

DEPARTMENT OF JUSTICE

28 CFR Part 14

Administrative Claims Under the Federal Tort Claims Act; Delegation of Authority

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: This Directive delegates authority to the Secretary of Veterans Affairs to settle administrative tort claims presented pursuant to the Federal Tort Claims Act where the amount of the settlement does not exceed \$300,000. This Directive implements the Administrative Dispute Resolution Act. This Directive will alert the general public to the new authority and is being published in the Code of Federal Regulations to provide a permanent record of this delegation. **DATES:** *Effective Date:* November 20, 2008.

FOR FURTHER INFORMATION CONTACT: Phyllis J. Pyles, Director, Torts Branch, Civil Division, U.S. Department of Justice, P.O. Box 888, Washington, DC 20044, (202) 616-4400.

SUPPLEMENTARY INFORMATION: This Directive has been issued to delegate settlement authority and is a matter solely related to the division of responsibility between the Department of Justice and the Department of Veterans Affairs. As such, this rule is a rule of agency organization, procedure, and practice that is limited to matters of agency management and personnel. Accordingly: (1) This rule is exempt from the notice requirement of 5 U.S.C. 553(b) and is made effective upon issuance; (2) the Department certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities and further that no Regulatory Flexibility Analysis was required to be prepared for this final rule since the Department was not required to publish a general notice of proposed rulemaking; (3) this action is not a "regulation" or "rule" as defined by Executive Order 12866, Regulatory Planning and Review," § 3(d)(3) and, therefore, this action has not been reviewed by the Office of Management and Budget.

This rule 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, in accordance with Executive Order 13132, "Federalism," it is determined that this

rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment. This regulation meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, "Civil Justice Reform." 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.

Finally, this action pertains to agency management, personnel, and organization and does not substantially affect the rights or obligations of non-agency parties and, accordingly, is not a "rule" as that term is used by the Congressional Review Act (Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996). Therefore, the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 28 CFR Part 14

Authority delegations (government agencies), Claims.

■ By virtue of the authority vested in me by part 0 of title 28 of the Code of Federal Regulations, including §§ 0.45, 0.160, 0.162, 0.164, and 0.168, 28 CFR part 14 is amended as follows:

PART 14—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

■ 1. The authority citation for part 14 is revised to read as follows:

Authority: 5 U.S.C. 301; 28 U.S.C. 509, 510, and 2672.

■ 2. The appendix to part 14 is amended by revising the heading and text for the "Delegation of Authority to the Secretary of Veterans Affairs" to read as follows:

Appendix to Part 14—Delegations of Settlement Authority**Delegation of Authority to the Secretary of Veterans Affairs***Section 1. Authority to Compromise Tort Claims.*

(a) The Secretary of Veterans Affairs shall have the authority to adjust, determine, compromise, and settle a claim involving the Department of Veterans Affairs under section 2672 of title 28, United States Code, relating to the administrative settlement of federal tort claims, if the amount of the proposed adjustment, compromise, or award does not exceed \$300,000. When the Secretary believes a claim pending before him presents a novel question of law or of policy, he shall obtain the advice of the Assistant Attorney General in charge of the Civil Division.

(b) The Secretary may redelegate, in writing, the settlement authority delegated to him under this section.

Section 2. Memorandum.

Whenever the Secretary of Veterans Affairs settles any administrative claim pursuant to the authority granted by section 1 for an amount in excess of \$100,000 and within the amount delegated to him under section 1, a memorandum fully explaining the basis for the action taken shall be executed. A copy of this memorandum shall be sent contemporaneously to the Director, FTCA Staff, Torts Branch of the Civil Division.

* * * * *

Gregory G. Katsas,

Assistant Attorney General, Civil Division.

[FR Doc. E8-27514 Filed 11-19-08; 8:45 am]

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 549

[BOP Docket No. 1145]

RIN 1120-AB45

Civil Commitment of a Sexually Dangerous Person

AGENCY: Bureau of Prisons, Justice.

