



[4410-05P]

**DEPARTMENT OF JUSTICE**

**Bureau of Prisons**

**28 CFR Part 551**

[BOP Docket No. 1140-F]

RIN 1120-AB42

**Smoking/No Smoking Areas**

**AGENCY:** Bureau of Prisons, Justice.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Bureau of Prisons (Bureau) finalizes without change a proposed rule that was published on this subject on May 12, 2006, to revise regulations pertaining to smoking/no smoking in Bureau facilities. The revised regulations generally prohibit smoking in and on the grounds of Bureau institutions and offices, except as part of an authorized inmate religious activity; and, for Bureau staff and official visitors, only in smoking areas designated by the Warden. Possession of smoking apparatus and tobacco in any form is prohibited for inmates under this rule, unless as part of an authorized inmate religious activity. We intend this amendment to promote a clean air environment and to protect the health and safety of staff and inmates.

**DATES:** This rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

**SUPPLEMENTARY INFORMATION:** In this document, the Bureau revises regulations pertaining to smoking/no smoking for inmates in Bureau facilities. The revised regulations indicate that smoking is generally prohibited in and on the grounds of Bureau institutions and offices, with the following two exceptions: Smoking is permitted as part of an authorized inmate religious activity; and, for Bureau staff and official visitors, smoking is permitted only in smoking areas designated by the Warden.

This rule also clarifies that possession of smoking apparatus and tobacco in any form is prohibited for inmates, unless as part of an authorized inmate religious activity. Smoking is defined as inhaling the smoke of any substance through the use of smoking apparatus including, but not limited to, cigars, cigarettes, or pipes. We intend this amendment to promote a clean air environment and to protect the health and safety of staff and inmates.

A proposed rule was published on this subject on May 12, 2006 (71 FR 27652). The Bureau received a total of 66 comments.

Approximately 57 of the comments were copies of the same six form letters. The remaining nine comments addressed issues

raised in the six form letters. Because all the comments related to the same set of issues, we address each issue raised by the commenters below.

**Comment:** The rule is contrary to 5 U.S.C. 7301, E.O. 13058 (banning smoking of tobacco products in all federal buildings except - see sec. 2(b)), which says the order does not extend to residential accommodation for persons involuntarily residing in a federal government building.

**Bureau's response:** 5 U.S.C. 7301 states only that "[t]he President may prescribe regulations for the conduct of employees in the executive branch." Executive Order 13058, Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace, issued on August 9, 1997, states that the smoking of tobacco products is thus prohibited in all interior space owned, rented, or leased by the executive branch of the Federal Government, and in any outdoor areas under executive branch control in front of air intake ducts. The Executive Order carves out an exception to its smoking prohibition for any residential accommodation for persons voluntarily or involuntarily residing, on a temporary or long-term basis, in a building owned, leased, or rented by the Federal Government.

Although the Executive Order prohibiting smoking in federal buildings does not extend to buildings such as Bureau facilities,

it does not affirmatively preclude the Bureau from exercising its authority to regulate in this manner. The Bureau therefore has determined that this regulation is necessary to conform with the intention of the Executive Order to protect Federal Government employees and members of the public from exposure to tobacco smoke in the Federal workplace.

The dangers of secondhand smoke exposure are well-documented. An August 2005 report from the American Lung Association states that secondhand smoke lingers in the air hours after cigarettes have been extinguished and can cause or exacerbate a wide range of adverse health effects, including cancer, respiratory infections, and asthma. Secondhand smoke has been classified by the Environmental Protection Agency (EPA) as a known cause of cancer in humans (Group A carcinogen). Secondhand smoke exposure causes approximately 3,400 lung cancer deaths and 22,700-69,600 heart disease deaths in adult nonsmokers in the United States each year. Nonsmokers exposed to environmental smoke were 25 percent more likely to have coronary heart diseases compared to nonsmokers not exposed to smoke.

Further, a June 2006 report from the Surgeon General concluded that scientific evidence indicates that there is no risk-free level of exposure to second hand smoke. Even short exposures to second hand smoke can cause blood platelets to become stickier, damage the lining of blood vessels, decrease

coronary flow velocity reserves, and reduce heart rate variability, potentially increasing the risk of heart attack.

**Comment:** The Bureau increased prices on other commissary items when it removed tobacco products from the commissary.

**Bureau's response:** There has been no policy change related to pricing of institution commissary items for several years. Prices of items in the commissary fluctuate on a regular basis due to changes in the cost to the Bureau of the products themselves. Any increase in pricing that may have been observed when the Bureau removed tobacco products from the commissaries would be due to such regular fluctuations. There was no change in the Bureau's pricing policy related to the removal of tobacco from the commissaries.

