional Workshops--Southeast, Northeast, Northwest and Southwest
March 22, 2004	CCAP Roundtable
March 29--31 and April 1, 2004	Four Regional Workshops--Southwest, Northwest, Northeast and Southeast
May 27, 2004	County/State Liaison Committee

John E. Wetzel

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While the above meetings took place, the DOC failed to meaningfully incorporate input from jail practitioners. This failure led to a piece of legislature that resulted in an increase in the financial burden on counties, an increase in paperwork, and components that simply don't make sense in a local detention center.

§ 95.220b. Scope.

The proposed rulemaking removes the ability for county prisons to receive a waiver of compliance with the requirements of this chapter for facilities achieving American Correctional Association accreditation and accreditation from the National Commission on Correctional Health Care. This will ensure onsite audits or inspections, or both, of a county correctional facility on a periodic basis.

The proposed rulemaking enhances the inspection process by allowing county prisons achieving full compliance with the minimum requirements of this chapter to be on a 24-month inspection cycle rather than being subject to an annual inspection. Preinspection audits have been added to assist county prisons by identifying deficiencies and allowing time for correcting deficiencies prior to inspection.

The proposed amendments to the inspection process allow the Department to focus resources towards county prisons with compliance problems while relieving facilities in full compliance from the burden of additional visits.

The proposed rulemaking establishes the availability of a vulnerability assessment of a county prison either when requested by the county or when a preinspection audit or inspection finds certain violations of the minimum requirements that may seriously impact the safety and security of the county prison, prison staff, inmates or the public.

The proposed rulemaking defines the circumstances in which a hearing may be ordered to determine if a county prison should be declassified from receiving prisoners sentenced with a maximum term of 6 months or more but less than 5 years.

§§ 95.223, 95.224, 95.229, 95.230, 95.233, 95.235, 95.237 and 95.241--95.248

These sections have been completely replaced as part of the final phase of the Department's efforts to replace outdated standards. Each section requires that the county jail establish a written policy on the subject matter and that the policy contain or address the minimum requirements described in the regulation. In each instance, the requirements are consistent with recognized professional standards for adult local detention facilities. Whenever possible, the Department eliminates requirements that are too technical and devises the minimum requirements so that county prison administrators are afforded flexibility in addressing prison management issues.

To begin, both American Correctional Association standards, as well as National Commission on Correctional Health Care standards are more comprehensive than even the proposed standards. As such, it defies logic to require jails that have achieved the above certifications to be subject to yet another, less stringent inspection. Furthermore, this section states that "this will allow the Department to focus resources on counties that are not in compliance", yet there is no budget line-item associated with this legislation. It also claims that the proposed rulemaking defines the circumstances under which declassification may take place, yet it fails to do so.

Fiscal Impact

The proposed rulemaking is not expected to have significant negative fiscal impact upon the Commonwealth, its political subdivisions or the general public.

This section is not supported by the proposed rulemaking. Several changes will result in an increased fiscal burden on counties.

Paperwork Requirements

The Department does not expect the new requirements to have significant effect on the paperwork requirements of the Commonwealth, its political subdivisions or the public.

This section is not supported by the proposed rulemaking. Several changes will result in an increased paperwork burden on counties.

§ 95.220a. Definitions.

The following words and terms, when used in this subchapter, have the following meanings unless the context clearly indicates otherwise:

Force, use of--Physical force used in instances of justifiable self-defense, protection of others, protection of property or prevention of escape.

This definition does not include the use of physical force to effect compliance with a lawful order. This omission makes inmate management nearly impossible. As a matter of fact, if the intent was to simplify the definition, using only "to effect compliance with a lawful order" would cover the other above enumerated justification.

§ 95.220b. Scope.

~~Each section sets forth minimum requirements, which are mandatory.~~

(1) Every county prison shall be subject to a prison inspection cycle. An inspection cycle will consist of a preinspection audit and, if necessary, a prison inspection. A preinspection audit will be scheduled at least every 24 months. The prison inspection, if necessary, will be conducted approximately 6 months after the preinspection audit. This inspection cycle will determine if the county prison is in compliance with the minimum requirements. An immediate prison inspection may be ordered by the Secretary

following an emergency situation at a county prison, including, but not limited to, a riot or disturbance, a fatality following a serious assault or an assault by an inmate using a deadly weapon resulting in serious injury. The inspection will be conducted to determine possible violations of the minimum requirements.