ACTION: Final Rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes its proposed rule providing definitions and standards relating to the certification of persons as sexually dangerous for the purpose of civil commitment, as authorized by the Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248) (Walsh Act), enacted July 27, 2006, which amended title 18 of the United States Code, Chapter 313.

DATES: This rule is effective December 22, 2008.

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

SUPPLEMENTARY INFORMATION: A proposed rule on this subject was published August 3, 2007. We received six comments on the proposed rule. One was in support of the rule. We discuss the issues raised by the remaining five comments below.

Also, in the proposed rule, we stated that these rules would be added to 28 CFR part 549, as "new" subpart F. However, subpart F currently contains regulations regarding "Fees for Health Care Services." These rules will instead be added to 28 CFR part 549 as new subpart H, and are renumbered accordingly.

Description of Bureau Mental Health Professionals

Several commenters requested more detail concerning the qualifications of the Bureau mental health professionals who will be making determinations regarding the eligibility of persons for civil commitment under these regulations.

The Bureau's Certification Review Panel (CRP), similar to the practice of several states' civil commitment systems, is composed of a variety of persons, including qualified health services staff as well as legal counsel. Included on the panel are appropriately-credentialed psychologists. These psychologists review each inmate's case thoroughly before the CRP decides to certify an inmate for civil commitment.

Definition of "Conduct of a Sexual Nature"

Section 549.72 of the proposed rule (now § 549.92 of the final rule) defined the term "sexually violent conduct" as "any unlawful conduct of a sexual nature with another person ("the victim") that involves" certain elements further enumerated in the regulation. Several commenters called for a definition of the term "conduct of a sexual nature," raising concerns that this language could be interpreted as including "flirting," certain terms of endearment, or other "harmless conduct."

At the outset, we note that our terminology is not limited solely to "conduct of a sexual nature," but also includes the necessary initial component that such conduct be "unlawful." Further, the term "conduct of a sexual nature" is not activated as a consideration unless accompanied by another qualification among those listed in the regulation. The conduct must involve one of the following:

- (a) The use or threatened use of force against the victim;
- (b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;
- (c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;
- (d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or
- (e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating

unwillingness to engage in, that conduct.

Further, a person cannot be committed based on conduct alone. A sexually dangerous person is one who also "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6). This requires the Bureau to review not only a person's behavioral history, but also his or her mental condition and risk of engaging in sexually violent conduct or child molestation in the future to determine whether he or she should be certified as a sexually dangerous person.

HIV Infected Inmates' "Innocent" Conduct

Several commenters expressed concerns that § 549.72(b) of the proposed regulation (now § 549.92(b) of the final rule) "could be used to impose civil commitment on a defendant infected with HIV who had flirted with, or otherwise indicated an innocent desire to have intercourse (which was never consummated [sic]) with someone."

In reconsidering this provision, the Bureau has determined that the best course of action is to remove this paragraph from § 549.92.

Constitutionality of the Walsh Act

One commenter stated that "[t]he Walsh Act was recently held unconstitutional. * * * See *United States v. Comstock*, 06-HC-2212-BR (E.D. N.C., U.S.D.J.)." (*United States v. Comstock*, 507 F. Supp. 2d 522 (E.D. N.C. 2007).)

The case cited by the commenter does not have any immediate effect on the authority for this regulation. On September 7, 2007, the district court found 18 U.S.C. 4248 unconstitutional in that case, but the court stayed its order pending the government's appeal of the ruling. The district court recognized that other district courts had upheld the constitutionality of 18 U.S.C. 4248, in the face of similar challenges. See *United States v. Shields*, 522 F. Supp. 2d 317, 341 (D. Mass. Nov. 7, 2007); *United States v. Carta*, 503 F. Supp. 2d 405, 407 (D. Mass. 2007); *United States v. Harnden*, No. 06-6960 (C.D. Cal. Dec. 27, 2006). See also *United States v. Dowell*, No. 06-1216 (W.D. Okla. Nov. 26, 2007 and Dec. 5, 2007); *United States v. Abregana*, No. 07-385 (D. Hawaii, Aug. 22, 2008). But see *U.S. v. Tom*, Civil No. 06-3947 (D. Minn. May 23, 2008).