**Comment:** Banning tobacco products will decrease the safety of staff. The price of contraband tobacco will increase, inciting inmate security issues.

**Bureau's response:** Previous regulations on inmate smoking allowed Wardens to prohibit smoking at their institutions with the concurrence of the Regional Director where the institution is located. At those institutions where the Warden has prohibited smoking, there has been no increase in assaults on staff.

However, Bureau regulations on inmate discipline were amended, through a separate rulemaking document, to increase the severity of sanctions that may be imposed for violation of the prohibited act codes (75 FR 76263, Dec. 8, 2010). The code prohibiting possession of non-hazardous contraband now includes smoking apparatus and tobacco in any form where prohibited. The specifically worded code, combined with more severe sanctions for violations, will deter possession of tobacco products in Bureau facilities.

Further, the Bureau implemented measures to increase searches of employees, to further ensure that Bureau staff are not a source of contraband on Bureau grounds. In a rule published on June 6, 2007 (72 FR 31178), the Bureau revised its regulations on searching non-inmates (including staff) to include random searches and searches using electronic devices other than metal detectors. This enhanced the Bureau's ability to detect and prevent contraband, thereby increasing the safety of staff and inmates in Bureau facilities.

**Comment: The prohibition on smoking and possession of tobacco and smoking-related apparatus should also apply to staff.**

**Bureau's response:** As a practical matter, smoking is a lawful activity for Bureau employees. In the interests of balancing staff morale with institution safety and security, the

Director has decided to allow for the possibility of limited opportunities for staff smoking.

Under current policy, Warden-designated staff smoking areas must be outdoors, to minimize the impact of second-hand smoke inhalation. Also, current Bureau policy requires that Bureau facilities maintain staff smoking cessation programs, which are intended to further minimize the likelihood that tobacco or smoking apparatus will be introduced upon institution grounds.

However, to ensure that persons visiting inmates are prohibited from smoking in and on the grounds of Bureau institutions and offices, we are altering the rule to state that smoking is permitted, in smoking areas designated by the Warden, only for Bureau staff and official visitors.

The Bureau intends for § 551.162 (b) of the rule to allow smoking for non-inmates only in areas designated by the Warden. Currently, Warden-designated staff smoking areas are carefully determined based on the unique circumstances at each Bureau facility.

**Comment: The Bureau violated the Administrative Procedure Act by discontinuing the sale of tobacco products.**

**Bureau's response:** By discontinuing the sale of tobacco products, the Bureau did not violate any requirement set by the Administrative Procedure Act (5 U.S.C. 551, et al.). The removal

of tobacco products from institution commissaries was not a prohibition of inmate possession of tobacco, which Wardens were permitted to authorize under the previous regulations. The listing of products available for sale in institution commissaries is not appropriate subject matter for federal regulations because particular brands, items, and cost will vary frequently depending on market fluctuations and what particular products are available or needed in different locales or in institutions with different security levels and needs.

**Comment:** The rule prohibiting possession of tobacco in any form is too broad in that it applies to snuff and/or chewing tobacco, which produce no smoke and do not implicate air quality - the rule should only apply to "lighted" tobacco products.

**Bureau's response:** Snuff and chewing tobacco are also harmful to health in the same way that "lighted" tobacco products are. A February 13, 2006, report by the American Cancer Society ([http://www.cancer.org/docroot/PED/content/PED\\_10\\_13X\\_Quitting\\_Smokeless\\_Tobacco.asp?#why\\_quit](http://www.cancer.org/docroot/PED/content/PED_10_13X_Quitting_Smokeless_Tobacco.asp?#why_quit)) states that smokeless tobacco can cause serious health problems, including nicotine addiction, cancer of the mouth and pharynx, leukoplakia, gum recession, bone loss around the teeth, and abrasion and staining of teeth. The Bureau is therefore committed to reducing these health risks in inmates by prohibiting use and possession of tobacco in any form.



Further, inmates may attempt to smoke snuff and chewing tobacco if such products are permitted in Bureau facilities and smoking tobacco is not permitted. To prevent this disparity, the Bureau now prohibits all forms of tobacco for inmates in Bureau facilities.

**Comment:** The regulation leads to forced medical treatment that is not properly implemented by qualified medical staff, in violation of the Constitution.