(2) The Department will issue a Preinspection Audit Report following the preinspection audit of the county prison. The report will be issued to the county prison administrator and the governing county prison authority. The report will, at a minimum, identify any instances of the county prison failing to comply with the minimum requirements.

(3) If the preinspection audit finds that the county prison is in full compliance with the minimum requirements, the subsequent prison inspection will be waived and the county prison will be on a 24-month prison inspection cycle. The next preinspection audit will be scheduled approximately 24 months after the preinspection audit.

(4) A prison inspection will be conducted any time the preinspection audit finds the county prison is not in compliance with the minimum requirements. The Department will issue a Compliance Report following the prison inspection. The report will be issued to the county prison administrator and the governing county prison authority. The report will identify whether the county prison has corrected the instances of noncompliance set forth in the Preinspection Audit Report.

(i) If the Compliance Report finds that the county prison is in full compliance with the minimum requirements, the county prison will continue on a 24-month inspection cycle. The next preinspection audit will be scheduled approximately 18 months after the prison inspection.

(ii) If the Compliance Report finds that the county prison remains in violation of the minimum requirements previously identified in the Preinspection Audit Report, the county prison administrator and the governing county prison authority will be issued a Notice of Deficiency as part of the report and subject to a 12-month inspection cycle. The next preinspection audit will be scheduled approximately 6 months after the prison inspection.

(iii) If the Compliance Report finds that the county prison remains in violation of the same minimum requirements for the second

consecutive prison inspection, the county prison administrator and the governing county prison authority will be issued a warning that if the instances of noncompliance are not corrected by the time of the next 12-month prison inspection, a Citation of Noncompliance will be issued.

(iv) If the Compliance Report finds that the county prison remains in violation of the same minimum requirements for the third consecutive prison inspection, the county prison administrator and the governing county prison authority will be issued a Citation of Noncompliance.

(5) Within 60 days of receipt of any Compliance Report citing instances of noncompliance with the minimum requirements, the governing county prison authority shall file a written reply that includes a written plan that describes the actions that will be taken and the time frame for bringing the county prison into compliance with the minimum requirements.

(6) The Secretary may authorize the conducting of a vulnerability analysis of a county prison when a preinspection audit or prison inspection finds one or more violations of the minimum requirements of the following sections and it is determined those violations may significantly impact the safety and security of the county prison, prison staff, inmates or the public:

- (i) Section 221--Personnel.
- (ii) Section 223--Orientation.
- (iii) Section 224--Rules and Regulations.
- (iv) Section 230--Food Service.
- (v) Section 232--Medical and Health Care Services.
- (vi) Section 240--Inmate Discipline Procedures.
- (vii) Section 241--Security.
- (viii) Section 243--Treatment Services.
- (ix) Section 248--Sanitation and Safety.

(7) A vulnerability analysis report will be issued to the governing county prison authority and the county prison administrator following the vulnerability analysis. The report will present an analysis of the overall operations of the prison and an analysis of potential threats to the safety and security of the county prison, prison staff, inmates and the public.

(8) A governing county prison authority may at any time request the Department to conduct a vulnerability analysis to assist in evaluating the operations of the county prison.

(9) The Secretary may order a hearing on why the county prison should not be declassified and declared ineligible to receive prisoners sentenced to a maximum term of 6 months or more but less than 5 years under the following conditions:

(i) If a vulnerability analysis report finds one or more violations of the standards identified in paragraph (6) and concludes that those violations present a significant threat to the safety and security of the county prison, prison staff, inmates or public safety.

(ii) If the county prison continues in subsequent prison inspections to violate the minimum standards for which it has been issued, a Citation of Noncompliance in accordance with paragraph (4)(iv) and the governing county prison authority's written response to the Compliance Reports fails to show a good faith effort to correct those violations.

(10) The hearing will be scheduled promptly, but no sooner than 20 days after receipt of the hearing notice. The proceedings will be conducted in accordance with 1 Pa. Code Part II (relating to the General Rules of Administrative Practice and Procedure).

(11) Following the hearing, a final order will be issued resulting in one of the following:

(i) Declassification of the county prison resulting in the prison being ineligible to receive prisoners sentenced to a maximum term of 6 months or more but less than 5 years.

(ii) The Citation of Noncompliance remains in effect, but the county prison is subject to a 12-month prison inspection cycle as of the issuance of the hearing report. If following the inspection the Compliance Report finds the county prison to be in violation of

some or all of the minimum requirements for which the hearing was conducted, the Secretary may order another hearing in accordance with paragraph (9)(ii).