The Regulation Violates the Fifth and Sixth Amendments of the United States Constitution

One commenter posited that the Bureau intends to "apply its regulation(s) retrospectively and based on any evidence regardless of source or conviction. [This] violate[s] the Fifth Amendment, U.S. Const., where applied retroactively/retrospectively to alleged conduct predating the enabling statute's enactment as attaching new legal consequences." The commenter argues that 18 U.S.C. 4248 violates the Fifth Amendment because it attaches new legal consequences to conduct that predated the effective date of the statute.

Section 4248, and the regulations implementing the statute, do not have retroactive effect. Rather, they permit civil commitment based on a determination that a person "suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released." 18 U.S.C. 4247(a)(6). While past behavior is taken into account, it is only one of several factors to be considered. The determination whether to certify an inmate for civil commitment is based also on a person's current mental condition and risk of future unlawful sexual conduct. Past conduct is used for evidentiary purposes. Thus, neither section 4248 nor these regulations attaches new legal consequences solely to past behavior. See *Kansas v. Hendricks*, 521 U.S. 346, 370-71, 117 S. Ct. 2072, 2086, 138 L.Ed.2d 501 (1997) (Kansas' Sexually Violent Predators Act does not have retroactive effect, but rather, permits involuntary confinement based on determination that person currently both suffers from mental abnormality or personality disorder and is likely to pose future danger to public; to the extent that past behavior is taken into account, it is used solely for evidentiary purposes).

The same commenter also argued that "the intention to rely on any evidence regardless of source or conviction would * * * violate a prisoner's Sixth Amendment right to have a jury of one's peers determine the facts in accord with the Court's reasoning."

The Sixth Amendment would not be implicated by these regulations. First, we note that the civil commitment proceeding contemplated under the Walsh Act is not a criminal proceeding to which Sixth Amendment jury rights would attach. See, e.g., *Poole v. Goodno*, 335 F.3d 705, 710-11 (8th Cir. 2003) ("There is no clearly established

Supreme Court law which holds that due process requires a jury trial in civil commitment proceedings or that incorporates the Seventh Amendment right to a jury for such cases.”); *United States v. Sahhar*, 917 F.2d 1197, 1207 (9th Cir. 1990), cert. denied, 499 U.S. 963 (1991) (jury trial is “neither a necessary element of the fundamental fairness guaranteed by the due process clause, nor an essential component of accurate factfinding”) (citing *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971)).

Further, the Walsh Act authorizes the Bureau only to certify to federal district courts that certain persons are “sexually dangerous persons” for whom civil commitment is required. The filing of the certificate by the Bureau stays the release of the person; however, the final determination that a person is “a sexually dangerous person” subject to civil commitment is made by the court after proceedings held pursuant to 18 U.S.C. 4248(b) and (c), which make applicable the procedures set forth in 18 U.S.C. 4247(b), (c), and (d). As provided in section 4248(b), the court may order that a psychiatric or psychological examination of the person be conducted, and that a psychiatric or psychological report be filed with the court. Pursuant to section 4248(c), a hearing shall be conducted in which the person shall be represented by counsel, and be afforded an opportunity to testify, present evidence, subpoena witnesses on his or her behalf, and confront and cross-examine witnesses who appear at the hearing. If the court finds by clear and convincing evidence that the person is a sexually dangerous person, the court shall commit him/her to the custody of the Attorney General as detailed in section 4248(d).

Based on the foregoing discussion, the Bureau now adopts the proposed rule as final, with minor changes.

