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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 501

[BOP Docket No. 1117-F]

RIN 1120-AB17

Bureau of Prisons Emergencies

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: The Bureau of Prisons (Bureau) makes this final rule to clarify that, when there is an institutional or system-wide Bureau emergency which the Director or designee considers a threat to human life or safety, the Director or designee may suspend the operation of the rules in this chapter as necessary to handle the emergency. This rule clarifies that the Director may suspend Bureau rules as needed in light of any emergency affecting the Bureau, and the Warden may do so to deal with emergencies at the institution level. This rule change clarifying the Director's authority to modify Bureau rules to handle emergencies is especially necessary in light of the recent terrorist attacks, threats to national security, threats of anthrax surrounding mail processing, and other events occurring on and after September 11, 2001.

DATES: This rule is effective June 20, 2005.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

SUPPLEMENTARY INFORMATION: In this document, the Bureau finalizes an

interim final rule we published on this subject on April 16, 2003 (68 FR 18544).

This Final rule clarifies that, when there is an institutional or system-wide Bureau emergency which the Director or designee considers a threat to human life or safety, the Director or designee may suspend the operation of the rules in this chapter as necessary to handle the emergency. This rule change clarifying the Director's authority to modify Bureau rules to handle emergencies is especially necessary in light of the continued threats of terrorist attacks, dangers to national security, and other events occurring on and after September 11, 2001.

Response to Comments

We received a total of four comments which raised similar issues. We will therefore address each of the issues raised instead of addressing each comment separately.

Authority To Suspend Rules

One commenter claimed that "[t]here is no authority to suspend the rules."

This rule was promulgated on June 29, 1979 (44 FR 38244) and proposed on May 23, 1977 (42 FR 26334), along with several other core Bureau regulations. There were no amendments made to this rule after 1979, until the interim final rule was published in 2003. When we proposed this rule in 1977, we referred to 18 U.S.C. 4001 and 4042 as the authority for the rule.

18 U.S.C. 4001(b)(1) states that the Attorney General "shall promulgate rules for the government" of Federal penal and correctional institutions. Subsection (b)(2) also gives the Attorney General the authority to "provide for [inmates'] proper government, discipline, treatment, care, rehabilitation, and reformation." The Attorney General delegates these statutory rulemaking and custodial authorities to the Director of the Federal Bureau of Prisons in 28 CFR 0.96(o). 18 U.S.C. 4042(a) gives the Director of the Bureau of Prisons the authority to manage and regulate all Federal penal and correctional institutions and provide for the "safekeeping, care and subsistence" of inmates.

The Bureau's authority to promulgate rules, together with its authority to provide for the care and safekeeping of inmates, gives the Bureau implicit authority to create a rule that allows for the suspension of other rules as

necessary in the limited situation of an emergency that threatens human life or safety.

Notice to Inmates

A commenter suggested that when rules are suspended, inmates should receive notice of the suspension immediately, including a description of the rules being suspended, a clear reason for the suspension and authority for suspension.

Because the reason for suspending the rules will necessarily involve an emergency, it will not always be practical or possible to provide notice to inmates of the specific circumstances surrounding suspension. However, the Bureau intends that inmates will be notified as soon as practicable of the suspension.

Administrative Remedies

Two commenters incorrectly assume that there is no way for an inmate to grieve a suspension of the rules. One commenter asked, "If the rules are suspended, does BOP waive any claim to administrative remedies regarding any incident occurring during the suspension period?" The Bureau will not waive claim to administrative remedies because inmates are permitted to follow the Administrative Remedy rules as set forth in 28 CFR part 542 to register complaints regarding incidents occurring during the suspension period.

Freedom of Information Act

A commenter asked whether the notice of suspension of rules, provided by the Warden to the Director, would be subject to release under the Freedom of Information Act (FOIA). The Warden's notice to the Director regarding suspension of the rules will be treated as any other Bureau document for the purposes of FOIA. Certain FOIA exemptions may apply, depending on the content of the notice.

Suspension of Rules Relating to Inmate Rights

Three commenters claimed that rule suspension would mean denial of Constitutional rights, such as attorney visits or other due process. Commenters asserted that there should never be a suspension of rules relating to other inmate programs or privileges, such as the Inmate Financial Responsibility Program, religious programs,

institutional lock-downs, meal service and hygiene allowances.