(iii) The Citation of Noncompliance may be rescinded based on findings that the county prison is now in compliance with the minimum requirements. The county prison will be returned to a prison inspection cycle consistent with paragraphs (3) and (4

This section gives broad discretionary power to the Secretary of Corrections to both order Vulnerability Assessments and to Declassify a jail, based on the inspection process which is subjective in nature. Again, local Prison Boards retain the sole power to operate local detention facilities. A Secretary ordered Vulnerability Assessment is clearly beyond the department's power. Additionally, where the sentenced inmates (longer than 6 month max) will go if a jail is declassified. Will the DOC accept these inmates?

§ 95.229. Bedding.

The following are the minimum requirements applicable to bedding:

(1) Written local policy must specify that inmates be provided a bed, mattress (not to exclude a mattress with integrated pillow), bed sheet, pillow, pillowcase, towel and blanket. The bed must be a sleeping surface and mattress that allows the inmate to be at least 12 inches off the floor. The mattress and pillow must have a waterproof and fire retardant cover. The bed must be located in an area preapproved for residential occupancy by the Department of Labor and Industry or local code authority.

This section is an example of why it is important to incorporate local correctional professionals in the process of putting together this standard. In a State Prison, admissions are scheduled. We do not have that luxury. In a situation such as a drug bust, where a facility may get overwhelmed with a large number of inmates in a short period of time, it may be reasonable to provide mattresses on the floor until all can be processed. This section would not allow for that.

§ 95.237. Religion.

(2) Individuals seeking to provide religious guidance to inmates shall be screened and selected by the prison administrator or designee. Screening and selection must include qualifications associated with clinical pastoral education or equivalent specialized training and endorsement by the appropriate religious certifying body.

While this is a good idea, the DOC is not paying for these services, therefore the local jurisdiction should decide on what level of clergy is appropriate.

§ 95.240. Inmate disciplinary procedures.

(3) Discipline for a minor infraction may not be imposed unless a written statement as to the rule violated is prepared and a person not involved in the rule violation reviews the statement and makes a decision as to guilt.

This standard again represents a situation in which the PA DOC is unfamiliar with common and recognized jail practices. The practice of allowing correctional staff the ability to sanction inmates within their housing unit in an informal manner, meaning in a manner that doesn't get recorded/reported to parole agencies is a common practice in Direct Supervision. This allows the unit officer to better control the unit, and the inmate benefits because the sanction does not impact parole eligibility or classification. This language precludes the use of this important correctional management tool.

(7) When an inmate in disciplinary status is deprived of any usual authorized items or activity, a report of the action is to be made to the prison administrator. If an inmate in disciplinary status uses food or food service equipment in a manner that is hazardous to self, staff or other inmates, an alternative meal may be provided, upon the approval of the prison administrator or designee and responsible health care provider.

By explicitly stating the circumstance under which an alternative meal can be used, an litigious inmate can infer that this is the only circumstance where it can be used. If that is the case, an inmate who is not in disciplinary status, but does the same inappropriate behavior can not receive the same response. This is problematic.

§ 95.241. Security.

(1) *Supervision of inmates.*

(ii) An initial staffing analysis shall be conducted to determine the staffing allotment and post assignments necessary to safely operate the prison. In determining the number of staff needed, relief factors are to be calculated for each classification of staff that is assigned to relieve posts or positions. Consideration must include, but not be limited to, annual leave, average sick leave usage, holidays, military leave, regular days off and training. The staffing analysis shall be reviewed and documented on an annual basis by the prison administrator. The results of this annual staffing analysis must serve as the required staffing allotment designated for the prison. Information on the number and type of positions filled and vacant shall be available at all times.

While a good jail administrator will follow this standard, the Prison Board and County Commissioners have autonomy on deciding the appropriate level of staffing and the funding of such. Again, the PA DOC does not fund positions.

(vi) Written local policy must provide that the prison administrator or assistant prison administrator and management staff designated by the prison administrator visit the prison's living and activity areas at least monthly to encourage contact with staff and inmates and observe living and working conditions. The visit shall be documented.

While a good jail administrator tours the facility at a greater frequency than this standard would suggest, the documentation of such increases the paperwork required.

(2) *Use of force.*

(i) Force shall be restricted to instances of justifiable self-defense, protection of others, protection of property and prevention of escapes, and only the least amount of force necessary to achieve that purpose is authorized. Force may not be used as a means of punishment or revenge.