**Bureau's response:** The inmate Smoking Cessation Program is not "forced" treatment. Participation in the program is voluntary - inmates decide of their own volition whether to participate in the program. Under current Bureau policy, Wardens are required to establish an institution Smoking Cessation Program consistent with local resources. A Smoking Cessation Program must, at a minimum, address nutrition, physical activity (exercise), stress management, and nicotine replacement therapy (NRT). Use of the NRT is optional, just as program participation is voluntary.

Further, the programs are run by qualified medical staff at each institution. Either Bureau health services or psychology services staff coordinate Smoking Cessation Programs at the institution level, and are trained specifically to do so.

**Comment:** The smoking cessation program is not available to indigent inmates.

**Bureau's response:** The Smoking Cessation Program is available to indigent inmates. Inmates may participate on a voluntary basis in all aspects of the program. There is no charge for any aspect of the program except for the nicotine replacement therapy, which is optional. The NRT is not considered medically necessary by health services staff, and therefore will not be provided to inmates who cannot pay for it. However, inmates without funds may participate in all other aspects of the program.

**Comment:** This regulation is an additional punishment on inmates suffering from nicotine addiction.

**Bureau's response:** This regulation is no different from current policies and regulations in place that prohibit inmate possession of other contraband that is harmful to health, such as illegal drugs. The Bureau offers drug abuse treatment programs for inmates who suffer from drug addiction, and offers smoking cessation programs for inmates suffering from nicotine addiction.

Prohibiting the possession of tobacco and smoking apparatus does not constitute punishment.

**Comment:** The regulation is subject to review under SBREFA because it creates a black market that exceeds the threshold of \$100,000,000. It blocks access to a long-standing market segment for legitimate businesses. The inmate trust fund is also impacted.

**Bureau's response:** Title 5 of the United States Code, section 804(1), requires the Office of Management and Budget (OMB) to review any federal regulation which "the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in . . . (A) an annual effect on the economy of \$100,000,000 or more." Notwithstanding the fact that Congress did not intend "economy" to encompass the "black market" or other illegal business ventures, this regulation was, in fact, submitted to OMB for review. OMB found this regulation to not be significant under 5 U.S.C. 804(1), and therefore decided that it did not warrant further review. Therefore, even if the regulation has an arguable economic impact, the Bureau has complied with SBREFA by submitting it to the Office of Management and Budget for review and approval.

**Comment:** This regulation creates a massive enforcement burden for Bureau staff.

**Bureau's response:** Bureau staff are trained to intercept contraband in all forms. Intercepting tobacco and smoking apparatus imposes no additional burden on Bureau staff, but may be done while staff perform routine searches of non-inmates and their belongings, and routine searches of inmates, their living and working areas, and belongings.

Also, the previous regulation allowed any Warden to decide, with the Regional Director's concurrence, not to designate smoking areas for general use. Several Wardens have already made this choice for their facilities, and the Bureau has not observed any further enforcement burden on staff with relation to this change.

**Comment:** The regulation discriminates against the mentally ill, who may find it difficult/impossible to quit smoking.

**Bureau's response:** A 2002 Psychiatric Services journal article entitled, "Smoking Cessation Approaches for Persons with Mental Illness or Addictive Disorders," a summary of 24 empirical studies with results from 1991 - 2001, found that the recorded "quit rates" of patients with psychiatric disorders were similar to those of the general population. It was no more difficult for the mentally ill to quit smoking than it was for someone with no mental disorder.

Also, mentally ill inmates are typically housed in no-smoking units already, and are permitted only limited time, under supervision, to visit any currently-existing authorized outdoor smoking areas. Such inmates already have decreased their smoking activity by virtue of limited access to smoking areas. This regulation does not, therefore, apply any differently to a mentally ill inmate than to any other inmate.

**Comment: The regulation creates a substantial burden as defined in 42 U.S.C. 2000cc on the religious exercise of Native Americans in that it is not the least restrictive means of furthering the compelling government interest.**

**Bureau's response:** 42 U.S.C. 2000cc relates to government imposition of a state, not Federal, "land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" without demonstrating that it is the "least restrictive means of furthering [a] compelling governmental interest." With regard to state governments, courts have acknowledged the application of this statute in a prison setting. See Ephraim v. Angelone, 313 F.Supp.2d 569 (E.D.Va. 2003) (State prison's refusal to provide inmate with vegetarian religious diet was not required to be analyzed under strict scrutiny test set forth in Religious Land Use and Institutionalized Persons Act (RLUIPA) because there was no showing prison was receiving

federal funding, or that burden imposed on inmate affected interstate commerce, as required for Act to be applicable); Borzych v. Frank, 439 F.3d 388, (C.A.7 Wis. 2006) (State prison procedure, prohibiting activities and literature advocating racial or ethnic supremacy or purity, was not overbroad and therefore not substantial in relation to its proper application under RLUIPA).