Executive Order 12866

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute “significant regulatory actions” under section 3(f) of Executive Order 12866 and, accordingly, it was reviewed by OMB.

The Bureau has assessed the costs and benefits of this rule as required by Executive Order 12866 section 1(b)(6) and has made a reasoned determination that the benefits of this rule justify its costs. This rule will have the benefit of avoiding confusion caused by the statutory change, while allowing the Bureau to operate under the definitions stated in the regulations. There will be

no new costs associated with this rulemaking.

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 persons in the custody 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 549

Prisoners.

Dated: November 17, 2008.

Harley G. Lappin,

Director, Bureau of Prisons.

■ Under 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 549 as follows.

Subchapter C—Institutional Management

PART 549—MEDICAL SERVICES

■ 1. Revise the authority citation for 28 CFR part 549 to read as follows:

Authority: 5 U.S.C. 301; 10 U.S.C. 876b; 18 U.S.C. 3621, 3622, 3524, 4001, 4005, 4042, 4045, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4241–4248, 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. Add a new subpart H, to read as follows:

Subpart H—Civil Commitment of a Sexually Dangerous Person

Sec.

549.90 Purpose and application.

549.91 Definition of “sexually dangerous person.”

549.92 Definition of “sexually violent conduct.”

549.93 Definition of “child molestation.”

549.94 Definition of “sexually dangerous to others.”

549.95 Determining “serious difficulty in refraining from sexually violent conduct or child molestation if released.”

§ 549.90 Purpose and application.

(a) This subpart provides definitions and standards for review of persons for certification to federal district courts as sexually dangerous persons, as authorized by title 18 U.S.C. Chapter 313, by Bureau of Prisons staff or contractors (collectively referred to in this Part as “the Bureau”).

(b) This subpart applies to persons in Bureau custody, including those:

- (1) Under a term of imprisonment;
- (2) For whom all criminal charges have been dismissed solely for reasons relating to the person’s mental condition; or

(3) In Bureau custody pursuant to 18 U.S.C. 4241(d).

(c) The Bureau may certify that a person in Bureau custody is a sexually dangerous person when review under this subpart provides reasonable cause to believe that the person is a sexually dangerous person. In determining whether a person is a sexually dangerous person and should be so certified, the Bureau will consider any available information in its possession and may transfer the person to a suitable facility for psychological examination in order to obtain information for this purpose.

§ 549.91 Definition of “sexually dangerous person.”

For purposes of this subpart, a “sexually dangerous person” is a person:

- (a) Who has engaged or attempted to engage in:
 - (1) Sexually violent conduct; or
 - (2) Child molestation; and
- (b) Has been assessed as sexually dangerous to others by a Bureau mental health professional.

§ 549.92 Definition of “sexually violent conduct.”

For purposes of this subpart, “sexually violent conduct” includes any unlawful conduct of a sexual nature with another person (“the victim”) that involves:

- (a) The use or threatened use of force against the victim;
- (b) Threatening or placing the victim in fear that the victim, or any other person, will be harmed;
- (c) Rendering the victim unconscious and thereby engaging in conduct of a sexual nature with the victim;
- (d) Administering to the victim, by force or threat of force, or without the knowledge or permission of the victim, a drug, intoxicant, or other similar substance, and thereby substantially impairing the ability of the victim to appraise or control conduct; or
- (e) Engaging in such conduct with a victim who is incapable of appraising the nature of the conduct, or physically or mentally incapable of declining participation in, or communicating unwillingness to engage in, that conduct.

§ 549.93 Definition of “child molestation.”

For purposes of this subpart, “child molestation” includes any unlawful conduct of a sexual nature with, or sexual exploitation of, a person under the age of 18 years.

§ 549.94 Definition of “sexually dangerous to others.”