As stated previously, this precludes the use of force to effect compliance with a lawful order, which makes this a very serious omission.

§ 95.242. [Extraordinary occurrences reports] Statistical/informational reporting.

2) *Report of extraordinary occurrence.*

Utility outages

This could significant increase the number of Extraordinary Occurrence reports, and to what end? There is already a requirement to have an emergency plan to address these.

§ 95.243. Treatment services.

The following are the minimum requirements applicable to treatment services:

(2) Treatment services must include, but are not limited to, the following programs:

- (i) Education.
- (ii) Social services.
- (iii) Alcohol and other drugs.
- (iv) Counseling services.

This standard represents the PA DOC dictating how services are delivered in a local jurisdiction without providing the requisite funding necessary. Furthermore, it precludes a community based approach to treatment. Specifically, in our jurisdiction, the Criminal Justice System, through the Criminal Justice Advisory Board has set up a community based Day Reporting Center to address higher level treatment needs, to include Alcohol and Drug counseling. This was a conscious decision that was made, and the sentencing practices were modified to ensure that inmates who have these needs will spend less time in jail and more time in community-based treatment along with Probation/Parole supervision. Accordingly, the Drug and Alcohol services in the jail were correspondingly reduced. Since these programs are funded locally, as opposed to by the PA DOC, local policy was made to address the needs in the most efficient and effective manner. The above standard precludes the use of this approach and represents the PA DOC again overstepping their bounds.

(6) Following review of the initial treatment intake screening by a treatment professional, a treatment needs assessment shall be conducted by a treatment professional within 14 days following admission. This assessment must identify individual treatment needs and, within available prison and community resources, provide for access to supportive and rehabilitative services. The assessment shall be recorded as part of the inmate's file. This assessment must include, but is not limited to:

- (i) Review of history of psychotherapy, psycho-educational groups and classes or support groups.
- (ii) Review of history of drug and alcohol treatment.
- (iii) Review of educational history.
- (iv) Review of history of sexual abuse-victimization and predatory behavior.
- (v) Review of history of violence.

This section is apparently an attempt to increase treatment services to inmates through better assessment. However, it obviously lacks knowledge of how local jails deliver services. In a state facility, where inmates stay YEARS, an exhaustive assessment plan is indicated. But at the local level, a "triage" of sorts takes place where those with the highest level of needs receive the highest level of service. Those with little to no needs, are put lower on the priority list. To expect each inmate who comes in to jail and stays longer than 2 weeks to receive a full and exhaustive assessment will translate into either non-compliance, inmates getting assessed and not treated or a significant increase in the number of Treatment Staff. In other words, and unfunded mandate. In our case with, an Average Daily Population of 300 inmates and 2200 commitments a year this represents 1150 inmates who would need to receive this. With the level of collateral information that this standard mandates being collected, it is not unreasonable to expect 1 hour per assessment (and I believe this to be a conservative estimate). That translates to a half of counselor a year to complete these. In jurisdictions who struggle for funding, this will directly lead to a DECREASE IN TREATMENT SERVICES PROVIDED as many of these positions both assess and provide treatment. Clearly that is not the intent of this section, but without the requisite knowledge of how local jurisdictions do business, the standard misses the mark.

§ 95.246. Investigations

The following are the minimum requirements for investigation of:

(1) *Deaths.*

- (i) The prison administrator shall immediately notify the coroner and the appropriate law enforcement agency when an inmate dies within the prison, on prison property or while in the custody of prison staff. Immediate notification shall also be made to the coroner and the appropriate law enforcement agency when a prison employee, volunteer, contractor or visitor dies within the prison, on prison property or while in the performance of his official duties.

This language does not allow for a designee of the jail administrator to contact the coroner and appropriate law enforcement. Elsewhere in this chapter, "or designee" is specified, therefore it leads one to believe that a designee is not an option.

§ 95.248. Sanitation, **maintenance** and safety.

- (8) An emergency power back-up system shall be available and in operational condition. This system shall be load tested at least on a quarterly basis, with this load test and the operating status of the system documented.

This requirement is overly burdensome. It requires one of two things, either that the institution is switched over to the generator four times per year, or that a testing agency is brought out to do a load test four times a year without switching the building over. Quarterly testing of a new generator is overkill, yearly is sufficient. To get an agency out to conduct the test is approximately \$6,000 per trip.