The Bureau intends that any suspension would be limited to those rules that are directly impacted or affected by the emergency necessitating suspension. As stated in the rule, no Bureau rules would be suspended unless there is a threat to human life or safety. In no situation would inmates be deprived of rights in a manner that violates the Constitution. *See Turner v. Safely*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).

30-Day Review of Suspension Is Not Frequent Enough

One commenter opined that more safeguards are needed to ensure that a prisoner's rights are not violated. The "removal or limitation of certain privileges * * * warrant[s] increased scrutiny. This * * * can be accomplished by shortening the 30 day time frame the Warden is given to certify to the Director that the institutional emergency still exist[s] and that suspension of the rules is necessary, while giving the prisoner an increased level of scrutiny by the Director."

After internal deliberation, we determined that the 30-day period of review and reporting to the Director regarding suspensions of rules is the best time frame alternative. Requiring the Warden to report more frequently than every 30 days would impose an obligation on the Warden and institution staff when their efforts should be on removing the emergency conditions which necessitated suspension of the rules in the first place.

The commenter posits that a shorter time frame for reporting would result in an "increased level of scrutiny by the Director." However, if an institutional or system-wide emergency arises causing suspension of rules, the Director and Bureau executives would necessarily be in constant contact with staff at any locations where rules are suspended, working to remove the emergency. The Bureau's "level of scrutiny" would already be heightened.

Further, as stated earlier, the Bureau intends that any suspension would be limited to those rules that are directly impacted or affected by the emergency necessitating suspension. To the extent that suspension is necessary to handle an emergency situation, prisoner's rights would not be compromised.

Director Should Report to the Attorney General

One commenter felt that suspension of the rules "should be reported to the Attorney General, subject to his review,

in the same format as outlined [for the Warden to report to the Director]."

The Attorney General has delegated to the Director of the Bureau of Prisons the authority to promulgate rules "governing the control and management of Federal penal and correctional institutions and providing for the classification, government, discipline, treatment, care, rehabilitation, and reformation of inmates confined therein," (28 CFR 0.96), as further authorized by 18 U.S.C. 4001, 4041, and 4042. The Attorney General does not require the Director therefore to report suspension of the rules because the Director has been given authority to oversee and monitor such suspension.

Report Criteria

Finally, one commenter suggested that when the Warden reports a suspension to the Director, the Warden should be required to report "how long the suspension of the rules will last and what criteria must be fulfilled in order to end the suspension. This would provide interested parties with an idea of how and when to expect the restoration of the rules. Requiring this component in a report would help inmates and their families to understand why rules have been suspended and would enhance the policy process by providing defined criteria for resumption of normal operations."

We agree and therefore have added the two requested criteria to the rule in § 501.1(b)(1), subparagraphs (iii) and (iv). Under the revised rule, if the Warden suspends operation of the rules, the Warden must, within 24 hours of the suspension or as soon as practicable, notify the Director by providing written documentation which not only describes the emergency and gives reasons why suspension of rules is necessary, but also estimates how long the suspension will last and describes criteria which would allow normal rules application to resume.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined not to constitute "significant regulatory actions" under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under

Executive Order 13132, we determine that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This rule pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 501

Prisoners.

Harley G. Lappin,

Director, Bureau of Prisons.

■ Under the rulemaking authority vested in the Attorney General in 5 U.S.C 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons, in 28 CFR 0.96, we amend 28 CFR part 501 as follows.

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

PART 501—SCOPE OF RULES

■ 1. The authority citation for 28 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed

in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. Revise § 501.1 to read as follows:

**SUBCHAPTER A—GENERAL
MANAGEMENT AND ADMINISTRATION**

PART 501—SCOPE OF RULES

§ 501.1 Bureau of Prisons emergencies.

(a) *Suspension of rules during an emergency.* The Director of the Bureau of Prisons (Bureau) may suspend operation of the rules in this chapter as necessary to handle an institutional emergency or an emergency affecting the Bureau. When there is an institutional emergency which the Director or Warden considers a threat to human life or safety, the Director or Warden may suspend the operation of the rules in this chapter as necessary to handle the emergency.