For purposes of this subpart, “sexually dangerous to others” means that a person suffers from a serious mental illness, abnormality, or disorder as a result of which he or she would have serious difficulty in refraining from sexually violent conduct or child molestation if released.

§ 549.95 Determining “serious difficulty in refraining from sexually violent conduct or child molestation if released.”

In determining whether a person will have “serious difficulty in refraining from sexually violent conduct or child molestation if released,” Bureau mental health professionals may consider, but are not limited to, evidence:

(a) Of the person’s repeated contact, or attempted contact, with one or more victims of sexually violent conduct or child molestation;

(b) Of the person’s denial of or inability to appreciate the wrongfulness, harmfulness, or likely consequences of engaging or attempting to engage in sexually violent conduct or child molestation;

(c) Established through interviewing and testing of the person or through other risk assessment tools that are relied upon by mental health professionals;

(d) Established by forensic indicators of inability to control conduct, such as:

- (1) Offending while under supervision;
 - (2) Engaging in offense(s) when likely to get caught;
 - (3) Statement(s) of intent to re-offend;
- or

(4) Admission of inability to control behavior; or

(e) Indicating successful completion of, or failure to successfully complete, a sex offender treatment program.

[FR Doc. E8-27723 Filed 11-19-08; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY**Coast Guard****33 CFR Part 117**

[USCG-2008-1060]

RIN 1625-AA09

Drawbridge Operation Regulation; Mantua Creek, Paulsboro, NJ

AGENCY: Coast Guard, DHS.

ACTION: Temporary deviation from regulations.

SUMMARY: The Commander, Fifth Coast Guard District, has issued a temporary deviation from the regulation governing the operation of the S.R. 44 Bridge, at mile 1.7, across Mantua Creek at Paulsboro, NJ. This deviation allows the bridge to remain closed to navigation to facilitate mechanical repairs.

DATES: This deviation is effective from 6 a.m. on December 1, 2008, to 6 p.m. on December 31, 2008.

ADDRESSES: Documents indicated in this preamble as being available in the docket are part of docket USCG-2008-1060 and are available online at <http://www.regulations.gov>. They are also available for inspection or copying at two locations: the Docket Management Facility (M-30), U.S.

Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays, and the Commander (dpb), Fifth Coast Guard District, Federal Building, 1st Floor, 431 Crawford Street, Portsmouth, VA 23704-5004 between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Mr. Gary S. Heyer, Bridge Management Specialist, Fifth Coast Guard District, at (757) 398-6629.

SUPPLEMENTARY INFORMATION: The New Jersey Department of Transportation, who owns and operates this vertical-lift drawbridge, has requested a temporary deviation from the current operating regulations set out in 33 CFR 117.729(b) which requires the bridge to open signal from March 1 through November 30 from 7 a.m. to 11 p.m., and on signal at all other times upon four hours notice.

The S.R. 44 Bridge, at mile 1.7, across Mantua Creek has vertical clearances in the full open and closed positions to vessels of 64 feet and 5 feet, above mean high water, respectively.

Under this temporary deviation to facilitate the repairs to the operating machinery, the S.R. 44 Bridge will be maintained in the closed-to-navigation position beginning at 6 a.m. on Monday, December 1, 2008 until and including 6 p.m. on Wednesday, December 31, 2008. There are no alternate routes for vessels with a mast height greater than 5 feet.

The Coast Guard will inform the users of the waterway through our Local and Broadcast Notices to Mariners of the opening restrictions of the draw span to minimize transiting delays caused by the temporary deviation.

In accordance with 33 CFR 117.35(e), the drawbridge must return to its regular operating schedule immediately at the end of the designated time period. This deviation from the operating regulations is authorized under 33 CFR 117.35.

Dated: November 6, 2008.

Waverly W. Gregory, Jr.,
Chief, Bridge Administration Branch Fifth Coast Guard District.

[FR Doc. E8-27520 Filed 11-19-08; 8:45 am]

BILLING CODE 4910-15-P