The Bureau's action in this document is a Federal regulation, not a state regulation, and therefore does not violate RLUIPA. Further, the regulation permits smoking as part of an authorized inmate religious activity, and therefore does not impact inmate religious activity.

The statute governing Federal action in this context is the Religious Freedom Restoration Act (42 U.S.C. 2000bb, et seq.) (RFRA). Although the regulation does not burden inmate religious activity, we note that preserving inmate health has been found to constitute a "compelling penological interest" under both RLUIPA and RFRA that would override a burden on inmate religious activity, if such a burden existed. Ragland v. Angelone, 420 F.Supp.2d 507 (W.D.Va. 2006) (Virginia's inmate grooming policy did not violate RLUIPA; policy furthered compelling penological interests in security, staff safety, inmate identification, and inmate health.); See also Weir v. Nix, C.A.8 (1997), 114 F.3d 817 (Prison's prohibition of personal property in prison yard did not

place "substantial burden" on inmate's rights under RFRA, he was free to use his Bible in his cell.); Davie v. Wingard, (1997) 958 F.Supp. 1244, 166 A.L.R. Fed. 709 (Prison officials' safety, security, and discipline concerns presented "compelling government interest" justifying hair length regulations challenged under RFRA.).

For the aforementioned reasons, the Bureau finalizes this rule without change.

#### **Executive Order 12866**

This regulation has been drafted and reviewed in accordance with Executive Order 12866, "Regulatory Planning and Review", section 1(b), Principles of Regulation. The Director of the Bureau of Prisons has determined that this rule is not a "significant regulatory action" under Executive Order 12866, section 3(f), and accordingly this rule has not been reviewed by the Office of Management and Budget.

#### **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, in accordance

with Executive Order 13132, it is determined 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, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and by approving it certifies that this regulation 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. Inmate smoking has been gradually decreasing in Bureau facilities since publication of the final rule in 2004 (see 69 FR 13737, Mar. 24, 2004), which restricted smoking to authorized outdoor areas except for authorized religious activities, and allowed Wardens to choose, with Regional Director concurrence, not to designate smoking areas at all for general inmate use (except for authorized religious activity). The determination to remove tobacco products from sale in the inmate commissaries likewise occurred several years ago when it became apparent that inmate smoking was decreasing. Therefore, the economic impact is expected to be minimal.

List of Subjects in 28 CFR Part 551

Prisoners.

Charles E. Samuels, Jr.,  
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 551 as set forth below:

**SUBCHAPTER C - INSTITUTIONAL MANAGEMENT**

**PART 551 - MISCELLANEOUS**

1. The authority citation for 28 CFR part 551 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 1512, 3621, 3622, 3624, 4001, 4005, 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; Pub. L. 99-500 (sec. 209); Attorney General's May 1, 1995 Guidelines for Victim and Witness Assistance.

2. Revise subpart N to read as follows:

**Subpart N - Smoking/No Smoking Areas**

**Sec.**

**551.160 Purpose and scope.**

**551.161 Definitions.**

**551.162 Smoking generally prohibited.**

**551.163 Possession of smoking apparatus and tobacco prohibited.**

**§ 551.160 Purpose and scope.**

To advance towards becoming a clean air environment and to protect the health and safety of staff and inmates, the Bureau of Prisons will restrict areas and circumstances where smoking is permitted within its institutions and offices.

**§ 551.161 Definitions.**

For the purposes of this subpart, *smoking* is defined as inhaling the smoke of any substance through the use of smoking apparatus including, but not limited to, cigars, cigarettes, or pipes.

**§ 551.162 Smoking generally prohibited.**

Smoking is generally prohibited in and on the grounds of Bureau institutions and offices, with the following two exceptions:

(a) Smoking is permitted as part of an authorized inmate religious activity; and

(b) For Bureau staff and official visitors, smoking is permitted only in smoking areas designated by the Warden.

**§ 551.163 Possession of smoking apparatus and tobacco prohibited.**

Possession of smoking apparatus and tobacco in any form is prohibited for inmates, unless as part of an authorized inmate religious activity.

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