(b) *Responsibilities of the Warden.*

(1) *Notifying the Director.* If the Warden suspends operation of the rules, the Warden must, within 24 hours of the suspension or as soon as practicable, notify the Director by providing written documentation which:

- (i) Describes the institutional emergency that threatens human life or safety;
- (ii) Sets forth reasons why suspension of the rules is necessary to handle the institutional emergency;
- (iii) Estimates how long suspension of the rules will last; and
- (iv) Describes criteria which would allow normal rules application to resume.

(2) *Submitting certification to Director of continuing emergency.* 30 days after the Warden suspends operation of the rules, and every 30 days thereafter, the Warden must submit to the Director written certification that an institutional emergency threatening human life or safety and warranting suspension of the rules continues to exist. If the Warden does not submit this certification to the Director, or if the Director so orders at any time, the suspension of the rules will cease.

[FR Doc. 05–10043 Filed 5–19–05; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 549

[BOP–1104–F]

RIN 1120–AB03

**Infectious Disease Management:
Voluntary and Involuntary Testing**

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes regulations on the management of infectious diseases. The changes address the circumstances under which the Bureau conducts voluntary and involuntary testing for HIV, tuberculosis, and other infectious diseases. We intend this amendment to provide for the health and safety of staff and inmates.

DATES: This rule is effective on June 20, 2005.

FOR FURTHER INFORMATION CONTACT:

Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

SUPPLEMENTARY INFORMATION: The Bureau finalizes its regulations on the infectious disease management program (28 CFR part 549, subpart A).

These regulations were first published in the *Federal Register* on October 5, 1995 (60 FR 52278) as interim final rules. We received no public comment on that interim rule. We had published an entry in the Unified Regulatory Agenda describing the finalization of that interim final rule (BOP–1017–F, RIN 1120–AA23). To clarify that this rulemaking is a change to the same interim rules, we merged that action into a proposed rule which we published on July 12, 2002 (67 FR 46136).

Why we are making this rule: The Correction Officers Health and Safety Act of 1998 gave the Bureau new statutory authority for conducting HIV tests. Additionally, the Centers for Disease Control (CDC) has issued a variety of recommendations on prevention and control of HIV, tuberculosis, and other infectious diseases. Consequently, the Bureau revises its regulations in accordance with the new statutory authority and in consideration of CDC recommendations.

Previously, Bureau regulations on the management of infectious diseases provided for mandatory HIV testing of a yearly random sample, yearly new commitment sample, new commitment re-test sample, pre-release testing, and clinically indicated testing. Any inmate

refusing an order for one of these mandatory HIV testing programs is subject to an incident report for refusing to obey an order. Previous regulations did not allow for involuntary HIV testing of an inmate following any intentional or unintentional exposure, when there is a risk of transmission of HIV infection to Bureau employees or other persons in a Bureau institution.

The Correction Officers Health and Safety Act of 1998 provides that each individual convicted of a Federal offense who is sentenced to a period of six months or more is to be tested for HIV, if such individual is determined to be at risk for HIV infection in accordance with the guidelines issued by the Bureau. The act also provides for involuntary HIV testing following any intentional or unintentional exposure when there is a risk of transmission of HIV infection to Bureau employees or other persons in a Bureau institution. Because of this new statutory authority, the Bureau amends its regulations to allow involuntary testing in those instances where an inmate refuses to be tested following any intentional or unintentional exposure. The inmate may also be subject to an incident report for refusing to obey an order.

The Bureau will continue to allow an inmate to request to be tested for HIV. Such testing is limited to no more than once per 12-month period, unless the Bureau determines that additional testing is warranted. The Bureau will also continue to provide pre- and post-test counseling, regardless of the test results.

The Bureau also amends its regulations on infectious disease management to address testing requirements for tuberculosis (TB). The Bureau's general authority to protect and provide for the safekeeping and care of inmates in Bureau custody (18 U.S.C. 4042(a)) allows us to conduct medical tests as necessary to protect the health of the inmate population. Currently, testing of inmates for TB is conducted in accordance with the recommendations and guidelines published by the Centers for Disease Control (CDC) in 1992. In response to the increased transmission of TB in correctional facilities, the CDC updated and expanded previously published recommendations for preventing and controlling TB in correctional facilities.

Based on these updated recommendations, the Bureau will screen each inmate for TB within two calendar days of initial incarceration. We intend to appropriately treat, isolate and/or protect inmates as a result of exposure in the two-day interim before testing. The Bureau will also conduct